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THE  
FEDERAL REPORTER.

VOLUME 82.

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CASES ARGUED AND DETERMINED  
IN THE  
CIRCUIT COURTS OF APPEALS AND CIRCUIT  
AND DISTRICT COURTS OF THE  
UNITED STATES.

PERMANENT EDITION.

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FEDERAL REPORTER, VOLUME 82.

JUDGES

OF THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE  
CIRCUIT AND DISTRICT COURTS.

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<sup>1</sup>Deceased.

<sup>2</sup>Confirmed December 15, 1896.

<sup>3</sup>Resigned.

<sup>4</sup>Confirmed July 8, 1897.

<sup>5</sup>Confirmed May 11, 1897.

<sup>6</sup>Deceased October 10, 1896.

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<sup>1</sup>Deceased.<sup>2</sup>Confirmed May 5, 1897.

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 Hon. CHARLES F. AMIDON, District Judge, North Dakota.<sup>8</sup>  
 Hon. ALONZO J. EDGERTON, District Judge, South Dakota.<sup>9</sup>  
 Hon. JOHN E. CARLAND, District Judge, South Dakota.<sup>10</sup>  
 Hon. JOHN A. MARSHALL, District Judge, Utah.  
 Hon. JOHN A. RINER, District Judge, Wyoming.

<sup>1</sup> Deceased November 17, 1896.<sup>2</sup> Commissioned December 15, 1896.<sup>3</sup> Resigned May 16, 1896.<sup>4</sup> Commissioned May 18, 1896. Confirmed same date.<sup>5</sup> Deceased October 28, 1896.<sup>6</sup> Resigned.<sup>7</sup> Deceased August 8, 1896.<sup>8</sup> Commissioned August 31, 1896. Confirmed February 18, 1897.<sup>9</sup> Deceased August 9, 1896.<sup>10</sup> Commissioned December 15, 1896.

## NINTH CIRCUIT.

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Hon. CHARLES S. JOHNSON, District Judge, Alaska.<sup>5</sup>

<sup>1</sup>Resigned.

<sup>2</sup>Commissioned May 20, 1897.

<sup>3</sup>Commissioned June 8, 1897.

<sup>4</sup>Removed.

<sup>5</sup>Commissioned July 23, 1897.

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**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**UNITED STATES CIRCUIT COURTS OF APPEALS AND THE**  
**CIRCUIT AND DISTRICT COURTS.**

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**CENTRAL TRUST CO. OF NEW YORK v. CITIZENS' ST. RY. CO. OF IN-**  
**DIANAPOLIS et al.**

(Circuit Court, D. Indiana. July 22, 1897.)

No. 9,448.

**1. FEDERAL COURTS—SUIT AGAINST STATE OFFICER.**

This is not a suit against the state of Indiana, within the meaning of the eleventh amendment to the national constitution.

**2. SAME—STATE DECISIONS.**

Where the controversy concerns a contract, and the meaning of the contract depends on the construction of a state statute or a provision of a state constitution, a decision on the meaning of said statute or constitutional provision by the highest court of a state, made after the contract was entered into, and rights had vested thereunder, is not conclusive upon a litigant in a federal court. The litigant in such case is entitled to the independent judgment of the national tribunal.

**3. SAME.**

If the controversy in a federal court involve a federal question,—and all the more if it involve both a contract right, as above mentioned, and also a federal question,—then that court must decide for itself, treating a state decision with due consideration, but not as foreclosing independent judgment.

**4. CONSTITUTIONAL LAW—VALIDITY OF SPECIAL STATUTES.**

The defendant railway company was incorporated under the act of 1861, that being a general law for the incorporation of street-railroad companies. By section 9 the power to fix the fare over its lines is given to the directors. By section 12 it could use the streets only on terms prescribed by the city. By section 11 the power in the legislature to amend the act is reserved. The defendant railway company built and operated its lines on an agreement with the city that the fare for each passenger could be five cents. The act of 1897 professes to amend section 9 of the act of 1861. It provides that in cities which had a population of 100,000 or more, by the census of 1890, the fare could not be more than three cents; also, that the passenger must be transferred from one line to another without additional charge; also, a severe and ruinous code of penalties and forfeitures. *Held* that, under the constitution of Indiana, any law for the formation of corporations for business and profit must be general,—that is, uniform in operation under like conditions whenever and wherever they exist, throughout the state; that the act of 1897 could never, under any circumstances, become operative elsewhere than in Indianapolis; that, if the act of 1897 be valid, then the entire law for the incorporation of street

railroads would cease to be general and of uniform operation under similar conditions throughout the state, and become local as applied to Indianapolis, and local, also, as applied to portions of the state other than Indianapolis,—wherefore the act of 1897 is unconstitutional and void.

5. SAME—LAWS IMPAIRING OBLIGATION OF CHARTER CONTRACTS.

The federal constitution provides that no state shall pass any law which impairs the obligation of a contract. The act of 1861, being the charter of defendant railway company, is a contract binding on the state of Indiana. The power to fix its rate of fare is expressly given to the railway company, subject to the condition in section 12 and the reservation as to amendment in section 11. The reservation covers no amendment which, if upheld, would make the incorporation act local or special. The act of 1897 would be a breach of the charter agreement, and this in violation of the federal constitution.

6. SAME—POLICE POWER.

The police power of Indiana on the subject of rates is not to be applied as against a charter agreement with that state which covers the matter of rates.

On a former hearing, a preliminary injunction was granted. A statement of the case is found in the opinion then delivered. 80 Fed. 218.

The defendant the city of Indianapolis now demurs to the bill, and also moves to dissolve the injunction. It appears that, after the hearing on the motion for preliminary injunction, the city of Indianapolis brought suit in one of the state courts against one Navin, to recover a penalty, under an ordinance of the city, for alleged misconduct of Navin in boarding a street car, and refusing to pay the fare demanded, namely, five cents. This alleged offense by Navin was after the hearing on the motion for the injunction, but before the injunction had been granted. Navin pleaded the act of 1897, called in question by the complainant here, in justification. The cause went by appeal to the supreme court of Indiana, and that court, on the 11th of June, rendered a decision holding the enactment of 1897 valid. 47 N. E. 525. Motion to dissolve is made on the strength of that decision. Complainant on its part moves for leave to amend the bill by making defendants thereto certain persons who have brought actions in the state courts for penalties pursuant to said act of 1897.

Butler, Notman, Joline & Mynderse, Benjamin Harrison, Miller & Elam, and F. Winter, for complainant.

William A. Ketcham, James B. Curtis, John W. Kern, and Joseph E. Bell, for defendants.

SHOWALTER, Circuit Judge (after stating the facts as above): It is again urged that this suit cannot be maintained against Prosecuting Attorney Wiltsie, because he represents the state of Indiana. If the enactment here in question be valid, then Mr. Wiltsie does represent the state; not the state as a proprietor, however, but the state as a governmental agency. If the enactment be invalid, then he does not represent anything. On the latter hypothesis, he, or any successor to him in office, in attempting to enforce the penalties in the enactment of 1897, would be merely a wrongdoer. The theory of the bill is that that statute is unconstitutional and void. If complainant be mistaken on this one proposition, then the bill cannot be sustained as to any defendant. I get the impression from the argument and citations made that a "suit in law or equity" against a state, within the sense of the eleventh amendment to the constitution of the United States, is a suit affecting in some manner a property right of the

state, as a municipal corporation. But the discussion on this point seems to me aside from the case at bar. If, as said, the enactment of 1897 be invalid, then Mr. Wiltsie does not here represent the state; if it be valid, he does. But, on the latter hypothesis, the entire suit must be disposed of before any question special to Mr. Wiltsie can arise. The validity of the amendment, I take it, this court must pass upon. What the rule of decision shall be,—whether the opinion of the state court shall be deemed final, or whether this court is charged with the responsibility of investigating the question independently,—on any view of that matter the validity of the amendment, so far as concerns this litigation, and apart from any subsequent review by the federal court of appeals or federal supreme court, depends upon the pronouncement of this court. For these reasons, I doubt if the discussion concerning the force of the eleventh amendment be pertinent.

In *Reagan v. Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, the legislature of Texas had, on April 3, 1891, passed an act establishing a board of three commissioners, with authority to fix rates on railroads in that state. Section 6 of the act provided that, if any railroad company "or other party at interest" be dissatisfied with a rate as fixed by the board, such "dissatisfied company or party" could commence a proceeding in a court of competent jurisdiction in Travis county, Tex., against the board, and thus determine the question of reasonableness in such rate; and, from the decision there made, either party could "appeal to the appellate court having jurisdiction of said cause." By section 5 of the same law it was provided, in substance, that the railroad company must carry for the rate fixed by the board, and that such rate be "conclusive and deemed \* \* \* reasonable \* \* \* until finally found otherwise, in" the direct action provided for in section 6. By section 14 of the same act, if any railroad company, its agent or officer, charged more than the rate fixed by the board, said "company and its said agent and officer" should "forfeit and pay to the state of Texas a sum not less than \$100, nor more than \$5,000." Section 15 defined "unjust discrimination," and fixed a penalty of not less than \$500, nor more than \$5,000, upon any railroad company violating any provision of that section. Other penalties were provided recoverable by "the person injured." By section 19 it was made the duty of the attorney general of the state to prosecute suits in the name of the state for all penalties except those recoverable by individuals. It will now be noticed that, by force of sections 5 and 14, a railroad company, unless it chose to accept the rates fixed by the board,—rates which had not yet been found reasonable by any judicial authority, and which might be in fact unreasonable,—would be subject to prosecutions at the suit of the state, instituted by the attorney general. On April 30, 1892, the Farmers' Loan & Trust Company, a New York corporation, being mortgagee of the railroad property of the International & Great Northwestern Railroad Company, a company organized under the law of Texas, and having and operating its road entirely within the limits of that state, exhibited its bill in the circuit court of the United States for the Western district of Texas, making said railroad company, the three members of the board, and the attorney general parties defendant. Upon the

showing of this bill that the rates fixed by the board were in fact unreasonable, the court issued its writ, enjoining the company from adopting such rate, the attorney general from instituting or prosecuting any suit to collect any penalty by reason of the failure of the company to adopt such rate, and the members of the board from any such action by them as would have been appropriate in aid of prosecutions by the attorney general had sections 5 and 14 been valid. This injunction was sustained by the supreme court of the United States. One contention before that court was that, by force of the eleventh amendment, the suit could not go against the attorney general, since in the enjoined prosecutions the state would be plaintiff, and the attorney general was the state officer and representative in that behalf. Mr. Justice Brewer, who delivered the opinion of the supreme court of the United States, reviewed the arguments and citations, and held that the suit was not against the state, within the meaning of the eleventh amendment. If section 5 had been valid for any purpose, or if section 14 had been valid according to its terms,—that is, as applied to any refusal of the company where the rate had not previously been judicially found reasonable as provided in section 6, and was in fact unreasonable,—then the attorney general, in the inhibited prosecutions, would certainly have represented the state. As the case stood, and assuming the invalidity of said sections, he represented nothing. His prosecutions would simply have been gross wrongs, under color of void legislative enactments. The opinion last cited was delivered in May, 1894. The position of Mr. Wiltsie here is the same as that of the attorney general in the Reagan Case. If the attorney general had not been specifically named as the officer to carry on the prosecutions under the Texas statute, that duty would have devolved upon some prosecuting attorney in Texas, and such officer, in place of the attorney general, would have been the defendant. I cannot hold that this suit, as against Mr. Wiltsie, is inhibited by the eleventh amendment, without disregarding the law as laid down by the supreme court of the United States. If, in the Reagan Case, sections 5 and 14 had been deemed valid, the injunction could not have issued or been sustained. Here the injunction is the purpose of the bill. If, as said, the enactment of 1897 be valid, the case fails, and the bill must be dismissed as to all defendants. If that enactment be invalid, Mr. Wiltsie, so far as the threatened prosecutions are concerned, does not represent the state in any capacity whatever. So much as preliminary to the matters which arise more particularly on this hearing.

When a federal question is involved, the decision of the highest court of the state is not final, but is reviewable by the supreme court of the United States. To this extent, at least, the judicial power of a state is subordinate to that of the United States. But there is no relation of subordination on the part of any federal court to any state court. In certain cases the federal courts, of their own motion, follow the decision of the state court, as determinative of the rights of a litigant. In *Forsyth v. City of Hammond*, decided April 19, 1897, by the supreme court of the United States (17 Sup. Ct. 665), it was ruled that a late decision of the supreme court of Indiana on the validity

of proceedings under Indiana statutes enlarging the boundaries of the city of Hammond was law for the parties, especially in view of the circumstance that Mrs. Forsyth herself had taken the appeal which resulted in that decision, and in view of the further circumstance that the state decision was upon essentially the specific controversy afterwards, in another form, made the subject of litigation in the cause before the supreme court of the United States. But where the controversy concerns a contract, and the meaning of the contract depends on the construction of a state statute or a provision of a state constitution, a decision on the meaning of said statute or constitutional provision by the highest court of a state, made after the contract was entered into, and rights had vested thereunder, is not conclusive upon a litigant in a federal court. The litigant in such a case is entitled to the independent judgment of the national tribunal.

*Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10, for instance, involved the construction of a contract between the defendant, a citizen of New York, and a Missouri corporation. The former had received certain shares of stock from the latter. Whether this stock was owned absolutely, or held as security for another obligation, was the question. The sense of the contract depended on the construction of a statute of Missouri. After the making of the contract, but before the decision in the supreme court of the United States, the supreme court of Missouri ruled, in another controversy between the same parties upon the same question, that, within the sense of the statute, the stock was owned, and not pledged. Having this decision before it, the supreme court of the United States made a contrary ruling, and this in a case where there was no federal question, but only diverse citizenship. If the Missouri decision had been prior to the contract, the federal tribunal would doubtless have said that the contract was made on the meaning of the statute as declared in the state decision, and that construction of the statute would doubtless have been followed, as of course. The Missouri statute, be it noticed, was in a sense part of the contract; that is, the court could not tell what the contract meant when the parties made it, without construing the statute. For a full and clear discussion of the subject and the cases in point, see the opinion of Lurton, Circuit Judge, in *Louisville Trust Co. v. City of Cincinnati*, 22 C. C. A. 334, 76 Fed. 296. If the controversy in a federal court involve a federal question,—and all the more if it involve both a contract right, as above explained, and also a federal question,—then, of course, that court must decide for itself, treating a state decision with due consideration, but not as foreclosing independent judgment. Whether the decision in the *Navin Case*, 47 N. E. 525, be conclusive upon the litigants here depends on the nature of the present controversy, in view of the rules above adverted to.

In the *Dartmouth College Case*, 4 Wheat. 519, it was ruled that the charter of a private corporation is a contract between the corporate body and the state, and that an act of the legislature changing the charter in any respect material to the rights of the corporation is a violation of that provision of the national constitution which inhibits a state from making a law impairing the obligation



of a contract. The action was trover, and the parties were citizens of New Hampshire. The appeal went to the supreme court of the United States, by reason of the federal question. The case was decided in 1819. This doctrine is still the law, and it applies to the charter of a railroad company. Take, for instance, *Railroad Co. v. Smith*, 128 U. S. 174, 9 Sup. Ct. 47. There the state of Georgia had granted a charter to a railroad company, and the contention was that, within the sense of this charter, the company was authorized or given the right to charge for carriage of freight as much as 50 cents per hundredweight, or 10 cents per cubic foot, for each hundred miles. The legislature of Georgia had passed a law creating a board, with authority to fix rates for common carriers. That board had prescribed rates much less than the 50 cents or the 10 cents mentioned above. The supreme court of the United States ruled that the railroad charter was a contract which the subsequent act could not alter; that if the charter provision, upon fair construction, had the meaning contended for, then the subsequent enactment could have no application as against it; but, upon examination of the words of the charter, they were held, when applied to the case before the court, not to have the meaning contended for. The doctrine of the *Dartmouth College Case* applies also to a railroad corporation organized under a general incorporation law. See, for instance, *Railroad Co. v. Iowa*, 94 U. S. 155. In such a case the sections of the general incorporation law constitute a contract between the state and any corporation organized thereunder. If in a charter it be provided that the corporation may charge rates up to or within a specified limit, or that the directors may, subject to certain limitations, themselves fix the rates in their discretion, such provision cannot be annulled or changed by the legislature unless power in that behalf be reserved as part of the charter agreement, and subsequent action by the legislature must be referred to and be within the reservation.

In *Reagan v. Trust Co.*, *supra*, Mr. Justice Brewer says:

"If the charter had in terms granted to the corporation power to charge and collect a definite sum per mile for transportation of persons or property, it would not be doubted that that express stipulation formed part of the obligation of the state, which it could not repudiate."

In the case at bar it was provided in section 9 of the act of 1861, under which the defendant company was organized, that the directors should have the power to fix the fare on its street railroad; by section 12, that the corporation could not build tracks or operate cars on the streets at all except under conditions which the city would first agree to; and, by section 11, that "this act may be amended or repealed at the discretion of the legislature." The city agreed that the fare charged by the company might be as much as five cents. Subject to this, the right to fix the fare was vested in the corporation, and this right cannot be modified otherwise than as provided in the charter contract, namely, by amendment of the act according to the terms of section 11, when read in the light of those restrictions in the Indiana constitution bearing upon the matter of amendment to that act. There is no general authority in the

legislature under which the corporate power on the matter of fares can be changed in contravention of the charter contract. Whatever the legislature may do must be within the sense of section 11 of the act of 1861, that section being itself a term in the charter contract. 2 Mor. Priv. Corp. §§ 1106, 1095.

A railroad corporation chartered, for instance, by some other state, might own or operate a railroad in Indiana. Such a company would have no charter contract with the state of Indiana. The state might provide by law for a board authorized to fix rates, and such rates, if reasonable, might be rates for such foreign company, and regulate its charges in Indiana. Such a law would be within the power of the legislature. But the enactment of 1897, here in question, cannot be referred to any such untrammelled power in the legislature, since the charter agreement between the state and the defendant railway company covers the subject of rates. The grant by section 9 of the act of 1861 cannot be taken back, evaded, or annulled in any way other than that stipulated, namely, by a law which shall be an amendment to the act of 1861; and valid legislative interference must fall within the scope of section 11 of the act last mentioned, that being part of the agreement. The state and the corporation have agreed that, within the restrictions imposed by the constitution of Indiana on the legislative function touching any law for the formation of business corporations, the legislature may amend the act of 1861; and the question is whether or not the act of 1897 is, in view of said restrictions, competent, as an amendment to the act of 1861.

These distinctions are made here because, as will presently appear, the supreme court of Indiana rules in the Navin Case that the enactment of 1897 is solely by virtue of the general power of the state to legislate on rates. In this way that court clears the subject of constitutional objections. The defendant railway company is treated as though it had no charter agreement with the state of Indiana,—as though its charter had been granted, for instance, by Ohio or Illinois. The police power of Indiana on railroad tariffs is thought of as authority which is in itself unquestionable and all-sufficient for the enactment of 1897. Considered merely as referable to the police power, want of uniformity in operation, it seems to me, might be a valid objection to said enactment. But that question need not be discussed. I think it may be said as a general proposition that no enactment which would be invalid as an exercise of the police power could be valid as an amendment to the act of 1861; but, on the other hand, an enactment proposed as an amendment to the act of 1861 might be unobjectionable as a police law, and yet not be an amendment within the constitutional restrictions which concern a law like that of 1861. To hold such an enactment valid would sanction a breach of the charter agreement. Under a police law, the rates must be reasonable; but, where there is a charter agreement as to rates, that agreement controls. In *Railroad Co. v. Smith*, supra, though the rates fixed by the board might have been reasonable, yet if the court had found that the charter gave the corporation power to charge, if it saw fit, 50 cents per hun-

dredweight, or 10 cents per cubic foot, for each hundred miles, such could have been the rates, whether reasonable or unreasonable. I may add that a law for the purpose of securing and enforcing fair and reasonable charges by common carriers is not to be classed with those laws making for the public health and public morals, the power to enact which cannot be contracted away or parted with by the state.

It being now understood that the words of section 11 of the act of 1861, "This act may be amended \* \* \* at the discretion of the legislature," constitute, in connection with sections 9 and 12, an agreement binding upon the state of Indiana, what the sense of this agreement is—whether the enactment of 1897 is an amendment to "this act"—can be determined only by reference to certain provisions in the Indiana constitution bearing upon the question. As the supreme court of the United States, in *Burgess v. Seligman*, supra, was obliged to construe the statute of Missouri in order to find the meaning of the contract between Seligman and the corporation, so here the meaning of the contract between the state and the corporation cannot be known without a construction of said constitutional provision. If, in the light of constitutional restrictions on the legislative function touching any law for the formation of corporations, the act of 1897 be not competent as an amendment to the act of 1861, then, and in breach of the national constitution, the act of 1897 would impair the obligation of the charter agreement, as expressed in sections 9, 11, and 12, and should be held void. I take it as clear that no enactment can be competent as an amendment to the act of 1861 which, when read in connection with what would be left of said act, would make the whole an unconstitutional statute. If the enactment of 1897 be valid, then the law for the formation of street-railroad corporations in Indiana, as now extant, provides that in the one city which had a population of 100,000 in 1890, namely, Indianapolis, such a corporation cannot charge more than three cents for each passenger, no matter what its contract with the city may be, and must transfer passengers from one of its lines to another without extra charge, and this under a special code of penalties, involving the forfeiture of its street franchises and divers criminal prosecutions; while in any other city, regardless of population, now or hereafter, the rate agreed on with such city may be charged, the matter of transfers being there left to the company subject to agreement with the city, and the penal code applicable in the one city identified by the law can have no force. It seems to me that, as to the one city identified in the act, the law, on the hypothesis now under view, would be special and local, since it could never apply to street-railroad business by corporations organized under the act of 1861 in any other part of the state; and as to that portion of the state, other than the one city, it would be special and local, since it could not apply to the one city.

Section 22 of article 4 of the constitution of Indiana reads: "The general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say, regulating the jurisdiction and duties of justices of the peace and of constables; for the

punishment of crimes and misdemeanors," and so forth, enumerating 15 additional subjects. Section 23, following in the same article, reads: "In all the cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the state." Section 13 of article 11 reads: "Corporations, other than banking, shall not be created by special act, but may be formed under general laws." From the language of sections 22 and 23, when read together, it will appear that a "local or special" law is any law which is not "general"; that is to say, "of uniform operation," as applied to similar conditions, "throughout the state." Assuming the validity of the enactment of 1897, then the law of which that enactment forms a part is "local or special," since it is not "general and of uniform operation throughout the state." The people of Indiana said in their constitution that, "where a general law can be made applicable, all laws shall be general and of uniform operation throughout the state"; also, that "corporations, other than banking, \* \* \* may be formed under general laws,"—in other words, that a general law can be made applicable when the formation of business corporations is the subject-matter of legislation. These propositions, when read together, express the meaning that any law for the formation of corporations must be general; that is to say, of uniform operation under like conditions throughout the state. The question whether or not a general law can be made applicable to the matter of corporate organization for enterprises of business and profit is thus foreclosed in the constitution itself. Upon this question no discretion or power of deciding is vested either in the legislature or the courts of the state. A law for the formation of street-railroad corporations must be general,—that is to say, of uniform operation, under similar conditions, throughout the state; otherwise, it is void. If the enactment of 1897 be held valid, then as an amendment it displaces a portion of the act of 1861 and becomes itself part of that law. The effect would be to make the entire law for the formation of street-railroad corporations local and special. Therefore the enactment of 1897 is unconstitutional and void.

As to any law on any one of the 17 subjects mentioned in section 22 of article 4 of the constitution, and as to any law for the formation of corporations for business and profit, the question whether such law may be local or special, or must be general, as these terms have already been explained, is settled in the constitution itself. Such law must be general, meaning of uniform application to similar conditions whenever they arise, and wherever they exist, in the state. A law upon any other subject may be special or local, provided a general law cannot be made applicable to such subject. Concerning this last proposition, the supreme court of Indiana long ago ruled that the question whether a general law could be made applicable was a judicial question, a question upon which the judgment of the legislature was not conclusive; and this, I suppose, upon the ground that it was for the courts to construe the constitution. Later, that court reversed this ruling, and held that the judgment of the legislature was conclusive. But never, so far as I am advised, until the Navin decision,

did that court suggest or intimate that the express declaration by the people of Indiana in their constitution, namely, corporations for business and profit "may be formed under general laws," left the legislature at liberty to decide that such corporations could not be formed under general laws.

In the case at bar the charter agreement between the corporation and the state on the matter of rates, as expressed in section 9 of the act of 1861, subject to the conditions in sections 12 and 11, was the chief consideration which induced the acceptance of the charter by the corporators, the expenditures by the corporation in the streets of Indianapolis, and the investment in the railroad property by this complainant. Under section 11, the security, aside from the wisdom and fairness of the legislature, was that an amendment could not be made otherwise than by an enactment which would still leave the law, as a whole, "general and of uniform operation" upon all corporations formed or to be formed under it, or at least upon all such corporations formed or to be formed as could be associated for legislative purposes by any germane and appropriate classification. No such classification is made by the act of 1897. To the contrary upon this proposition I find nothing in the opinion in the Navin Case. I may here add that, while the constitutional inhibition is against "local or special laws," the court rules in the Navin Case that it is not material whether the act of 1897 be "local" or not, the decision resting upon grounds entirely distinct from that question. The charter contract says: "This act may be amended at the discretion of the legislature." Is the enactment of 1897 an amendment to "this act," within the meaning of the foregoing reservation? This is the question, and it concerns the construction of the charter contract. Whether the act of 1897 is an amendment, and what discretion the legislature is vested with,—in other words, whether the act of 1897 would break, or be in accord with, the contract,—depends upon the sense of certain provisions in the constitution of Indiana.

I now call attention more specifically to the state decision in the Navin Case. Mr. Justice Monks says in the opinion:

"It is insisted by appellant that the act of 1897 is unconstitutional, because it impairs the obligation of a contract. Counsel for appellant do not point out any contract the obligation of which is impaired by said act. If it is the contract under which the street-railway company took possession of the streets of Indianapolis, and constructed its tracks, it is sufficient to say that the city was not authorized to enter into any contract which would prevent the legislature from legislating upon the subject of fares. It is settled law that the legislature has the power to reasonably regulate the rates of fare for transportation of passengers within the state on street railways."

Here a number of cases are cited; but they are upon the general proposition that, where there is no charter contract on the matter of rates, legislation looking to reasonable rates is competent. Not one of the citations concerns any street-railroad corporation organized under the act of 1861. The opinion proceeds:

"Besides, section 11 of said act of 1861, being section 5463, Rev. St. 1894 (section 4153, Rev. St. 1881), expressly reserves to the legislature the right to amend or repeal said act at its discretion. The right of the legislature, however, to regulate the fare upon street railroads organized under the act

of 1861, does not depend upon the reservation of the right to amend or repeal the act in section 11 of the act. That power would exist even if the right to amend or repeal the act had not been reserved."

How can this be? If section 11 were omitted, the legislature could not touch the subject of rates. Note the quotation made above from the Reagan Case. Does the supreme court of Indiana mean that, where a charter contains no reservation of power to amend, such reservation is implied, or that the vested rights of a corporation organized under a general incorporation law, which contained no reservation of power to amend, can be disturbed by any subsequent amendment? The opinion goes on:

"In order to exempt a common carrier from legislative control over its rates of fare, it must appear that the exemption was made in its charter by clear and unmistakable language, inconsistent with the exercise of such power in the legislature."

If section 11 had been omitted, then, as said, the charter agreement between the corporation and the state would have been that the directors of the corporation could fix the rates, subject to no condition or limitation other than the agreement with the city. As the case stands, the grant to the corporation as to rates is subject to no condition or limitation other than the agreement with the city and the agreement with the state that the legislature might, within the appropriate constitutional restrictions, repeal or amend the act of 1861. If the learned writer of the opinion means that, in addition to a contract covering the subject of rates, there must also appear in the charter an express exemption from such legislative action as might be competent if there were no contract at all,—which would be competent, for instance, as respects a carrier chartered by some other state,—I cannot agree with him. The three citations made by Mr. Justice Monks, among which are *Railroad Co. v. Smith*, supra, and *Railroad Co. v. Iowa*, supra, are to the point, as above stated herein, that, if the charter contract cover the matter of rates, legislative interference in that behalf, otherwise than within the terms of the contract, is unauthorized. The state opinion goes on:

"Appellant [meaning the city of Indianapolis] had the power to prescribe the terms upon which and the time for which a street-railroad company organized under said act of 1861 should occupy the streets of said city; but such contract, when made, was subject to the right of the legislature to amend or repeal said act at its discretion, and no contract made by the city with a street-railroad company could prevent the exercise of such power by the legislature."

Now follows the conclusion drawn by Mr. Justice Monks from those portions of his opinion hereinabove quoted:

"It is clear, therefore, that said act of 1897 does not impair the obligation of any valid contract of either the state or appellant."

If, in view of constitutional limitations touching the legislative function as to laws for the formation or creation of corporations, the act of 1897 be not competent as an amendment to the act of 1861, then said act of 1897 certainly does impair the obligation of the charter agreement, as well as the obligation of the contract made with the city; and this in violation of the constitution of the United States. The learned writer of the state opinion characterizes the enactment of

1897 as "a mere regulation of an existing corporation." In so doing, he still has reference to the police power as the untrammelled source of legislative authority for the enactment. But the state contracted that no amendment which would leave the act as amended a special or local law should be made. The point is that the enactment of 1897 is not the kind of amendment which it was stipulated in the charter agreement could be made. The long-settled doctrine that the 12 sections of the act of 1861 constituted a contract between the state of Indiana and any corporation organized under that act, and the terms of that contract, are ignored in the state opinion. The citations to the proposition that the act of 1897 is "a mere regulation of an existing corporation" concern what may be done when the state is not fettered by its own agreement, upon the face of which the other contracting party has acted and expended his money. It is said in the state opinion that the legislature, since the adoption of the present constitution in 1851, has occasionally, and by some special, specific enactment, "enlarged the powers and privileges" of some particular corporation organized by special charter prior to 1851. Surely, the legislature could not diminish the powers and privileges (so as to destroy a vested property right) granted by a special charter to a business corporation, unless by a term in the charter reserving that power. The argument seems to be, however, that, in view of the legislative practice referred to touching old corporations under special charters, the grant of an additional power or privilege to an existing corporation is not inhibited by the words in the constitution, "Corporations \* \* \* shall not be created by special act." It is thence, apparently, inferred that a special enactment, like that of 1897, destroying the right previously vested in the defendant railway company to fix the fare on its lines at five cents, is not unconstitutional. But the scope of the agreement between the state and the defendant company is that any such change on the subject of fares must be by an amendment which, when put into the charter, would still leave that instrument a general law for the formation of street-railroad corporations; that is to say, a law uniform in operation under like conditions throughout the state.

If before this defendant company was organized, or, possibly, if before this complainant took its mortgage, the supreme court of Indiana had decided that an enactment taking from the street-car companies of one particular city the power to fix rates as agreed upon with that city was, within the terms of the Indiana constitution, an amendment of the act of 1861, the case here would be different. But, as the matter stands, it seems impossible to say that the parties litigant here are not entitled to the opinion of this court treating the decision of the supreme court of Indiana with respectful and careful consideration, but not as of binding force. Apart from the diverse citizenship of the parties, there is here distinctly the question whether or not the enactment of 1897 impairs the obligation of the charter contract,—whether or not the enactment of 1897 does not violate the constitution of the United States. The decision of the Indiana court (assuming that appellant in that case was entitled to, and did, make upon the record the federal question) is not final, but subject to review by the supreme court of the United States. In *Burgess v. Seligman*, be it noticed,

there was no federal question, and the decision of the state supreme court was final and conclusive upon the parties and the state courts.

In *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 17 Sup. Ct. 305, the decision of the supreme court of Ohio upon the question whether the tax law in controversy violated the constitution of Ohio was held final. But this feature of that case raised no federal question. The state of Ohio had made no contract the sense of which was to turn on the meaning of the Ohio constitution, as authorizing or not authorizing such legislation. In deciding merely that the statute in question was not in violation of the constitution of the state, the supreme court of Ohio had no federal question before it. But the construction of the statute, apart from its relation to the constitution of Ohio, by the Ohio court, was not taken as final by the federal courts. There was no claim made that the law, if valid, would break the obligation of any contract to which the state was or was not a party; but it was contended that the act violated certain other provisions of the national constitution. On this contention the opinion of the supreme court of Ohio was not treated as conclusive. The federal courts followed that court merely because they agreed with it.

The federal question is more distinctly to the front in the case at bar than even in *Reagan v. Trust Co.* In the latter case it did not appear that the charter contract contained any express provision as to rates. The court inquired whether an engagement by the state to permit reasonable rates was not an implied term in the charter contract, and ruled that this inquiry brought the charter contract into the case for construction. If the charter contract contained such an implied term, then the question would be whether the statute objected to in that case was in violation of that contract. Following is the language of Mr. Justice Brewer:

"Still another matter is worthy of note in this direction. In the famous *Dartmouth College Case*, 4 Wheat. 518, it was held that the charter of a corporation is a contract protected by that clause of the national constitution which prohibits a state from passing any law impairing the obligation of contracts. The *International and Great Northwestern Railroad Company* is a corporation created by the state of Texas. The charter which created it is a contract whose obligation neither party can repudiate without the consent of the other. All that is within the scope of this contract need not be determined. Obviously, one obligation assumed by the corporation was to construct and operate a railroad between the termini named; and, on the other hand, one obligation assumed by the state was that it would not prevent the company from so constructing and operating the road. If the charter had in terms granted to the corporation power to charge and collect a definite sum per mile for the transportation of persons or of property, it would not be doubted that that express stipulation formed a part of the obligation of the state, which it could not repudiate. Whether, in the absence of an express stipulation of that character, there is not implied, in the grant of the right to construct and operate, the grant of a right to charge and collect such tolls as will enable the company to successfully operate the road, and return some profit to those who have invested their money in the construction, is a question not as yet determined. It is, at least, a question which arises as to the extent to which that contract goes, and one in which the corporation has a right to invoke the judgment of the courts; and if the corporation, a citizen of the state, has the right to maintain a suit for the determination of that question, clearly a citizen of another state, who has, under authority of the laws of the state of Texas, become peculiarly interested in, equitably, indeed, the beneficial owner of, the property of the corporation, may invoke the judgment of the federal courts as to whether the contract rights created by the charter, and of which it is thus



the beneficial owner, are violated by subsequent acts of the state in limitation of the right to collect tolls. Our conclusion from these considerations is that the objection to the jurisdiction of the circuit court is not tenable."

I may here add, in connection with the matter above quoted, that the Reagan Case must necessarily be understood as presenting a federal question, and not only a federal question, but a question which concerned "the construction or application of the constitution of the United States," or a question which concerned "the constitution or law of a state," as being "in contravention of the constitution of the United States"; otherwise, the Reagan Case could not have gone, in the first instance, to the supreme court of the United States, but must have gone to the court of appeals of the Fifth circuit. It will be seen from the foregoing quotation from the opinion of Mr. Justice Brewer what one federal question was.

In the case at bar there can be no inquiry as to the reasonableness of the three-cent rate, or the unreasonableness of the five-cent rate, unless the enactment of 1897 be, within the terms of section 11, when read in the light of constitutional restrictions, an amendment to "this act," meaning the act of 1861. If the enactment of 1897 be void, then the city and Mr. Wiltsie, in enforcing it, would be mere wrongdoers. The bill avers, in effect, that, if no injunction be granted, the railway company will either obey the "law" through fear of the city and defendant Wiltsie, in which case the complainant's security will be diminished in value, or, in defiance of the city and defendant Wiltsie, refuse to obey, in which case the security will be destroyed. Under the circumstances, and assuming the act of 1897 invalid, can the defendants the city and Wiltsie insist, as against this bill, that complainant must show that a reduction from five cents to three cents in the fares would make the income from the mortgaged property insufficient to pay operating expenses and the interest on the mortgage debt? Does it lie in the mouth of a mere wrongdoer, as against a proceeding to stop the wanton destruction or impairment in value of a given property, to object that, since the complainant holds the property as security for a debt, he can have no cause of complaint, without a specific showing that there will not be enough value left, after the proposed spoliation, to satisfy the debt? The complainant's lien attaches as much to that portion of the property which is to be destroyed as to any other. The general owner whose management of mortgaged property is objected to by a mortgagee may well urge that what he proposes to do with said property will still leave ample security. But what right would a mere wrongdoer have as against even a mortgagee to destroy any portion of the property pledged? The demurrer is overruled, the motion to dissolve the injunction is denied, and complainant's motion to amend is allowed.

WILSON et al. v. WINCHESTER & P. R. CO. et al.<sup>1</sup>

(Circuit Court, D. West Virginia. July 2, 1897.)

## 1. EQUITY—PLEADING—TIME OF FILING ANSWER.

Code W. Va. c. 125, § 5, provides that, after the filing of a bill, a rule may be taken "to declare, plead, reply, enjoin, or for other proceedings." Section 44 provides that, "if the defendant fails to appear at the rule day at which the process against him is returned executed, \* \* \* the plaintiff, if he has filed his \* \* \* bill, may have a \* \* \* decree nisi against him," and also that, if defendant fails to appear at the next rule day thereafter, the bill shall be entered as taken for confessed. *Held*, that defendant is not required to plead to the merits of the suit until the decree nisi has been taken, although the bill may be filed on or before the return day of the summons.

## 2. REMOVAL OF CAUSES—PETITION—TIME OF FILING.

Act Cong. March 3, 1887 (24 Stat. 554), provides that the party desiring to remove a cause from a state court to the circuit court of the United States on the ground of diverse citizenship must file his petition "at the time, or at any time before the time, when the defendant is required by the laws of the state \* \* \* to answer or plead to the declaration or complaint of the plaintiff." *Held*, that this has reference to the time when he is required to plead to the merits of the cause, and does not limit the filing of the petition to the time when pleas in abatement must be filed under the state practice.

Trapnell & McDonald, for complainants.

George Baylor, for Winchester & P. R. Co.

J. A. Hutchinson and J. Bassel, for Baltimore & O. R. Co.

JACKSON, District Judge. This case is now heard upon a motion to remand it to the court from which it was removed, and that is the only question now to be considered. It appears from the record that a summons issued from the clerk's office of the circuit court of Jefferson county, W. Va., against the defendants, on the 27th day of October, 1893, requiring them "to answer on the first Monday in next month a bill in chancery to be exhibited against them" by the plaintiffs in this action. It does not appear from the record when the bill was filed, except from a statement in the petition that it was filed at the following November rules. When the bill was filed, the plaintiffs were entitled to a rule to plead or reply as the case then stood (chapter 125, § 5, Code W. Va.); but the record does not disclose that the plaintiffs took any such rule, nor does it appear that any step was taken by the plaintiffs to mature their action for hearing beyond the mere filing of their bill at November rules. The statute of West Virginia provides that, after the suit has been brought, "that if the defendant fails to appear at the rule day at which the process against him is returned executed, \* \* \* the plaintiff, if he has filed his declaration or bill, may have a conditional judgment or decree nisi as to such defendant." Code W. Va. c. 125, § 44. No decree nisi was taken, so far as the record discloses, the purpose of which is to notify the defendants that, unless they appear and plead at the next rules, "the bill shall be entered as taken for confessed." *Id.* The result of this neglect kept the case open until the next rules, and left the plaintiffs in the same condition as if they had failed to file their bill. This

<sup>1</sup> Reported by Benj. Trapnell, Esq., of the Charleston bar.

omission upon the part of the plaintiffs to avail themselves of their right to take a decree nisi furnished the defendants with the opportunity of tendering any defense they might wish to make at December rules, for the reason that under the practice in this state they were not required to plead until the decree nisi was taken, and, as no such order was given at November rules, they were in time to plead at December rules. At the December rules the defendants filed their petition for removal, and subsequently the case was docketed in this court. As there was no necessity for the defendants to do anything to protect their rights until the decree nisi had been taken, it would seem that when they filed their petition at December rules they were in time. But it is insisted that under the act of congress passed in 1888 the defendants were required to file their petition at the rules to which the summons was returnable, and, not having done so, that they lost their right of removal. To sustain this position the case of *Martin's Adm'r v. Railroad Co.*, 151 U. S. 691, 14 Sup. Ct. 533, is cited. I confess that this case somewhat surprised me when I first read it, and ever since I have entertained grave doubts as to the correctness of the construction claimed for it; and I may add that in this conclusion I am supported, not only by the views of some of my brothers in this circuit, but by a judicial construction of the act in question. *Mahoney v. Association*, 70 Fed. 513. I do not admit that the act is susceptible of the construction which is supposed to have been given it by the supreme court in the case cited. I have the greatest respect for that tribunal, and, however much I might be inclined to differ with its conclusion in any case where the questions ruled were raised by the pleadings, still I would feel it to be my duty, as it would be my pleasure, to cheerfully acquiesce; but still, if I am mistaken as to what the conclusion of the court was in the case cited, I submit that, where the record not only shows that there was no plea filed to the jurisdiction of the court, but that it clearly appears from it that no objection to the removal was made either in the state court or in the circuit court of the United States, and that the court incidentally passed upon the question of removal, not strictly raised by the pleadings before it, then I will be excused if I treat its conclusion as "obiter,"—a mere dictum, by which I am not bound.

It will be noticed that the act requires any party who desires to remove a case from the state court to the federal court to file his petition in the case "at the time, or any time before, the defendant is required by the laws of the state or the rule of the state court in which suit is brought to answer or plead to the declaration or complaint of the plaintiff." 24 Stat. 554. Under the decision of *Martin's Adm'r v. Railroad Co.*, it is claimed that the petition must be filed at the rules to which the summons is returnable, which is the first rule day. If such is the conclusion of the court in that case, with great deference I think it is a misconception of the act. As I have said before, I do not understand that I am bound by its reasoning, and I trust that I will be excused if I venture to differ with the learned judge who delivered the opinion of the court. It will be observed that the act requires the party to file his petition "when, by the laws of the state, or a rule of the court in which the suit is brought," he is required to

answer or plead to the declaration or complaint of the plaintiff, and not when he might make a defense to the writ or summons. It must be apparent to the legal mind that when congress employed the words "declaration" and "complaint" in the act they were used in a legal sense, and not as synonymous with the word "writ" or "summons," which is, at common law, the process to commence the suit, and is the first step taken to bring the party sued before the court, while the declaration or complaint is necessarily the second step, which manifests the cause of action, and sets out a narrative of the case; and this must be true where the practice exists by commencing a suit by petition. The act does not, in terms, describe the nature or character of the plea or answer to be filed to the "declaration or complaint," manifestly for the reason that the practice in the states of the Union is not uniform. I must presume that congress was fully advised of the meaning of the words used in the act, and that it is far safer to suppose that it did not intend to require the petition to be filed before the pleadings had been filed stating the nature and character of the suit. This ought to be, if it is not, the purpose of the act; and it seems to me that any construction of the act which would admit pleas in abatement to be filed (which are ordinarily pleas to the writ) before the declaration or complaint is filed, is not warranted by its express terms, and that they are not such pleas as the act requires to "oppose or answer the declaration or complaint which the defendant is summoned to answer."

It is a universal rule of construction that the courts should endeavor, if possible, to ascertain the intention of the legislative power in passing an act, and, if possible, give effect to that intention, unless the language is so clear that it admits of but one meaning, leaving no room for construction. When we look to the purpose of congress in enacting this statute, we must conclude that it was only to furnish a national tribunal in which citizens of different states could litigate their rights, removed as far as practicable from local prejudice. It is almost impossible to believe that it was the intention of the legislative power, in passing this act, to confer upon citizens of different states the right to litigate in the courts of the United States, and yet to so limit the time of removal of cases brought in the courts of the states as to amount almost to a denial to this class of litigants of the right to be heard in the courts of the United States. If this construction has been given to the act by the supreme court, and is to be followed as a rule of conduct by the inferior courts, it puts it in the power of a litigant in this state to bring his suit on the first rule day of any month, and have a process issued and served on that day on the agent of the defendant, a nonresident corporation; the result being that, before the chief officers and counsel of such defendant have been informed of such proceedings, the rules have been closed, and it is deprived of the right of removal. *Spragins v. Railway Co.*, 35 W. Va. 139, 13 S. E. 45. I submit that such could not have been the intention of congress in the passage of this act. We must presume that congress intended to furnish a right to remove within a reasonable time, and at the same time a remedy to protect the non-resident defendant against local prejudice. If such was the inten-

tion, surely it would not legislate so as to defeat that object. Looking at this act in that light, it occurs to me that it was not the intention of congress to require that the petition for removal should be filed in the state courts until the defendant was required to make defense upon the merits of the case, and not when he might avail himself of a purely technical defense, such as a plea in abatement, which, with great respect, it seems to me not the character of a plea or answer contemplated in the act. As I understand the rule of pleading, pleas in abatement are always pleas to the writ, except where "the declaration, which is presumed to correspond with the writ, be incorrect, in respect to some extrinsic matter," otherwise "there is no plea to the declaration alone but in bar." Chit. Pl. (16th Am. Ed.) 466. This statement of the law of pleading by Chitty is supported by a great many English and American authorities. Minor, in his Institutes (a very high authority both in Virginia and West Virginia), in volume 4, part 1, page 627, says that: "A plea in abatement is one which shows some ground for abating or quashing the original writ or declaration or both. Such pleas are of two sorts: First, to the disability of the person to sue or be sued; second, to the declaration." It will be observed that pleas to the writ are of a personal nature, technical in their character, while pleas to the declaration are in the nature of pleas to the merits of the action. Minor, in stating the rule as to pleas in abatement to the declaration, says that pleas in abatement may be filed for a variance between the writ and the declaration, for a defect in the declaration, for matter apparent on the face of the writ and declaration, for matter dehors (that is, outside) the writ, for misnomer, for nonjoinder, etc. This class of pleas are of a dilatory character, and are not pleas which go to the merits of the action to defeat it. It would seem that by a strict construction of the act a party who files his petition for removal would be in time when he was first required "to plead to the declaration or complaint," and not to the writ. If, however, the defendant is required to appear at the first rule day after process is served, and a decree nisi taken, then any petition filed after that would be too late; but under our system of pleading the only plea required at that time, if, in fact, it is required before office judgment or decree nisi would be entered, is the plea in abatement. In the case of *Hinton v. Ballard*, 3 W. Va. 586, the court held that, "a plea in abatement not being a plea to the issue, which can be filed to set aside an office judgment, it follows necessarily that all such pleas must be filed at rules before office judgment is entered, except when the cause making the filing of a plea in abatement necessary occurs after the office judgment entered at rules, in which case it may be filed the first opportunity afterwards." This decision affirms the right of a defendant in this state to file a plea in abatement before "office judgment entered," which must be done not later than the first rule day succeeding after the decree nisi was entered, notifying him that judgment would be entered against him on the succeeding rule day. The effect of this decision is to hold that the plea may be filed at any time before the common order is confirmed. I am aware that in a later case—*Simpson v. Edmiston*, 23 W. Va. 675, 678—it is claimed that the

court held that the plea must be filed at the first rules, and that the two cases are somewhat conflicting, and that the latter case overrules the first, although it does not say so in express terms. This claim is founded upon the supposed ruling of the court as announced in the first clause of the syllabus, which states that "a plea in abatement to the jurisdiction of the court cannot be filed after a conditional judgment or decree nisi." Upon a careful examination of this case I reach the conclusion that the time when such plea should be filed was not before the court. It was only necessary for the court to determine under the pleadings whether a plea filed to the jurisdiction of the court long "after the bill was taken for confessed" as to the defendant Edmiston was in time. The record shows that the summons in that case was returnable to March rules, and was served upon the defendant Edmiston before the return day, at which time there was a decree nisi, which was confirmed at April rules, but the plea in abatement was not filed until August rules. Upon this state of facts the only question that could arise was whether the plea was filed in time. It was not absolutely necessary for the court to determine at what state of the pleadings the plea must be filed, as no such question was properly before it. Upon the facts, as they appeared in the case, the court held that the plea came too late, and it seems to me that there can be no question as to this conclusion; and that this decision does not conflict with the ruling of the court in the case of *Hinton's Adm'r v. Ballard*, supra, which decides that plea in abatement may be filed before "office judgment entered." I am therefore of the opinion that the two cases are easily reconciled with each other, and that the rule of law laid down in that case is correct. But in this case, as we have seen, it is not necessary, in disposing of this motion, to decide whether the petition should have been filed at the first rule day, though I am inclined to concur with the learned judge in the case cited supra (70 Fed. 513), and hold that a plea in abatement "is not the sort of plea or answer contemplated in the act of 1888." The motion to remand is refused.

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MOORE v. BAHR et al.

(Circuit Court, D. South Carolina. July 8, 1897.)

**1. INTOXICATING LIQUORS—INTERSTATE COMMERCE—RIGHT TO STORE ORIGINAL PACKAGES.**

The right to import and sell intoxicating liquors in original packages in South Carolina being established by the law of interstate commerce, a dealer who is a citizen of another state has a right to store such liquors within the state for purposes of sale.

**2. SAME—SALES IN ORIGINAL PACKAGES—DISPENSARY LAW OF SOUTH CAROLINA.**

Sales of intoxicating liquors in South Carolina by citizens of other states, in the original packages in which they are imported into the state, are subject to the regulations imposed by the dispensary law of the state as to the times and quantities in which, and the persons to whom, they may be made, and all such provisions as are in the nature of police regulations.

Suit in equity by W. G. Moore, a citizen and resident of the state of New York, against W. N. Bahr, C. F. Glover, W. Livingston, S.

Duncan, J. J. Browning, William J. Schneider, E. V. Baker, and J. M. Scott, citizens and residents of South Carolina, and state constables. Heard on rule to show cause why injunction should not issue, and return thereto.

J. N. Nathans, for complainant.

Wm. A. Barber, for respondents.

SIMONTON, Circuit Judge. The complainant, a rectifier of liquor and wholesale liquor dealer in the city of New York, files his bill against the defendants, who are state constables appointed under the provisions of the dispensary act. The facts stated are that the complainant shipped to Charleston, by the Clyde Steamship Company, an interstate commerce carrier, certain liquors, wines, and beer, products of other states, in original packages, to be stored for the purposes of sale in such original packages by his agent in that behalf appointed; that the defendants had entered the premises, and had seized his goods, and had interfered with the sale thereof; that they are hopelessly insolvent; and that he has no remedy at law. The bill prayed an injunction. The return to the rule to show cause, after setting up certain objections to the jurisdiction, admits substantially the facts stated in the bill, and denies the right of the complainant to import into this state the wines, liquors, and beer mentioned in the complaint, or to store them therein, or to sell them by his agent, as claimed by him. The jurisdiction of this court, upon the facts stated in the bill, seems clear.

At the hearing it appeared that there was no difference of opinion between counsel as to what constituted an original package, and it was agreed that the packages which were stored and offered for sale in this case were original packages. The questions made were these: Has a dealer, a citizen of a state other than South Carolina, a right to import liquors, wines, and beer, in original packages, and to store them in this state for purposes of sale? If this question be answered in the affirmative, must such sales be conducted under the restriction of time, quantity, and persons made in the dispensary law?

In *Cantini v. Tillman*, 54 Fed., 969, after full discussion and consideration, it was held by this court that the dispensary law, in its general provisions, did not conflict with the constitution of the United States or of this state. In that case, Cantini, a wholesale and retail dealer in liquors, resident in Charleston, claimed the right to carry on his business, notwithstanding the dispensary law, both on the ground of the unconstitutionality of the law, and because he was a subject of the king of Italy, and was protected by treaty stipulations. The court decided the case on the facts before it, but it expressly reserved the question whether the act was not void in such of its provisions as were in conflict with the interstate commerce law. In the case *In re Langford*, 57 Fed. 570, it became necessary to discuss some provisions of the dispensary law conflicting with interstate commerce, and it was held that in so far as such conflict existed the law was inoperative and void. These two decisions are unreversed, and are the law for this court. In *Donald v. Scott*, 67 Fed. 854, a full dis-

cussion of the relations between the dispensary acts and the law of interstate commerce was had, and the decision was reached that under the protection of the interstate commerce law any resident of this state could, notwithstanding the dispensary acts, import liquors for his own use and consumption. This decision has been sustained by the supreme court of the United States in *Scott v. Donald*, 165 U. S. 58, 17 Sup. Ct. 262. In the *Vandercook Case* (recently heard and decided in this court) 80 Fed. 786, following the supreme court in *Scott v. Donald*, it was held that a producer of wines and other liquors in California had a right to import and sell in this state his products in original packages. No difference can be seen in principle between the right of a producer, as in the *Vandercook Case*, and that of the complainant in this case. Both are equally under the protection of the interstate commerce law. The conclusion reached in this line of cases is this: The state, in the exercise of the police power, can declare that the use of intoxicating liquors of all kinds as a beverage is noxious,—injurious to the health, welfare, and safety of the people,—and, having so declared, can forbid the manufacture, importation, and sale of such liquors within her borders. That such prohibition takes intoxicating liquors out of the category of articles of commerce, and is not in conflict with the interstate commerce law. But that so long as the state recognizes the use of intoxicating liquors as a beverage, and encourages such use by purchasing them in large quantities, and selling them for such use to the inhabitants within her borders, accompanying such purchase and sale with a prohibition to others from doing the like, this prohibition is not a lawful exercise of the police power. On the contrary, it is an attempt, under the guise of the police power, to secure for the state the benefits, profits, and emoluments of the liquor traffic heretofore enjoyed by individual citizens, and so increase her revenue. And for greater certainty in this behalf a monopoly in this traffic is created in the state. That the state cannot engage in this business for this purpose in contravention of the rights of citizens of the other states. This being so, and the right to import and sell in original packages being established, it necessarily follows that there must exist a right to have a place for the receipt and exposure for sale of the original packages so imported. The one is the inevitable consequence of the other. But when this has been accomplished the protection of the interstate commerce law ceases. This law protects the original package in its importation and in its sale. The hours within which the sale can be made, the persons to whom it can be made, the quantity at one time to be sold, and the disposition after sale are within the police power of the state. The provisions of the dispensary acts, except in so far as they conflict with the interstate commerce law, are absolutely binding on all persons within the state. So, when once a sale has been made of an original package, and its delivery within the state, it cannot again be sold by its recipient or any one else without violation of the law. No sale can be made of liquors, wines, or beer in original packages anywhere except between the hours by law appointed,—sunrise and sunset. No sales can be made in such packages of liquors, wines, or beer to be drank on the premises, none in quantities less than half a



pint, none on Sunday, and none to minors or habitual drunkards. These police provisions are irrevocably fixed in the public policy and police law of the state, and must be observed by all persons, citizens or strangers, doing business within the boundaries of the state. With these modifications and restrictions, let an injunction issue as prayed for in the bill.

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Ex parte SING.

(Circuit Court, N. D. New York. July 12, 1897.)

**ALIEN—DEPORTATION OF CHINAMAN—REFUSAL TO BE SWORN.**

A Chinese person, who is shown by uncontradicted evidence to be entitled to remain in the United States, cannot be deported because of his refusal to be sworn to testify at the request of the prosecution.

R. M. Moore, for petitioner.

Samuel M. Welch, Jr., Asst. U. S. Atty., opposed.

COXE, District Judge. The petitioner was brought before a United States commissioner charged with violation of the Chinese exclusion act of May 5, 1892, and, after hearing, an order was made removing him to the empire of China. A witness was produced who swore to facts which entitled the petitioner to remain in this country. This testimony was wholly uncontradicted. The district attorney, thereupon, requested that the petitioner be sworn, which, under the advice of counsel, he declined to do. The evidence being closed the commissioner ordered the petitioner deported upon the sole ground that his failure to be sworn cast so much doubt upon his right to remain in the United States as to justify his removal therefrom. The petitioner, thereupon, sued out this writ.

The simple question, then, is, whether the failure of a Chinese person to be sworn at the request of those who are endeavoring to deport him raises such a presumption against him as to warrant his removal. But for his refusal to be sworn he would be entitled to remain. This was conceded on the argument. Does his refusal raise a presumption against him sufficiently strong to overthrow the positive testimony in his behalf? Is his silence alone sufficient to support a judgment which involves imprisonment and custody for months while being transported thousands of miles by land and sea? It is thought not. If the petitioner were charged with an offense or a misdemeanor, then, under the act of March 16, 1878, his failure to be sworn "shall not create any presumption against him."

But it is said that the act of 1892 is political and not criminal in character and that the provision for imprisonment at hard labor is unconstitutional. The decisions upon this question are not in accord and it is unnecessary to decide it, for, upon the facts here, the presumption, assuming one to exist, is not sufficient to overthrow uncontradicted testimony and furnish the only foundation for the judgment. If something had occurred to discredit the testimony offered on behalf of the petitioner, if there had been a conflict upon the facts, if some witness had sworn to a circumstance

which called for explanation from the petitioner, if the commissioner had intimated that, for any reason, he did not credit the petitioner's witness, the rule might be different. But the judgment of the commissioner, in effect, declares that after a Chinese person has proved himself a citizen of the United States, unless he goes upon the witness stand, at the request of his prosecutors, the court will find that he is not a citizen and must be deported. I am familiar with no such rule of evidence and no authority has been cited warranting such a course. If not a criminal statute the act of 1892 is, concededly, a most drastic and summary law. Its machinery should not be set in motion by straining the evidence so as to convict those who, because of their ignorance of our language and institutions, are peculiarly helpless and unable to protect themselves. It is one of the safeguards of our organic law that no one shall be compelled to incriminate himself and the courts have gone to the greatest lengths in enforcing this principle by a broad and liberal interpretation. It has never been construed in a narrow or illiberal spirit or relaxed so as to endanger civil freedom or oppress one, no matter how lowly, whose liberty is threatened. A Chinese person is entitled to demand that the judgment of deportation against him shall be based on legal evidence. The petitioner is discharged.

## NIXON v. UNITED STATES.

(District Court, E. D. Tennessee. May 8, 1897.)

## 1. UNITED STATES MARSHALS—"ENDEAVOR EXPENSES"—VOUCHERS.

A marshal cannot recover in a suit against the government a charge of two dollars a day, under Rev. St. § 829, allowing him the sum actually expended in endeavoring to make an arrest under process, not to exceed two dollars a day, in addition to his compensation for service and travel, where his claim is not supported by vouchers or an itemized statement, and was for that reason disallowed by the comptroller.

## 2. SAME—MILEAGE—SERVING SUBPŒNA IN CRIMINAL CASES BEFORE COMMISSIONERS.

Where a United States commissioner, on issuing the warrant for the arrest of a person charged with the violation of the internal revenue laws, at the same time issued subpœnas for witnesses to be used to sustain such charge, which subpœnas were left blank as to time and place of return until return was made, the practice being for the marshal to serve such subpœnas only in case the arrest was made, the marshal is entitled, under Rev. St. § 829, to mileage on such subpœnas, when served, from the place of return to the place of service, the same as though issued after the warrant had been served and returned.

## 3. SAME—TRANSPORTATION OF PRISONER.

Where a defendant committed by a United States commissioner is confined in the nearest jail to await the action of the grand jury, and after indictment, on an order to bring him into court, is taken from such jail to court, the marshal is not entitled, in addition to the mileage allowed by Rev. St. § 829, "for transporting criminals," to treat the order as an original process, and charge thereon two dollars for service, and mileage at the rate of six cents from the place of holding court to the jail.

## 4. SAME—ATTENDANCE BEFORE COMMISSIONER.

A marshal attending criminal examinations in separate and distinct cases on the same day, before the same commissioner, is not entitled to fees in each case, but only to the two dollars per diem allowed by Rev. St. § 829.

Action by W. M. Nixon against the United States to recover fees earned as marshal. Heard on exceptions to master's report.

Pritchard & Sizer, for complainant.

James H. Bible, U. S. Atty.

CLARK, District Judge. This suit is brought by the plaintiff against the United States to recover upon an account for fees alleged to be due to plaintiff as United States marshal for the Eastern district of Tennessee, his term of office extending from August 27, 1887, to April 13, 1889. The fees claimed are for services of different kinds. The case has been referred to a special master, and the questions are now raised by the exceptions to the master's report. The litigation has been limited by the reference and the exceptions. The fees claimed were disallowed by the comptroller of the treasury, and hence the present suit. These exceptions do not raise any question of fact, but proceed upon the ground that, taking the facts as found by the special master, there is error in the conclusions of the master upon these facts. This renders it unnecessary in this opinion and finding to discuss the facts, and reference to the report of the special master is sufficient.

It is well to keep in view, in the examination of the specific exceptions, the general rule of law applicable to fees and costs claimed as against the public, which was stated in *U. S. v. Shields*, 153 U. S. 91, 14 Sup. Ct. 736, as follows:

"Fees allowed to public officers are matters of strict law, depending upon the very provisions of the statute. They are not open to equitable construction by the courts, nor to any discretionary action on the part of the officials."

This is a rule of interpretation of general application to costs and fee bills.

The first exception is to the ruling of the master in disallowing the claim for certain "endeavor expenses," because not supported by vouchers nor by itemized account. The particular clause of section 829 of the Revised Statutes on which this claim is based is as follows:

"For expenses while employed in endeavoring to arrest, under process, any person charged with or convicted of a crime, the sum actually expended, not to exceed two dollars a day, in addition to his compensation for service and travel."

The master finds that a report by a special examiner of the department of justice was made to the attorney general April 12, 1888, recommending the disallowance of various items in an account of the present petitioner. Among the reasons stated for the disallowance was the following:

"Neither has the marshal in a single instance, as far as I can learn, furnished the department with vouchers for these expenses of arrest, which should, under the regulations of the treasury department, be attached to each charge of such a nature. Strict justice would doubtless strike out every 'endeavor to arrest' and every charge for 'subsistence of prisoners' found in the marshal's account unless itemized for each day, and only the amount actually expended therein, not exceeding the limit charged for one day, viz. two dollars (\$2.00). The department of justice, in the register of said department, especially calls the attention of officials to this matter in circular of 'Instructions as to Accounts,' page 243."

And the master finds that a copy of this report was mailed to the petitioner May 18, 1888, from which it is, of course, found that the marshal had express notice of the ground on which the items in his accounts were disallowed. It would seem to be clear, therefore, that if the comptroller might lawfully require specific items or vouchers for items, which make up an account for expenses of this kind, the disallowance of the account for such expense was proper. In *U. S. v. Fletcher*, 147 U. S. 666, 13 Sup. Ct. 435, the supreme court said:

"The comptroller, however, had a right to require items of these expenses to be furnished. The smallness of the amount allowable under the statute does not affect the principle, unless at least a showing be made that it is impossible to furnish the particulars."

See, also, *In re Crittenden*, 6 Fed. Cas. 816.

If, therefore, as thus decided, the comptroller may require, as a condition of allowing a claim of this character, that it shall be supported by an itemized account or vouchers, it necessarily follows that when the account is disallowed for this or any other legally valid reason, suit cannot be successfully maintained against the government without supporting the account with the same character of evidence. The marshal obviously cannot be permitted to present to the treasury for approval an account without items or vouchers legally required by the treasury officials, and, when the account is disallowed, institute suit and recover judgment against the United States upon a lump sum charged, being the maximum amount allowed by law, as is done here. To rule that he may do so would be manifestly inconsistent with the holding that the comptroller may require the items or vouchers for the items of the account. The brief, in support of this exception, proceeds largely upon the ground that the marshal is allowed the absolute or lump sum of two dollars per day, not only for the purpose of covering actual expenses, but as compensation, to an extent, for the time required in the service. The statute plainly, however, allows only actual expenses, and provides an express limit beyond which the marshal is not permitted to go in the actual expenses incurred, and no claim for time is allowed by the terms of the statute, or any just inference therefrom. Exception 1 is therefore overruled.

Exception 2 raises by far the most serious question in this case. The claim in this item of the account is for mileage charged for traveling to execute subpoenas in criminal cases instituted before United States commissioners. The facts, as found by the special master, are these: United States commissioners are in the habit of issuing warrants for the arrest of a defendant charged with a violation of the internal revenue law, and, with such warrants, would issue a subpoena for the witness or witnesses whose testimony was intended to sustain the charge; and the practice was, in case the marshal should find and arrest the defendant, to proceed to execute the subpoena for the witnesses to appear before the commissioner, and before whom the defendant was to be taken. In the event the defendant was not found and the warrant of arrest not executed, the subpoena, of course, could not be executed, and there would be no case set and no trial at which the witnesses could appear. The subpoena, in such cases, did not direct the marshal to summon the witnesses before any particular com-

missioner, nor to attend at any time or place. The subpoena was necessarily issued in blank in these respects, and was completed on the marshal's return of the subpoena when executed, whereon the time and place of trial and the commissioner and particular case were given. It is certain, therefore, that the command in the subpoena to summons was in fact understood both by the commissioners and the marshal to be a conditional direction, and this process was to be executed only in the event the warrant of arrest should first be executed. The report of the master proceeds upon the ground that a subpoena in the hands of the marshal under such circumstances was not a complete process or authority in fact on which the marshal might lawfully travel, but was only process to be executed on condition, and that no service could have been rendered with respect to this particular process, such as would authorize the mileage charge for its execution, until after the warrant of arrest was executed, when, for the first time, the subpoena would become a complete authority to the marshal to execute, on which he did or could lawfully travel. It is not disputed that where, in fact, after execution of the warrant of arrest, the marshal traveled further to execute a subpoena, under such circumstances the additional travel was paid for. The contention for the marshal is that mileage may be lawfully charged on the subpoena, just as on the warrant of arrest, both being in his hands during the travel; and the case of *U. S. v. Harmon*, 147 U. S. 268, 13 Sup. Ct. 327, is relied on to sustain this contention. The district attorney relies in part upon section 7 of the act of 1875 (18 Stat. 334), providing that "no person shall be entitled to an allowance for mileage or travel not actually or necessarily performed"; but in *U. S. v. Fletcher*, 147 U. S. 666, 13 Sup. Ct. 434, it was said that this provision refers only to cases in which process is sent by mail to a deputy to be served at a place remote from the office whence the process has issued. And this view would make that provision of the statute inapplicable to the present case. Under the existing law, no such practice as that now in question is any longer possible.

In the case of *U. S. v. Harmon*, 147 U. S. 279, 13 Sup. Ct. 329, the agreed statement of the facts was as follows:

"That in some instances the officer had in his hands for service several precepts against different persons for different causes, and made service of two or more such precepts in the course of one trip, making but one travel to the most remote point of service, but charging full travel on each precept."

And the same interpretation was put upon this statute (Stat. 1875, § 7), in *U. S. v. Harmon*, 147 U. S. 280, 13 Sup. Ct. 327, the court in that respect concurring in the opinion of Atty. Gen. Devens, 16 Op. Attys. Gen. U. S. 165-169. In *U. S. v. Harmon*, as will appear from the agreed statement of facts, the writs in the hands of the officers were against different persons, and in different cases, while in the case under consideration the warrant of arrest and subpoena are precepts in the same case, but for different persons; and this fact of the warrant and subpoena being in the same case is the only ground for maintaining a distinction between that case and this, so far as the right to the mileage charge is concerned. And whether that fact does authorize or require a different ruling is a close question. It may

be observed just here that according to the very terms of the statute the mileage charge allowed is "six cents a mile, to be computed from the place where the process is returned to the place of service, or, when more than one person is served therewith, to the place of service which is most remote, adding thereto the extra travel which is necessary to serve it on the others." The officer, in the execution of process, therefore, is not entitled to charge mileage on the distance traveled from the place where the warrant is issued or delivered to him unless this is the same place, or the process issued by the same commissioner before whom the case is returned, although it is said that the distance is often computed from the place where the precept is issued or delivered to the marshal to that where it is served. Such being the rule prescribed by the statute for computing the mileage, the expense to the government is not different from what it would be if the subpoena for the witness were not in fact issued or served until after the arrest of the defendant and the return of the case before the commissioner. The marshal has not in the account sued on attempted to charge mileage on more than one subpoena in the same case in which a similar charge is made for executing the warrant of arrest. The allowance of six cents a mile for travel in going to serve any process includes "writs of subpoena in civil or criminal cases," and the argument of the district attorney is that until execution of the warrant of arrest and return of the case before a commissioner there is no case pending, and that the fee cannot, for this reason, be allowed, aside from other objections; and *Southworth v. U. S.*, 151 U. S. 185, 14 Sup. Ct. 274, is relied on. But that case is clearly not in point. The court was considering whether or not the mere filing of a complaint and issue of a warrant were sufficient to entitle a commissioner to the \$10, under section 1986 of the Revised Statutes, providing: "And where the proceedings are before a commissioner, he shall be entitled to a fee of ten dollars for his services in each case, inclusive of all services incident to the arrest and examination." It was clear, as the court observed, that where no arrest had been made, and no examination took place before the commissioner, there was no case, within the meaning of section 1986, entitling the commissioner to the fee therein provided. No question is made in the case as to the jurisdiction or power of the commissioner to issue a blank subpoena, as was done in these cases, before arrest and return before a commissioner. If it should be held that the process or subpoena was for this reason void, this would not, as a rule, help the case of the government as the law was at the time the process in these cases was executed, for, as we have seen, if subpoena could not rightfully issue until arrest of the defendant and return of the case, it would then not admit of question that in the separate travel to execute the subpoena the marshal would be entitled to the mileage fee allowed by the statute. The exact form of these subpoenas, and how far they were complete or incomplete on their face, is not disclosed by anything in this record, and, as stated, no question is made as to the validity of the subpoena in the brief or exceptions.

As will be seen, and as has already been intimated, the case, in respect to the point now considered, is not distinguishable from *U. S.*

v. Harmon, 147 U. S. 280, 13 Sup. Ct. 327, except in the fact alone that the separate writs here were in the same case, while there the writs were in different cases. The ruling in U. S. v. Harmon evidently proceeded upon the view that the service of both processes on the same trip was an accidental circumstance, not occurring in the regular course of procedure. And so here the fact that the marshal might be able to serve the subpoena and the warrant of arrest on the same trip would depend upon the fact that the defendant and the witness or witnesses might be found at the same place, or on the same trip. It must be noted that the reasoning of the special master proceeds upon the ground that the mileage fee which the marshal may charge is from the point of issue of the warrant to the place of arrest, whereas it appears from the very terms of the statute that the mileage is computed from the place where the case is returned to the place of service, and this place may be, and justly should be, the nearest United States commissioner. Indeed, under the present law, the marshal is required to return the case before the nearest commissioner to the place of service, but was not required to do so under the law as it existed at the time the account now in question was made. It is very true that Judge Ballard, in the Crittenden Case, above referred to, entertained the opinion that the place where the process was returned was necessarily to the court issuing the process, for otherwise it was said that the court could never know whether its writs had been executed as commanded or not. Of course, under such view as that, the conclusion was reached that the place of return and the place of issue were necessarily the same, and could not be different. Such an opinion, however, could only be sustained by putting proceedings before the United States commissioners on the same footing as suits in courts of record of general jurisdiction, and having power to try the merits and administer final justice; and it is under a view such as this that Judge Ballard proceeds in the opinion referred to. It is perfectly obvious, however, that United States commissioners, as committing officers, sustain towards courts of the United States the same relation that justices of the peace in the several states sustain towards the state courts of general jurisdiction. The procedure is precisely similar to that before a committing magistrate under the common law of England. At the common law, a warrant issued by one of these committing examiners or magistrates might be general, commanding the officer to bring the party before any justice of the peace of the county; or special, to bring him before the justice who granted the warrant. If it were general, the election of the magistrate before whom the defendant should be taken lay entirely with the officer making the arrest. 4 Cooley's Bl. Comm. 291; also 2 Hawk. P. C. 85. In Todd v. U. S., 158 U. S. 282, 283, 15 Sup. Ct. 890, the court said:

"That a commissioner is not a judge of a court of the United States within the constitutional sense is apparent and conceded. He is simply an officer of the circuit court, appointed and removable by that court. Rev. St. § 627; Ex parte Hennen, 13 Pet. 230; U. S. v. Allred, 155 U. S. 591, 15 Sup. Ct. 231. A preliminary examination before him is not a proceeding in the court which appointed him, or in any court of the United States. Such an examination may be had, not merely before a commissioner, but also before any justice or judge of the United States, or before any chancellor, judge of a state court, mayor of a city,

justice of the peace, or other state magistrate. Rev. St. § 1014. And it cannot be pretended that one of those state officers, while conducting a preliminary investigation, is holding a court of the United States. Technically, we speak of an examining magistrate, and not of an examining court. The distinction is recognized in the statutes (section 1014), by which sundry judicial officers of the United States and of the states are authorized to conduct an examination, and imprison or bail the defendant 'for trial before such court of the United States as by law has cognizance of the offense.' Also section 911, which provides that 'all writs and processes issuing from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof.' But a commissioner, like a justice of the peace, is not obliged to have a seal, and his warrants may be under his hand alone. *Starr v. U. S.*, 153 U. S. 614, 14 Sup. Ct. 919."

It is obviously implied throughout in this opinion, and the ground on which it proceeds, that the United States commissioner sustains in the federal system exactly the same relation of the committing magistrate in the state systems and at the common law, and, as has been seen, the warrant issued by such magistrate might be made general, and returned before any magistrate, giving to such magistrate full jurisdiction. It is very clear, therefore, that a warrant issued by a United States commissioner, like one issued by one of these magistrates long known to the common law, might be returned before a United States commissioner other than the one issuing the same. The ground on which the special master proceeds, therefore, gives way, in view of the fact that the marshal cannot, under the statute, charge mileage from the place of issue to the place of service, but only from the place of return to the place of service. If, therefore, the subpoena became perfect process on which the marshal might charge after the arrest of the defendant, it seems that the travel to execute the subpoena between the place of return and the place of service could be claimed upon the same ground and equally with the fee for travel on the warrant of arrest. It may be true that the result in particular cases, and also generally, may be inequitable as against the government, but, if the statute in terms allows the charge, the court would be without authority to deny it on equitable grounds. In the effort to reach an equitable result, the power of interpretation must not be permitted to trench upon the province of legislation. The distinction between the legislative and judicial function must be preserved. Interpretation may make manifest that a change of law is necessary, but it must not make that change itself. It was recognized at once that the ruling which the court thought the express language of the statute required in *U. S. v. Harmon* was unjust to the government, and that decision was promptly met by proper legislation changing the law in that respect, and making such a result no longer possible. This case, however, is controlled by the previous law as announced in *U. S. v. Harmon*, provided the facts here do not substantially distinguish this case from that; the only difference being that the writs here, while against separate persons, were issued and served in the same case. I am not, by any mode of reasoning satisfactory to myself, able to see that there is any such substantial legal distinction as justifies a different judgment from that pronounced in *U. S. v. Harmon* upon the facts in that case, and I therefore feel constrained, in obedience to the authority of that case, to sustain the exception to the special



master's report which raises this question. That Attorney General Devens was of the opinion that there was no distinction between the cases of process against different persons in the same and in separate causes is made clear by the parts of the opinion herein referred to. The precise question which was being answered by the attorney general was this:

"Whether a marshal of the United States is entitled to full mileage on each writ served by him when several issued in behalf of the government, to be served on different persons, are or might be served at the same time, only one travel being necessary to make the service on all of said persons."

Keeping in view the only lawful method of computing the mileage fee, and that question is exactly similar to the one here presented. In the progress of the opinion, the question was again stated as follows:

"The inquiry accordingly is whether this clause forbids the allowance of mileage to a marshal on each writ where two or more writs issued in behalf of the government, to be served on different persons, at the same place, are then served by him, only one journey being necessary to serve them."

Continuing the opinion, it was said:

"It is to be observed that in regard to mileage section 829 makes no distinction between process issued in behalf of the government and that issued in behalf of individuals. Mileage is provided by that section 'for travel, in going only, to serve any process, warrant, attachment, or other writ, including writs of subpoena in civil or criminal cases,' the provision applying alike to cases in which the government is concerned and to cases of individuals. Hence the circumstance that the writs in the case presented by the inquiry under consideration were issued in behalf of the government is unimportant. The same section also provides that the mileage shall be 'computed from the place where the process is returned to the place of service, or, where more than one person is served therewith, to the place of service which is most remote, adding thereto the extra travel which is necessary to serve it on the others.' And under the general provision of that section the marshal must be deemed to be entitled to mileage, thus computed, on each and every writ served by him, irrespective of the number served at any time or place, with the exception of one case, which is withdrawn from their operation by being made the subject of a specific provision. That case is 'when more than two writs of any kind required to be served in behalf of the same party on the same person might be served at the same time.' In such case it is provided by section 829 'the marshal shall be entitled to compensation for travel on only two of such writs.' As is well remarked by the district judge of Kentucky in the opinion hereinbefore referred to, this limitation implies that the marshal is entitled, under the other provisions of the section, to compensation for travel in going to serve any number of writs, provided that they were issued in behalf of different parties, or are to be served on different persons."

And, finally, coming directly to the point under examination, it was observed:

"As has just been intimated, where several writs, issued in behalf of different parties, are received by the marshal at the same time, and are to be served on different persons residing in the same place, the journey which is undertaken to serve these writs is as necessary for any particular one of them as it is for either of the others. If it had been the design of congress to limit the compensation of the marshal to mileage upon but one writ in a case of this kind, the provision referred to would doubtless have been accompanied by some regulation for determining on which of the writs mileage should be allowed or taxed,—whether on the one first placed in the marshal's hands or on the one first served, etc. It is not likely that a matter of such concern to litigants would have been left to the arbitrary determination of the marshal himself. But the case of several writs issued in behalf of the same party (whether such party be the government or an individual) against different persons stands on precisely the same footing, when viewed in connection with

the provision in the act of 1875, as the case of several writs issued in behalf of different parties; and I am unable to find in that provision anything inconsistent with the allowance of mileage on each of the writs issued and served in either of those cases when actual travel has been performed by the marshal in serving them. \* \* \* To the question submitted for reconsideration, I accordingly return this answer: That, in my opinion, a marshal is entitled to 'full mileage on each writ served by him when several issued in behalf of the government, to be served on different persons, are or might be served at the same time, only one travel being necessary to make the service on all of each persons where such travel is actually performed.'

Such was the ruling in the Crittenden Case. The opinion of Attorney General Devens was recognized and followed by the first comptroller in a recent ruling. Dec. 1st Comptr. 1893-94, p. 192. The comptroller stated that the question whether a marshal should be entitled to mileage from the place where he receives the writ to the place where it is served is in doubt.

Exception 3 is to so much of the special master's report as disallows the item for service and travel in transporting prisoners from one jail to another under order of the court. The facts on which this claim rests are these: Offenders tried before a United States commissioner, and bound over, failing to give bond, were by the marshal committed to the county jail nearest to the place of trial, there to remain in custody until a true bill should be found by the grand jury. The court would then order the prisoner brought into court, just as a prisoner would be ordered brought in who was in the jail of the county where the court was held. Under such order the prisoner was transferred from the jail in which he was first lodged to the county in which the circuit court was being held, for the purpose of being put on trial under the indictment. The marshal was allowed and paid his fees, under section 829 of the Revised Statutes, "for transporting criminals ten cents a mile for himself and for each prisoner and necessary guard." What the marshal now claims is the right to charge six cents a mile for the distance in going to the out county jail and two dollars for service of the order, treating the order in all respects as original process under the general provisions of section 829. This is clearly an attempt to make a double charge for the same service, and cannot be allowed, under the express language of the section of the act; and such, in effect, is the holding in *U. S. v. Tanner*, 147 U. S. 661, 13 Sup. Ct. 436. And see, also, *Campbell v. U. S.*, 13 C. C. A. 128, 65 Fed. 781. Exception 3 is therefore overruled.

The fourth and last exception raises the question of the right to charge two dollars per day in each case for attending criminal examinations in separate and distinct cases on the same day before the same commissioner. The reasons why the master disallows this item of the account are fully stated in the report, page 33. Plaintiff's attorney relies, to sustain this exception, upon the case of *U. S. v. McMahon*, 13 C. C. A. 257, 65 Fed. 976. The judgment in that case was, however, on writ of error reversed by the supreme court, and it only remains upon the undisputed facts to make the decree conform to the law as settled by that court. *U. S. v. McMahon*, 164 U. S. 81, 17 Sup. Ct. 28.

**KEYES v. UNITED INDURATED FIBRE CO.**

(Circuit Court, N. D. New York. July 1, 1897.)

No. 6,254.

**1. PATENTS—INFRINGEMENT.**

The use of a plain iron ring to prevent the ends of barrel bodies molded from paper pulp from shrinking or losing their proper shape while drying, is not an infringement of a patent for an article consisting of a ring having an inwardly-extending flange and a cross fastened down on the flange, its arms extending beyond the outer periphery of the ring.

**2. SAME—END SUPPORTER FOR PULP BARRELS.**

The Laraway patent, No. 339,064, for an improvement in mechanism for preventing a molded barrel body from shrinking in diameter at either end while being dried, if valid at all, must, in view of the prior state of the art, be restricted to the precise mechanism described.

Tracy C. Becker, for complainant.

Frederick P. Fish, W. K. Richardson, and John E. Pound, for defendant.

COXE, Circuit Judge. This action is based on letters patent No. 339,064, granted, March 30, 1886, to George W. Laraway for an improvement in mechanism for preventing a molded barrel body from shrinking in diameter at either end while being dried. The specification says:

"Barrel-bodies molded from paper pulp are now extensively made and used. In drying a body of such kind after its formation in a molding-machine it is important that each mouth or part that receives the barrel-head should retain its proper size and shape to fit such head, and this is the purpose of my invention or barrel-body-end supporter, which, on the barrel body being taken in a moist state from the molding-machine, is inserted in it (the said body) at its end and kept there until the body may have become dry. The said body in becoming desiccated shrinks in size; but by having in the mouth or opening at each end of it one of the said supporters while the drying operation is taking place the mouth is preserved in its proper condition and size to receive a barrel-head."

The device shown in the drawings and described in the specification consists of a ring having an inwardly-extending flange and a cross fastened down on the flange, its arms extending a short distance beyond the outer periphery of the ring. The claim is as follows:

"As a new article of manufacture, for the purpose described, the pulp barrel end supporter substantially as represented, consisting of the cross and the flanged ring, substantially as set forth."

The defense of noninfringement only need be considered. If there be any invention in the complainant's patent, and this is exceedingly doubtful in view of the use of rings for similar purposes in this and in analogous arts, it is clear that it must be confined to the precise mechanism described and shown. The patent is not entitled to a broad construction. It is clear that when properly construed the claim is not infringed. The defendant uses a plain angle iron ring. It has no inwardly-extending flange and no strengthening or supporting cross. The bill is dismissed.

## HALE v. BUGG et al.

(Circuit Court, W. D. Arkansas. March 31, 1897.)

## 1. FEDERAL COURTS—ENJOINING SUIT IN STATE COURT—CONCURRENT JURISDICTION.

A circuit court of the United States will not, at the instance of a receiver appointed by a state court in another state, enjoin creditors who have attached property in a state court in this state from prosecuting their suit in the state court; nor will it make any order requiring the sheriff to deliver property in his custody under attachment proceedings to the receiver of the circuit court. The general rule is that, where there are two or more tribunals competent to issue process to bind the goods of a party, the goods shall be considered as effectually bound by the authority of the process under which they were first seized, and the court which first obtains possession of the res must be allowed to dispose of it without interference or interruption from a co-ordinate court. Under the state of facts above set out, a circuit court of the United States will not look into the pleadings in the state court to see whether any cause of action is stated, for the reason that the pleadings, if defective, may be amended; and, if the facts are such as not to admit of an amendment, the state court is the proper tribunal to determine that question.

## 2. SAME—REMEDY FOR WRONGFUL ATTACHMENT BY STATE COURT.

If a party, where property has been attached wrongfully in a state court, desires to pursue it in a circuit court of the United States, his remedy is trespass, not replevin, and not by proceedings for an injunction or receiver. The rights of domiciliary and ancillary receivers of the assets of insolvent mutual benefit associations, and the rights of creditors, casually discussed, but not decided. *Marshall v. Holmes*, 12 Sup. Ct. 62, 141 U. S. 589, does not contravene any principle decided in this case.

Suit in equity by William D. Hale, as receiver of the American Savings & Loan Association, against T. W. Bugg and others. Heard on the pleadings and stipulation of facts.

Eugene G. Hay and Jos. M. Hill, for plaintiff.

T. W. M. Boone, for defendants.

ROGERS, District Judge. The facts necessary to a correct determination of this cause are as follows: J. W. Hood, Antone Maree, George H. Lyman, and several other creditors, all citizens of Arkansas, on the 21st of February, 1896, filed a creditors' bill in the Sebastian circuit court for the Ft. Smith district against the American Savings & Loan Association of Minneapolis, Minn., and, having made the necessary affidavits, caused an attachment to be issued and levied upon a body of land belonging to said association, situate in the Ft. Smith district of Sebastian county, Ark., and which, for convenience, is called the "Tilley Tract." While said Tilley tract was in the custody of the sheriff the defendant association appeared in the state court, and removed the case into this court. Upon its being docketed here a motion was filed to remand the same, which was accordingly done; and that case is now pending in the Sebastian circuit court for the Ft. Smith district, its status being the same as when it was originally removed into this court. Subsequently, on the 19th of November, 1896, the bill in this case was filed in this court by William D. Hale, as receiver of the American Savings & Loan Association, against all the plaintiffs in the suit in the state court, the agents for the Arkansas land, and the sheriff of Sebastian county, who holds the

Tilley tract under attachment from the state court, as defendants, and alleges that he was appointed such receiver on the 14th of January, 1896, by the district court of the Fourth judicial district of the state of Minnesota, at the relation of the attorney general of that state, said association being a corporation created and existing under and by authority of the laws of that state, and that subsequently, on the 18th of June, 1896, the appointment of said Hale as receiver was made permanent, and said receiver invested by the decree of said court with all the lands, tenements, hereditaments, choses in action, and assets of every kind, wherever situate, and the officers of said company decreed to convey, and did convey, to said Hale on the 27th of June, 1896, among other things, the said Tilley tract of land, and also other lands described in the complaint, situate in the Western district of Arkansas. It alleges that under the orders and decrees of said court it is the duty of the said receiver to reduce to possession all the assets of every description belonging to said association, and from the money so derived to pay the creditors of said corporation, and disburse the residue under the orders of that court; that on the 7th of November, 1896, the said district court for the state of Minnesota directed said receiver to file a bill in this court to the end that the real estate situate in the Western district of Arkansas might be reduced to his possession through the appointment of a receiver. It is alleged that the said William D. Hale is a citizen and resident of the state of Minnesota, and that all of the defendants to this bill are residents, citizens, and inhabitants of the Western district of Arkansas, and that all the tracts of land in controversy exceed in value the sum of \$2,000. It is also alleged that the plaintiffs in the suit in the Sebastian circuit court for the Ft. Smith district are stockholders in said defendant association, and that there are no creditors of such association in said state except such stockholders, and that no citizen of Arkansas has any prior right or rights in the Arkansas lands; that said association was a duly-created building or savings and loan association of the state of Minnesota, its business being to assist its members in saving and investing money, and in buying and improving real estate, and in procuring money for other purposes, by loaning or advancing, under the mutual building society plan, to such of them as may desire to anticipate the ultimate value of their shares, from funds accumulated from the monthly contributions of its stockholders, and also such other funds as might from time to time come into its hands; that the Arkansas stockholders paid their stock in monthly subscriptions, in accordance with the methods of business adopted by the company; that said association owns real estate in 19 states, and has mortgages in 29 others, and that all the stockholders in each of said states were jointly interested with the Arkansas stockholders in the rights, privileges, immunities, and liabilities of said association; that the association is insolvent, and has been so declared by the said district court of Minnesota, at the relation of the attorney general of said state, and that the rights and liabilities of each and every stockholder in said corporation were to be determined and adjudicated under the laws of the state of Minnesota; that the said creditors' bill filed in the Arkansas state court is based

upon subscriptions of stock which the said plaintiffs therein had paid, and that said suit in the said state court is an attempt upon the part of the plaintiffs in said suit in said state to secure an unlawful preference over other stockholders in said association, and over creditors of said corporation, and is unauthorized by law and against equity and good conscience; that said receiver is not a party to said suit in said state court, although it was filed after he had been appointed and was invested with all of the assets of said corporation, and after said corporation was adjudged insolvent and restrained from further controlling or managing its assets. It does not appear from the bill that said corporation has ever been dissolved. *Folger v. Insurance Co.*, 99 Mass. 267; *Hubbard v. Bank*, 7 Metc. (Mass.) 340; *Taylor v. Insurance Co.*, 14 Allen, 353. On the contrary, it appears that said corporation appeared in the Arkansas state court, and caused said suit to be removed to this court, which suit, as before stated, has been remanded to the state court. The prayer of the bill is for the appointment of an ancillary receiver to take possession of all the property of said association in Arkansas, and to sell the same under proper orders of the court, and bring the proceeds into said court, to be turned over to the complainant, to be administered under the orders of the district court of the state of Minnesota, or, in the event the judges of this court determine otherwise, then to be administered under proper orders of this court, and the surplus, if any, to be turned over to the complainant, to be administered under the laws of the state of Minnesota; (2) that the sheriff of Sebastian county, and George H. Lyman, the agent of said association, and defendants Clark & Clock, agents of other property situated at Eureka Springs, Ark., be required to deliver to the receiver so appointed the real estate under their control; (3) that the Arkansas defendant stockholders, who are plaintiffs in the suit in the Arkansas state court, be enjoined and restrained from pursuing their action at law in this court, or in the Sebastian circuit court for the Ft. Smith district, or any other court, and be required to dismiss their attachment of said real estate in said Arkansas state court. The bill also prays for general relief. All of the defendants except Clark & Clock appear and file answer, but the answer does not contravene any matters of fact hereinbefore stated. The replication was duly filed, and the cause submitted to the court upon bill and exhibits, answer and replication, and the written stipulation that the allegations of fact contained in the pleadings are true, and that they state all the facts of the case.

The court is of opinion that the bill is sufficient to authorize the appointment of an ancillary receiver to take charge of all the property in the state upon which no prior lien by citizens of this state has been acquired. The real question in the case is "whether or not this court can render any decree which in any wise affects the sheriff's possession of the Tilley tract, duly levied upon under attachment, issued from the state court at the instance of the plaintiffs in that suit, who are defendants in this." In the determination of this question, it is not necessary to decide, and I do not decide, whether or not the plaintiffs in the state circuit court have stated any cause of action, or whether, under the admitted facts in this case, any cause

of action can be stated which would entitle them to recover against the defendant corporation, or the receiver appointed in this case, should he conclude to make himself a party to that suit, contesting the title and right of possession to the Tilley tract, for the reason that, if the cause of action in that case is defectively stated, it can be amended, and, if the facts do not admit of its being so amended as to make a good cause of action, that question can be determined by that court, which has jurisdiction of the parties and the subject-matter. If it be said that this view of the case deprives the plaintiff, who is a citizen of Minnesota, of his right, guaranteed under the laws of the United States, to have his case tried in the federal court, the answer is that, had the receiver, in apt time, and before the defendants instituted their suit in the state court, applied here for the appointment of an ancillary receiver to take charge of the assets of the said association in this state, it would have been granted, and the federal court would then have adjudicated and settled all the questions involved; or, if the receiver had appeared in apt time and made himself a party to the proceedings in the state court for the purpose only of testing his title and right to the possession of the Tilley tract, the court is inclined to the opinion that, the property being worth more than \$2,000, he would have had the right to remove the case into the federal court for trial. *Hoover & Allen Co. v. Columbia Straw-Paper Co.*, 68 Fed. 945; *Lehigh Zinc & Iron Co. v. New Jersey Zinc & Iron Co.*, 43 Fed. 545. But, if the court is in error in this regard, then it must be held that, when the association engaged in business in this state, it elected, under the conditions above stated, to submit such matters to the jurisdiction of the state court. We confine ourselves, therefore, to the simple questions stated.

Mr. Beach, in his work on Receivers (paragraph 20), after discussing the comity between courts of different states, and courts of co-ordinate jurisdiction in the same state, says:

"The same principle of comity which has already been noticed as actuating the settlement of similar questions between courts of different states has been invoked for their determination, until the rule is now well settled by the practice of the courts, under both systems, that the court which first acquires jurisdiction of the res or subject-matter will retain such jurisdiction until the final disposition of the case. While this rule is subject to limitations, it is well settled that while the property is in the possession of a court, either actually or constructively, that court is bound to protect its possession from the process of other courts. *Buck v. Colbath*, 3 Wall. 334; *Andrews v. Smith*, 19 Blatchf. 100, 5 Fed. 833."

The supreme court of the United States, in *Riggs v. Johnson Co.*, 6 Wall. 196, says:

"Based on that consideration, the settled rule is that the remedy of a party whose property is wrongfully attached under process issued from a circuit court, if he wishes to pursue it in a state tribunal, is trespass, and not replevin, as the sheriff cannot take property out of the possession and custody of the marshal. *Freeman v. Howe*, 24 How. 455. \* \* \* Undoubtedly circuit courts and state courts, in certain controversies between citizens of different states, are courts of concurrent and co-ordinate jurisdiction; and the general rule is that, as between courts of concurrent jurisdiction, the court that first obtains possession of the controversy, or of the property in dispute, must be allowed to dispose of it without interference or interruption from the co-ordinate court. Such questions usually arise in respect to property attached on mesne process, or property seized upon execution; and the general rule is that, where there are two or more tribunals

competent to issue process to bind the goods of a party, the goods shall be considered as effectually bound by the authority of the process under which they were first attached or seized. Corresponding decisions have been made in this court, as in the case of *Hagan v. Lucas*, 10 Pet. 400, where it was held that the marshal could not seize property previously attached by the sheriff and held by him or his agent under valid process from a state court. *Taylor v. Carryl*, 20 How. 595; *Mallett v. Dexter*, 1 Curt. 174, Fed. Cas. No. 8,988."

In *Christmas v. Russell*, 14 Wall. 69, the court say:

"That judgment [*Freeman v. Howe*, 24 How. 450] was reversed by this court upon the ground that the circuit court, having first acquired possession of the res, could not be deprived of that possession until the litigation there was brought to a close."

See, also, *New Orleans v. Steamship Co.*, 20 Wall. 393.

Authorities on this precise point might be multiplied almost indefinitely, but the general rule is so well established as not to require further citation.

*Baldwin v. Hosmer* (Mich.) 59 N. W. 432, is the case of a mutual benefit association like the American Savings & Loan Association, of which the plaintiff in this case is receiver. Its title was the "Order of the Iron Hall," and it was a corporation organized under the laws of Indiana, where its supreme lodge was located. It had nearly 1,200 local or sisterhood branches in different states, and 9 in Canada, with a total membership of 60,000 persons. It became insolvent, and a receiver was appointed at Indianapolis, and also an ancillary receiver in Michigan, where it had a sisterhood or local branch, which local branch had funds in its possession. James F. Failey was appointed receiver at Indianapolis, Ind., where the main lodge was located, of all the property of every kind of the Iron Hall, both within and without the state of Indiana, with full powers, such as receivers ordinarily exercise. The other facts are very similar to those stated in this case. The receiver appointed in Michigan sought to compel the local order to turn over the funds in its hands to him as receiver. The local order declined. Thereupon the Michigan receiver filed a petition in the court which appointed him, praying the court for an order to compel the local order to show cause why they should not be punished for contempt in not turning over the funds. The petition was refused, and thereupon the receiver filed a petition in the supreme court of Michigan for a mandamus to compel the circuit judge to compel the local order, by proceedings for contempt, to turn over the funds. The mandamus was refused. The supreme court of Michigan went into an elaborate discussion of the entire case. I quote from the synopsis:

"(1) Where the rules of a mutual benefit order provide that the reserve fund of its local branches in other states shall be controlled by and belong to the supreme lodge, the title to such fund is in the supreme lodge, and must be so distributed that each member shall derive benefit from the entire corpus of the assets of the supreme lodge, without regard to its local habitation. (2) Where such order becomes insolvent, and a domiciliary and an ancillary receiver are appointed therefor, the local branches cannot refuse, without good cause shown, to turn over the assets to the ancillary receiver, and when he has possession thereof the court may order them transmitted to the domiciliary receiver."

In this case the local order had been garnished prior to any of the steps taken to compel it by proceedings in contempt to turn over the



money, and they set up that garnishment in their answer. On that point the court said:

"By the answer of the local branch and its officers, it appears that the fund has been garnished in their hands, and that such proceedings are still pending and undetermined. Certainly the court would not make an order for the payment of this fund into the hands of the receiver until the questions arising under the garnishment proceedings are determined. The plaintiffs in these cases have a right to their day in court before they can be deprived of the fund, or before the local branch and its officers are bound to pay it over to the receiver. The plaintiffs in the garnishment proceedings are not parties here, and their rights cannot be here litigated. If they have obtained a valid lien on the fund, that lien is not dissolved by the filing of a bill, and the appointment of a receiver, but may be enforced. *Hubbard v. Bank*, 7 Metc. (Mass.) 340; *Taylor v. Insurance Co.*, 14 Allen, 353; *Folger v. Insurance Co.*, 99 Mass. 267."

It does not appear in that case that the persons who had garnished the local lodge were stockholders; they were presumably creditors, and not stockholders; and in that respect it differs from this case. But I am of the opinion that the difference is entirely immaterial, and that the principle involved is the same. The mandamus in that case was refused. The court further say:

"The court below offered to permit the receiver to bring suit for these assets, which offer was declined. We think the court, under the facts stated in the answer of the local branch and its officers, properly refused to adjudge the parties guilty of contempt. We may remark, however, that, if the assets are finally paid into the hands of the receiver, it will be the duty of the court to direct that upon their payment over to the Indiana receiver the Michigan claimants shall receive a proportionate dividend with creditors elsewhere."

In *Hunt v. Insurance Co.*, 55 Me. 290, the supreme court of that state said:

"The judgment of another state decreeing a dissolution, and appointing receivers to wind up the concerns of a corporation created by its laws, will not permit an action commenced against such corporation here prior to such dissolution from proceeding to judgment, unless it be shown that the corporation is utterly extinct. It is not sufficient to show that, by the law and usage in the courts of the state where such decree of dissolution is passed, such corporation is permanently dissolved, although it still has a qualified existence, capable of being a party to a judgment there. The local authority of receivers duly appointed in another state is co-extensive with the jurisdiction of the court by which they were appointed, and comity does not require the courts of this state to permit receivers appointed by the courts of another state to exercise privileges detrimental to our own citizens while pursuing appropriate legal remedies here."

The principles laid down in the Maine decision seem to be well settled, not only by the decisions of the states, but also of the federal courts. Beach, Rec. § 19, and cases there cited.

Counsel for the plaintiffs cite *Marshall v. Holmes*, 141 U. S. 589, 12 Sup. Ct. 62, as authority for the issuance of an injunction in this case against all the defendants. A careful examination of that case will show an entire absence of analogy between the two cases. In that case David Meyer recovered a number of judgments against Mrs. Marshall in the Eighth district court for the parish of Madison, La. Each of the several judgments was less in amount than \$500, but the aggregate of all the judgments amounted to over \$3,000. After these judgments were recovered, Mrs. Marshall filed a bill in equity in the same court against David Meyer and the sheriff of that parish to vacate all of the judgments for fraud, and to prevent the execution

thereof by the sheriff. Meyer appeared, and filed exceptions and pleadings of estoppel and *res adjudicata*. Mrs. Marshall then filed a petition, in apt time and form, to remove the case into the circuit court of the United States. The application for removal was denied. The case was heard upon its merits in the state court of Louisiana, and judgment entered dismissing the bill for want of equity. The case was appealed to the state court of appeals in Louisiana, and there affirmed. From that judgment Mrs. Marshall prosecuted a writ of error to the supreme court of the United States. The bare statement of facts shows the want of analogy between that case and the one at bar. In that case Mrs. Marshall filed her original bill in the same state court of Louisiana in which the judgments were rendered, and then undertook to remove it into the United States circuit court. In this case the proceedings by the defendants originated in the state court, as in that case, but the bill in this case was filed in the United States (not the state) court. It does not appear from the opinion whether, in that case, the sheriff had levied the execution or not. In this case it affirmatively appears that the property is in custodia legis. It would, however, make no difference in that case as to whether the property was in the custody of the law or not, because the application was to remove the whole case, together with the custody of the property, into the federal court, and when there, if properly there, that court could administer equity just as if the case had been tried in the court where it originated. It was not an effort at all upon the part of Mrs. Marshall to interfere through the United States court with the proceedings in the state court. It was an effort upon her part to impeach the judgment for fraud in the same court where the judgments were rendered, and afterwards she sought to remove it into the federal court to be heard. The supreme court held, of course, that that was a proper proceeding, provided the federal court had jurisdiction; and it also held, for the purposes of that bill, that more than \$500 was involved, and that the federal court had jurisdiction, and therefore reversed the court of appeals in Louisiana, and remanded the cause, requiring the Louisiana courts to conform to that opinion and send the whole case into the federal court to be tried. Counsel have not been able to cite any case which authorizes a federal court to interfere by injunction or by receiver, or by its marshal, with property in the custody of the law in a state court of co-ordinate jurisdiction, and I have been unable to find any modern decision of any state or federal court recognizing that doctrine.

If it be said that the facts stated in the bill constitute a cause for equitable cognizance, and that the court can see that the plaintiffs in the state court, who are stockholders, are not entitled to prosecute suits at law to judgment against the company for the amount of premiums they have paid in, and that, therefore, an injunction should be granted staying the suit, and also an injunction compelling the sheriff to surrender the property to the receiver, the answer is that the state court, having first acquired jurisdiction of that question, must be left to determine it. But suppose the court should make such an order. The property in the custody of the sheriff would remain in the custody of the sheriff perpetually, unless the complainant in this

bill should apply to that court to have the property released; and, if such application were made, the plaintiffs in that suit and the sheriff would be enjoined from resisting the same, and we should have the spectacle presented of the receiver of this court applying to that court for relief as against the plaintiffs and the sheriff in that suit, while they were enjoined from prosecuting the suit or defending the application by the order of this court. It is just this condition of things upon which the doctrine of comity hereinbefore stated rests. Moreover, under the decisions heretofore cited, if the receiver should undertake to take possession of the property in the custody of the sheriff the sheriff would have the right to resist the same, and that court, perhaps, the power to punish the receiver of this court for contempt, and thus would be brought about such conflict of authority as the law would avoid. It may be said that the court has the power to not only enjoin the defendants from prosecuting their suit in the state court, but also to compel them to dismiss the same, in which event the property in the hands of the sheriff would be released, and the receiver could then take possession thereof. Authorities have been cited to enforce that doctrine, but all the cases upon that point rest upon the theory that some fraud or unjust advantage has been taken, whereby the rights of the complainant have been prejudiced; but in this case, while the allegations in the bill allege that the plaintiffs in the state court are seeking to secure an unjust advantage, it is manifest that the question can be decided in the state court just as well as in this court, and the defendant association can now set up all of its defenses, whether they be at law or in equity; and the receiver may also appear and set up his rights with reference to the property, and have the same adjudicated in that court. There is therefore no fraud in this case, nor is there any reason why the rights of the parties in that court cannot be adjudicated as fairly and justly there as if they were here. We think, therefore, on that point, that the facts stated in the bill do not constitute a separate and distinct ground of equity jurisdiction. *Railway Co. v. Burke*, 27 U. S. App. 736, 13 C. C. A. 341, and 66 Fed. 83.

A decree will go appointing a receiver for all property belonging to the American Savings & Loan Association, of every description and character, real, personal, and mixed, including debts, choses in action rents, and the like, which are not in custody of any state officer under legal process; and authority will be given to such receiver, if he elect so to do, to take proper steps in the state court to reduce to his possession the Tilley tract referred to in this complaint; and the court retains the case for the purpose of making any further orders that may be necessary for the proper disposition of the assets of said association.

## MACKALL v. RATCHFORD et al.

(Circuit Court, D. West Virginia. August 21, 1897.)

**1. INJUNCTION—MARCHING ON HIGHWAY—INTIMIDATING EMPLOYEES—CONTEMPT.**

An injunction was granted and served on defendants, restraining them and all others from in any way interfering with the management, operation, or conducting of the mines named in the bill, either by menaces, threats, or intimidation of any character used to prevent the employes of said mines from going to or from the same, or from engaging in their usual business of mining. Defendants joined a body of over 200 striking miners in marching, with music and banners, past one of said mines and the homes of the miners working therein, marching and countermarching for three days along the public highway between the mine and the homes of the miners, halting in front of the mine, and taking positions on each side of the road which the miners must cross in going to and from the mine, before daylight and late at night, at the time when such miners were going to and from their work. The avowed object of the strikers was to influence the miners to join in the strike, and this marching and halting in front of the mine were with the evident intent to accomplish this object by intimidation, and some of the miners were thereby intimidated and kept away from their work. *Held*, that defendants were guilty of contempt.

**2. SAME—USE OF HIGHWAY.**

Any use of a public highway which prevents its reasonable, seasonable, and ordinary use by the general public, or by citizens, for purposes connected with their regular business, is unlawful, and in a proper case the continuance of such use may be enjoined.

**3. SAME—MINE OWNER—UNLAWFUL INTERFERENCE.**

The owner of a mine is entitled to the aid of the courts to protect him, against the unlawful interference of others, in the continued enjoyment of the right to operate his mine, the right to employ the labor of those willing to work, and his right to the use of the highway leading to his mine, for himself and his employes.

**In Chancery.** In the matter of the contempt proceedings against Patrick Harney, Ed. L. Davis, J. L. Higginbotham, et al.

A. B. Fleming, for complainant.

John J. Davis, John W. Davis, and W. Scott, for defendants.

**GOFF, Circuit Judge.** As to the law applicable to the matter now under consideration counsel have not differed, and the court has no trouble. It is concerning the facts—what they prove, and their proper application to the law involved—that counsel have expressed differences, and the court is required to decide. Many matters foreign to the issue now presented have been referred to by counsel and testified about by witnesses, but the court will exclude them from its consideration. Matters referring to “free speech,” “natural rights,” and the “liberty of the citizen” are not now involved in this issue nor are they in danger. They will survive this ordeal, and it is to be hoped that they will be further endeared to us all, if that be possible, by our mutual experience herein and the incidents connected therewith. The right of free speech has not been abridged, nor in any manner interfered with. The “organizer” has spoken to his heart’s content here, there, and everywhere. The “camp” has heard him, and been electrified by his eloquence. City, town, and hamlet have been visited by him, and have given him generous welcome. Public build-

ings have been thrown open, street corners utilized, the crossroads and highways called into requisition. The right of the people to assemble and discuss matters in which they feel an interest has had an exemplification during the last month in this and adjoining states that has been pleasing to our citizenship, and as gratifying to all true lovers of republican government as it has been unwelcome and unexpected to the agitator and the demagogue, who it seems delight in drawing lurid pictures of the days yet to come, when "liberty" shall have perished from the face of the earth, and "free speech" shall be but the dim remembrance of a dream long passed, recalling but faintly the days when freedom yet tarried among men, and was worshipped by those who called themselves "freemen."

The simple question here is, are these defendants in contempt of this court? On the 16th inst. this court granted an injunction restraining the defendants and all others from in anywise interfering with the management, operation, and conducting of the mines in the bill mentioned, either by menaces, threats, or any character of intimidation used to prevent the employes of said mines from going to or from the same, or from engaging in their usual business of mining. All persons were restrained from entering upon the property of the Montana Coal & Coke Company for the purpose of interfering with the employes of said company, either by intimidation, or by the holding of either public or private assemblages upon said property, or in any way molesting, interfering with, or intimidating the employes of that company so as to induce them to abandon their work in the said mines. This injunction was served on a number of the defendants early on the morning of the 17th inst. It was also served on other of the defendants, together with an additional or supplemental and construing order, on the morning of the 18th inst. If the defendants were aware that the court had passed the decree granting the injunction mentioned, if they were aware of its terms and import, and if they then interfered with or intimidated the employes of said coal company, thereby preventing them from going to or from their work, or causing them to abandon the same, then they are guilty of the contempt charged, and should be, must be, and will be punished. The strikers had the right to quit work themselves, and they had the right to induce other miners, by peaceable means, by the persuasive force of public or private argument exerted in a lawful way, to also quit work and join them. But it must be kept in mind that the miner who still desired to work had the same right to do so as the miner to quit work; and also it should be remembered that the owners of the mines, individual or company, had the right to operate the same, the right to employ the labor of those willing to work, the right to use the highway leading to the mines for themselves and for their employes, even as had the strikers to quit work, the miner to go on with his work, or the agitator to indulge in the right of "free speech." It seems from the evidence that but few of the miners employed at the Montana mines had joined the strikers. All efforts to induce them to do so had apparently failed. At this juncture a company of marching strikers, mostly from Monongah, went into camp about one mile from the Montana mines. During Monday, Tuesday, and Wednes-

day, this company, under command of its officers, with music and banners, marched and countermarched along the county road running through the property of the Montana Coal & Coke Company. This marching was very early in the morning and in the afternoon, at times when the miners of said company were either going to or coming from their work. The marching was from the camp down to the mine opening, then back to the village where the miners lived, thence again past the mine opening, and so on, "to and fro," during certain hours of the morning and afternoon. They did not march past the property of the company, for the reason, as stated by their leader, that the river stopped them. The marching was therefore from the camp to the river, and from the river back to the camp, always by the mine opening and the miners' homes. There was an object in this, and the intent will be disclosed by the facts. These miners had refused to join the strikers, and had neglected to attend the strikers' meeting, evidently preferring to remain at work. The camp was established near them for the purpose of influencing them. Was that influence to be exerted, and was it exerted, in a lawful and proper manner? The answer to that question determines the guilt or innocence of these accused. In endeavoring to influence the miners to join them, did the strikers prevent them from going to or from their work, and did they use any character of intimidation in so doing?

A body of men, over 200 strong, marching in the early hours of the morning, before daylight, halting in front of the mine opening, and taking position on each side of the public highway for a distance of at least a quarter of a mile, at the exact places where the miners were in the habit of crossing that highway for the purpose of going from their homes to their work, is at least unusual, and, in the state of excitement usually attending such occasions, neither an aid to fair argument, nor conducive to the state of mind that makes willing converts to the cause thus championed. That the marching did intimidate quite a number of the miners is clear, if the evidence offered is to be believed; and the court finds it uncontradicted and entitled to credence. The court is also forced to conclude, from all the facts and circumstances detailed by the witnesses, from the object the marching men had in view, and from the locality where they marched, and its topography, that the intention of the marching strikers was to interfere with the operation of the Montana mines, with the miners engaged in working said mines,—to intimidate them, and thereby induce them to abandon their work, and then secure their co-operation in closing the mines. The marching men seemed to think that they could go and come on and over the county road as they pleased, because it was a public highway. But this was a mistake. The miners working at Montana had the same right to use the public road as the strikers had, and it was not open and free to their use when it was occupied by over 200 men stationed along it at intervals of three and five feet,—men who, if not open enemies, were not bosom friends. That some miners passed through this line is shown. That others feared to do so is plain. That the marching column intended to interfere with the work at the mines would be foolish to deny. A highway is a way over which the public at large have a right of pas-

sage. It is a road maintained by the public for the general convenience. True, the strikers had a right to march over it as passengers just the same as all other citizens; but they had no right to make it a parade ground, or stop on its sideways at frequent intervals, and by the hour, at times when other people who had the same right to its use were in the habit of using it for purposes connected with their daily avocations. The miners of the Montana mines, as well as the owners of that property, had the same right to use the public road as had the marching strikers. It seems to the court that the men whose work is interrupted and the people whose property is damaged by the improper use and occupation of the highway are the people who have the true grounds of complaint because of the improper use of what in the early books of the law is called the "king's highway." The building in which we are now holding this court is located on the corner of Third and Pike streets, Clarksburg. All the citizen of that town can use those streets for purposes connected with their business. All persons properly deporting themselves can pass along and upon them for all proper business matters, or for the mere purpose of transit; and all persons, due regard being had for the public interest and safety, may parade, with banners, flags, and bands of music, along and over said streets at reasonable times and seasonable hours, provided the same does not prevent the reasonable and seasonable use of said streets by those entitled to the same. If such use should close the business houses along said streets, by preventing employes from reaching them, then, if such parades were not prevented by the city authorities, the owners of property so affected would be entitled to the aid of the courts in protecting their rights. No one portion of the community has a right to march along those streets day after day, night after night, and station themselves along them at intervals of three or five feet, for hour after hour, thereby preventing the owners of property located thereon from reaching the same in person, or by their clerks or other employes, for purposes connected with their regular business. Under such circumstances the police of the city would either move the column along, out of the way of the public business, or take into custody the men who without authority obstruct the streets and public highways. The marching men had then no such right on the county road as they claimed.

That the parties now in custody knew that the injunction had been issued is not denied,—is plain from the evidence. They spoke of it jocularly, mostly,—now and then resentfully and disrespectfully. Such terms as these passed along the line: "We are used to papers like that." "We will take the consequences." "I will eat mine for breakfast." The officers were careful in explaining its terms, and, I may say, in beseeching the strikers not to violate them. They told the marchers to march on and pass by if they wished to, but not to march and countermarch "to and fro" by the mines, because such marching was prohibited by the court. But the advice was not heeded, the disregard of the court's order continued, and the conduct that constituted violation of the injunction was openly resorted to and persistently maintained. These defendants are all guilty of the contempt charged. Their conduct, in connection with their knowl-

edge of the action theretofore taken by this court, concerning the injunction referred to, was evidently in violation of the provisions of section 725 of the Revised Statutes of the United States. What should the punishment of the court be? Outside of their conduct in this particular, the demeanor of those who so marched has been most commendable. They have indulged in no threats, nor has loud, boisterous, or taunting language been used. They have been sober and decent, mindful of their own interests, and, with the exception noted, respectful of the rights of others, and observant of the requirements of the law. They impress me as thoroughly honest in their claim that they had the right to march and act as they did, because they were on the "public highway." In my judgment, they were in that particular mistaken, having been badly advised thereto; but nevertheless such belief, honestly entertained by them, deprives their disobedience to the court's decree of malice, takes the sting out of the contempt found, and suggests a punishment that will be as light as due regard for the proprieties will admit of. The parties have already been in custody for three days. Let them be confined in the jail of Harrison county, W. Va., for the further period of three days from this date. But let it not be supposed hereafter, now that attention has been called to the matter and the law, that other and further infractions of the decrees and orders of this court will be so lightly punished. In this case, for the reasons mentioned, justice has been tempered with mercy; but if, with the light of this investigation in their pathway, these defendants shall persist in disregarding the decrees of this court duly entered in causes properly before it, then let it be remembered that mercy shown to contempt under such circumstances would be not only a crime, but the death of justice.

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WATERLOO MIN. CO. v. DOE et al.

(Circuit Court of Appeals, Ninth Circuit. June 7, 1897.)

No. 145.

**1. EQUITY JURISDICTION—APPEAL—WAIVER OF OBJECTIONS.**

In a suit to enjoin a continuing trespass by taking ore from a mine, the title to which is in dispute, an appellate court will consider as waived the objection that complainant was bound to establish his title at law before a decree for equitable relief could be granted, when such objection was not taken in the court below.

**2. MINES AND MINING—PATENTED CLAIMS—EXTRALATERAL RIGHTS.**

When a patent describes a claim as having parallel end lines, and grants extralateral rights, the courts are bound by the terms thereof, in a controversy with the owners of an adjoining claim, and cannot deny such extralateral rights on the theory that the end lines are not in fact parallel.

**3. APPEALS IN EQUITY—FINDINGS OF FACT.**

On an appeal in equity, findings of fact made by the court below are entitled to some weight, but are not binding on the appellate court. The whole case is before the latter court, and it is bound to decide the same, so far as it is in a condition to be decided, on its merits.

**4. MINES AND MINING—LODES AND VEINS.**

Where two veins or ore bodies, lying near together in country rock of sparite, each had clearly-defined foot and hanging walls, with the usual



characteristics of lodes or veins, *held*, on the evidence, that they were separate lodes or veins, and could not be considered as constituting, with the mass of liparite between them, a single mineralized zone or lode, though the intervening liparite was more broken up than that lying outside, and to some extent impregnated with silver.

5. SAME—EXTRALATERAL RIGHTS.

If the apex of a vein, or part of it, crosses the end line of a claim, and then passes out through a side line, but curves back again into the claim and crosses its other end line, this gives the owners of the claim no right to any part of the apex which is outside of their lines.

Appeal from the Circuit Court of the United States for the Southern District of California.

A. H. Rickets and Geo. H. Noyes, for appellant.

John Garber, for appellees.

Before GILBERT, Circuit Judge, and KNOWLES and BELLINGER, District Judges.

KNOWLES, District Judge. This is an action brought by John S. Doe to restrain and enjoin the appellant from committing a continuing trespass upon two mining claims, known as the "Oriental No. 2" and the "Red Cloud," situate in Calico mining district, San Bernardino county, Cal. John S. Doe died, and the appellees, Bartlett Doe and Charles F. Doe, were appointed executors of his last will and testament, and were substituted as parties plaintiff in the place of the said John S. Doe. The appellant, the Waterloo Mining Company, owns the Silver King mining claim. This lies north of and adjoining the said Oriental No. 2 and Red Cloud claims. The appellant sunk a shaft or incline upon its own surface ground within the lines of its claim, and from thence drifted into the ground claimed by appellees, and which ground is beneath the surface of that which is within the line of appellees' claims. This the appellant claims the right to do, and threatens and undoubtedly intends to continue to do, and to extract the ore therein and appropriate the same to its own use. There is a vein of spar, carrying silver and other minerals, in the Silver King lode claim, called the "north vein," and another sometimes called a "divergent vein," and at other times the "middle vein." There is a vein of spar, also carrying silver, which crops out on the Red Cloud and Oriental No. 2, and which in the evidence is termed the "south vein." Appellant claims that all these veins belong to a mineralized zone whose apex is in the Silver King ground. The Silver King is higher up the mountain than the Red Cloud and Oriental No. 2 claims, and hence upon a higher elevation than the other two. If the ground embracing these three veins is one mineral zone, then the part thereof within the Silver King premises would have the higher elevation. This zone would, however, be cut by the south side line of the Silver King and the north side lines of the Red Cloud and Oriental No. 2. Appellant received pending this suit a patent from the United States to the Silver King lode. The appellees have certificates of sale from the United States for their two claims.

Before proceeding to discuss the questions involving more or less

the merits of this controversy, one of a preliminary nature is presented for determination, and one involving the jurisdiction of the lower court to hear and enter a decree in the same. It is urged that the circuit court and that this court, in accordance with the established rules in equitable proceedings, had no right or jurisdiction to enter any decree in this case. The ground upon which this claim is based is that the bill of complaint does not present an equitable cause, for the reason that it does not appear that the title of the complainants to the premises described in their bill, and upon which it is alleged appellant has trespassed, has ever been established by any action at law, and that the title complainants alleged to be in them was controverted and denied in the answer of appellant. Hence one of the issues in the case involved the determination as to the legal title to complainants' alleged mining claims; that under such issues the action was more in the nature of an action of ejectment to try a legal title than one to determine equitable rights. It does not appear to be controverted but that appellant by its answer put in issue the legal title complainants allege in the bill to be in them. There is no doubt but this is an action asking for equitable relief. Enough is stated in the bill to have warranted the issuing of an injunction pendente lite, had an action at law existed to recover possession of said premises within the boundaries of appellees' mining claims, or in an action in trespass. The prayer in the bill is for an injunction pending this action, and also that at the determination of this action said injunction be made perpetual. There is no dispute in the case upon the point that appellant has entered upon premises beneath the surface of the two claims set forth in the bill as the property of appellees. While the answer to the bill presents an issue as to the title of appellees to their two claims, there was no controversy in the evidence upon this point. The point presented in this case upon this matter in this court was not presented or considered in the court below. In the case of *Erhardt v. Boaro*, 113 U. S. 537, 538, 5 Sup. Ct. 565, 566, the supreme court, having stated that the former doctrine was that when there was a dispute as to title no injunction would be granted restraining a trespass, said:

"This doctrine has been greatly modified in modern times, and it is now a common practice, in causes where irremediable mischief is being done or threatened, going to the destruction of the substance of the estate, such as extracting ores from a mine, or the cutting down of timber, or the removal of coal, to issue an injunction, though the title to the premises be in litigation. The authority of the court is exercised in such cases, through its preventive writ, to preserve the property pending legal proceedings for the determination of the title."

Where there is no dispute as to title, there would seem to be no necessity of resorting to an action at law for the purpose of determining the same. But, when there is a dispute as to the legal title, it would seem that the best rule was to require an action at law to settle the legal title. This was so stated in the case of *St. Louis Mining & Milling Co. v. Montana Mining Co.*, 58 Fed. 129. Pending this action, however, an injunction pendente lite would be proper. When the legal title is settled, if the equitable rights such as would

warrant a perpetual injunction should be found for complainants, then such an injunction should be awarded. The allegations in the bill were sufficient to warrant the court in issuing, not only a temporary injunction in this case, pending an action at law to determine the legal title, but also were sufficient to warrant a perpetual injunction upon the determination of the legal title in favor of the complainants. The question is then presented as to whether or not the appellant could waive this right to have the legal title established at law before there was any consideration of the issues that presented the question as to whether a permanent injunction should issue. If the fact that the legal title has not been determined is one of such vital importance to the jurisdiction of the court that when it exists no jurisdiction to hear and determine such a case as this can be properly exercised, then, upon the motion of appellant, or perhaps upon the court's own motion, the cause should be dismissed. In the discussion of this question, Mr. Pomeroy, in his work on Equity Jurisprudence, says:

"Where, however, the plaintiff's title is disputed, the rule is settled that he must, in general, procure his title to be satisfactorily determined, by at least one verdict in his own favor, by at least one successful trial at law, before a court of equity will interfere; but the rule no longer requires any particular number of actions or trials. The reason for this requisite is that courts of equity will not in general try disputed legal titles to land. But the rule is one of expediency and policy, rather than an essential condition and basis of the equitable jurisdiction."

Here, it is to be observed, the view set forth, that the doctrine that a court of equity will not, in such a case as this, proceed to determine the issues presented until the legal title, if controverted, is established in an action at law, is one having its foundation in expediency and policy, and not because a court of equity, as a matter of fact, has no jurisdiction to determine a cause where a legal title is disputed and is one of the issues presented for determination. The same author, in volume 1, p. 130, of said work, says, in speaking of the jurisdiction of a court of equity:

"On the contrary, as will be more fully stated hereafter, the objection that the case does not come within this so-called equity jurisdiction must ordinarily be definitely raised by the defendant at the commencement of the action, or else it will be regarded as waived, and the judgment will not even be erroneous."

In Modern Equity Practice, by Beach, sections 13 and 14 are as follows:

"Sec. 13. The objection that plaintiff has an adequate remedy at law should be raised by demurrer or by plea, or should be distinctly stated in the answer of the defendant. It comes too late at a hearing on the merits, when the court has jurisdiction of the parties and the subject-matter.

"Sec. 14. But when the case is one in which it is not competent for the court to grant the only relief asked, the remedy being at law, or it appears that chancery has not, under any circumstances, jurisdiction of the subject of the bill, the court will entertain the objection at any stage of the case, or sua sponte, and dismiss the bill."

I am of the opinion that these two sections state the correct position. As has been stated before, the relief asked in this case was equitable, and such as a court of law could not afford. An action of trespass, in which damages only could be recovered, cannot be considered

as a substitute for an action which asks that a continuing trespass be prevented, and which trespass goes to the destruction of the estate of the plaintiff. In a case where equitable relief is demanded, the fact that there is a plain, speedy, and adequate remedy at law should be raised in the trial court, or it will be deemed waived. *Reynes v. Dumont*, 130 U. S. 354-395, 9 Sup. Ct. 486; *Kilbourn v. Sunderland*, 130 U. S. 505-514, 9 Sup. Ct. 594; *Tyler v. Savage*, 143 U. S. 79, 12 Sup. Ct. 340; *Brown v. Iron Co.*, 134 U. S. 539, 10 Sup. Ct. 604; *Iron Co. v. Reymert*, 45 N. Y. 703. The case at bar was not one in which there was any plain, speedy, and adequate remedy at law, but one that courts of equity, when the objection has been properly presented, would not proceed and determine, as a matter of policy and expediency, until the legal title in dispute had been determined in an action at law. But the rule of waiver applied to the former class of cases should be more readily and unreservedly applied in the latter class of cases. For these reasons we hold that the appellees waived the objection that the issue as to the legal title of appellees had not been determined in an action at law before the court below entered the decree in this cause.

Counsel for appellees urge that whatever the court might find as to the south vein being a part of a mineralized zone having its apex in the Silver King lode, the premises of appellant, still appellant would have no right to follow such lode on its downward course outside the side lines of said Silver King lode, because the location of the same was not made according to law, in this: that its end lines were not located parallel with each other. It has been observed that the appellant has a patent from the United States for its said lode. Its rights must be determined by the terms of this patent. The description in the patent of the Silver King lode gives it parallel end lines, and grants the right to follow all lodes on their dip outside of the side lines of the same, whose apex is within the surface lines of the claim, and whose strike is cut by the end lines of the claim extended perpendicularly downward. It is true, perhaps, that in the section of the mineral land act providing for the issuing of patents by the United States for lode claims there is no provision made for granting any extralateral rights. The language of section 2325, Rev. St., is:

"A patent for any land claimed and located for valuable deposits may be obtained in the following manner."

In section 2319, Rev. St., it is, however, provided:

"All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase."

It will be observed that the valuable mineral deposits above named are declared to be open to purchase, and that they are distinguished from the land in which they are found. In section 2322, Rev. St., it will be observed that a lode, vein, or ledge containing a valuable mineral deposit is distinguished from the ground in which the same is found. The grant in this section is:

"Shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their location, and of all veins, lodes and

ledges throughout their entire depth, the top or apex of which lies inside of such surface lines, extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside of the vertical side lines of such surface location."

Then follow the limitations of the grant, which it is not necessary to quote for a determination of the question now presented for consideration.

It will be observed that the lodes, veins, or ledges granted are distinguished from the surface ground, and are made the subject of a separate grant, and to separate provisions. It may be that congress, considering the provisions of the common law which reserved in every grant from the crown all precious metals, wished to set this matter at rest in these provisions. When we come to the patent for mineral land again, we again observe that the land in which the vein, lode, or ledge is found is treated separately from that of said veins or lodes. Since the passage of the mineral act of 1872, the land department of the United States has given such an interpretation to the same as would allow of a patent to the locator of mineral lands for a lode claim; granting to him, not only the ground within the surface lines of his location, but also all lodes, veins, or ledges having their top or apex within the same, throughout their entire depth, although they might, on their dip extending downward into the earth, depart from the side lines of the ground granted. There was a limitation upon this right, which was described in the following language in the patent:

"Provided, that the right of possession to such outside parts of said veins, lodes or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said lot (naming the same) so continued in their own direction that such planes will intersect such exterior parts of said veins, lodes or ledges; and provided further, that nothing herein contained shall authorize the grantees herein to enter upon the surface of a claim owned or possessed by another."

There has also been since said date a reservation in all patents of the ground described, which is as follows:

(1) "That the premises hereby granted, with the exception of the surface, may be entered by the proprietor of any other vein, lode or ledge, the top or apex of which lies outside of the boundaries of said granted premises, should the same in its dip be found to penetrate, intersect or extend into said premises, for the purpose of extracting and removing the ore from such other vein, lode or ledge."

Section 2320, Rev. St., provides for the location of mining claims "upon veins or lodes of quartz, or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits." The act of January 22, 1880 (1 Supp. Rev. St. p. 276), speaks of vein, lode, or ledge sought to be patented.

The land department has considered, in view of all these provisions of the statute, that it was proper to word a patent for mineral land embracing a vein, lode, or ledge, as above described. To interfere with this construction of the said mineral land acts would disturb many rights long enjoyed. A contemporaneous construction of a statute by those compelled to act thereunder is entitled to great weight. The lodes, veins, or ledges conveyed are those embraced within the mining claim located and granted in the patent. The presumptions are in

favor of the correctness of the land department in issuing this patent. Its action was within its jurisdiction, and we cannot go behind the same in a collateral action. Looking, then, at the patent, we observe that appellant was granted extralateral rights. If, then, appellant, in entering the premises embraced within the lines of appellees' claim, beneath the surface, followed down on its dip a lode whose apex was within its ground, and whose strike was cut by the end lines of its claim as patented, it was pursuing a course to which it had a legal right.

It is further urged by appellees that this court is bound by the findings of facts of the circuit court, unless they are found to be clearly and palpably erroneous. On an appeal in an equity suit, the whole case is before the court, and it is bound to decide the same, so far as it is in a condition to be decided, on its merits. *Beach, Mod. Eq. Prac.* p. 978; *Ridings v. Johnson*, 128 U. S. 212, 9 Sup. Ct. 72; *Garsed v. Beall*, 92 U. S. 684-695; *Johnson v. Harmon*, 94 U. S. 371. If a case has been referred to a master, and he has made findings of fact, there ought to be exceptions to the same, if any party to the suit is dissatisfied therewith, and a ruling upon the same made by the chancellor. If this course is not adopted, these findings cannot be reviewed on appeal. It is to be observed, however, that the findings of fact by the circuit court are not without some weight in considering the merits of the case. This case, therefore, is presented to this court upon its merits, and must be considered upon the evidence, with such aid as may be found in the findings of the circuit court. The main issue, upon the evidence, is as to whether what is called by the witnesses the "south vein" is a part of a mineralized zone, which may be denominated a "lode," and which has its apex in the Silver King ground, or is a separate vein or lode, having its apex in the Oriental No. 2 and Red Cloud mining claims. If it should be determined that this south vein is no part of a lode having its apex in said Silver King claim, then the difficult question that may be presented if the court should find otherwise is not involved. This question is as to what would be the rights of the parties if it was found that the south and north veins were part of one lode, as the said lode would be cut by the south side line of the Silver King lode and the north side line of the Oriental No. 2 and the Red Cloud claims. In considering the question as to whether this south vein is part of a mineralized zone, which would come under the definition of a "lode," as used in the mineral land act of congress, we are presented with the definition of a "lode" as given by Justice Field in the *Eureka Case*, 4 Sawy. 302, Fed. Cas. No. 4,548. That definition made the term "lode" "applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock. It includes, to use the language cited by counsel, all deposits of mineral matter found through a mineralized zone or belt coming from the same source, impressed with the same forms, and appearing to have been created by the same process." In considering this definition, the facts which confronted that distinguished jurist in that case should not be lost sight of. He found a lime-rock formation lying between two clearly-defined walls, each hav-

ing a definite dip, one composed of shale and the other quartzite. The quartzite wall exhibited marks of movement on its surface; that is, attrition. This is one of the distinguishing marks of a vein or lode. This lime rock between said walls was of a peculiar character, and differing from that above the shale. The stratification common to lime rocks in their normal condition had by some force of nature been destroyed, and the whole mass crushed and fissured. There were two other facts presented by the evidence in that case which it would appear might also have been noticed by the distinguished jurist. The evidence presenting said facts has been read in this case, and made a part of the testimony of the witness Hammond. These facts are: (1) That the lime rock found between the walls named was what is called magnesian or dolomite lime rock. This is a lime rock which has, through some dynamic force or agency, undergone a metamorphism. Usually such lime rock by one of said forces has been changed in its constituents, besides having its stratification destroyed. (2) That this class of lime rock often constitutes the lead or lode in which lead ores are found. In one portion of said evidence Mr. Hunt states that these dolomite or magnesian lime rocks are the formation in which most of the lead deposits of the world occur. He also quotes Mr. Van Cotta, to the effect that the magnesian lime stone itself has something to do with these deposits. The ores found in the Eureka were lead-silver ores. Let us see whether the facts in this case bring the premises in which the south, north, and middle veins are found within the definition of a "lode" found in the Eureka Case. The country rock where these veins are found is a volcanic rock termed "liparite." It extends several miles above and to some distance below where these veins are found. In the ground between the north and south veins the liparite is more broken up than elsewhere, unless it be in the ground between the south vein and a vein south of this called the "AA and BB vein." In the fissures there is, perhaps, more spar than is elsewhere found in the liparite. The north vein rests upon a clearly-defined foot wall. There is a hanging wall over the south vein. Between these two veins the liparite was softer than in other places, and there had occurred a greater kaolinization in its fissures than elsewhere. I have stated that it appears that there was a well-defined foot wall to the north vein and a hanging wall to the south vein. The evidence also shows that there was a clearly-defined foot wall to the south vein and a clearly-defined hanging wall, other than the hanging wall of the south vein, to the north vein. In fact, the characteristics of the two veins are very similar. Mr. Janin, a witness for appellees, says, in speaking of the south vein:

"The vein itself has very strong and distinctive features of a foot wall that is continuous. The vein filling is to the south,—that is to say, towards the hanging-wall side,—with occasional breaks on the foot-wall side, where it shows some jasper, at least; and I presume it was a portion of the vein filling once. So it is easy to trace throughout this whole length of 2,000 feet on the surface, and also in depth. I therefore consider it to be a very continuous, strong vein, so far as it is marked and goes. The vein is like all other fissure veins, or, rather, it has the fissure faulting plane, because it shows some evidence of movement and the hanging wall is somewhat broken. At the Oriental shaft on the

upper level the foot wall is very highly polished. Indeed, it shows slickensides very plainly, and it shows there must have been some movement."

A little further in his evidence the witness says this vein has a regular dip, which he describes. There are many other witnesses in the case who note and describe this foot wall, and some the hanging wall of this south vein. It is not necessary to quote all this evidence. The witness Aldersley, who was examined on the part of appellant, admits that in some places he found the foot wall of this south vein. He says that the hanging wall thereof was for about four-fifths of the distance along its strike, as exposed, composed of what he terms "bird's-eye porphyry," or what is locally called "bird's-eye," and one-fifth mud or brown tuffa. He says that this bird's-eye is all the way from 20 to 5 feet thick, according to the locality where found. In describing the north vein, upon cross-examination, the witness says:

"Q. The slip was there? A. Yes, sir. Q. Now, then, when they took it out, did they take all out between the foot wall and the hanging wall at the surface? A. Not altogether. It has been taken out since the first working. Q. Well, was the hanging wall as well defined as at the foot wall? A. Yes, sir. Q. It was? A. Yes, sir. Q. The whole distance was? A. Yes, sir; well, no hanging wall is ever as well defined as the foot wall, in that position, and I would like to correct myself in that statement. Then that foot wall is a perfect plane, nearly,—as nearly as can be in a mine,—but the hanging wall did not have that condition. Q. Well, was there any hanging wall distinctly to be traced at the surface? A. Yes, sir. Q. Well, to what extent along the vein was that the case? A. Very near two-thirds of the way. Q. From which end? A. From the east end. Q. To where? A. From the east end two-thirds of the way westward. Q. Along the claim? A. Along the claim,—along the outcrop of the vein. \* \* \* Q. Now, what was the appearance of the hanging wall for a distance from the surface down 20 feet? A. It had a perfectly smooth, but irregular, surface. Q. For twenty feet? A. Yes, sir. Q. And what extent on the strike of the vein,—whole distance? A. The whole distance, as far as I knew. There is some parts that are not exposed, and them I cannot vouch for. Q. But there is some of that wall exposed there, isn't it? A. Yes, sir. Q. That hanging wall? A. Yes, sir. Q. What is the character of the rock? A. Bird's-eye porphyry. Q. Bird's-eye porphyry right through? A. Yes, sir. Q. Any of it mud? A. No, sir. Q. How far below the surface, following that bird's-eye porphyry, do you have to descend before you strike the mud? A. At what point? Q. Any point. A. Well, as I said before, on the surface of the Cunningham shaft the mud is about 40. The bird's-eye is about 40 feet wide. Consequently the mud would be 40 feet from the vein. Q. What did you mean by 'mud' at that point? A. I mean a soft, friable sandstone. Q. Is it not porphyry? A. No, sir."

The witness in other parts of this evidence shows that his "bird's-eye porphyry," as he calls it, extends down as a hanging wall to this north vein to its lowest workings. This north vein, then, has all the characteristics of a vein or lode. It has a foot wall clearly defined, and a hanging wall clearly defined. In both the south vein and in the north vein spar impregnated with ore is found between these walls, as a rule. There is another fact worthy of remark. The vein still further south, called the "AA and BB vein," has been described. In the evidence of Mr. Hammond and other witnesses we find that this vein has also a liparite foot wall, and the material called "bird's-eye" for or on the hanging wall. This material is from 5 to 20 feet thick. This AA and BB vein is on a horizontal plane about 600 feet south of what is called the "north vein" in the



Silver King ground. The characteristics of this vein and that of the south vein, so called, and also the country between them, are so similar to the north vein and the country rock between the north and south veins that the expert witness J. Ross Brown claims that it is also a part of the Silver King lode, and that all this country lying between the north vein and AA and BB vein is one lode. Mr. Edwards, one of the witnesses for the appellees, says that spar in the region of all these veins is a part of the country rock. Considering all of the evidence, I am inclined to think this is correct. This spar occurs to a greater extent in some parts of the country than others. This fact would not prove, however, that, where it abounded in the fissures of the liparite, it proved that a vein existed. The appellant urges with some force that the assays made from the ground show that from the foot wall of the south vein to the north vein the whole mass is impregnated with silver, and that the country south of the south vein does not show this condition. But it should be borne in mind that the material sampled south of the south vein was the mud or brown tuffa. This was no fair test. That there is liparite between the south vein and the AA and BB vein would appear from the evidence as to the character of the foot wall of this last-named vein. The evidence, I think, shows that this brown tuffa or mud is only a surface deposit resting upon liparite, which is the prevailing country rock. This is the opinion of Mr. Janin. To have presented a fair test, the liparite south of the south vein should have been tested. The mining engineers and scientific witnesses who gave evidence in this case did not differ materially as to the physical facts presented, but, as is usual with such witnesses, according to the sides in whose interests they were sworn, they had different opinions as to what these facts demonstrated. The circuit court inclined to place the greatest reliance upon the opinion of Mr. Janin. As we consider the facts in this case, we are disposed to concur in that view. We cannot see that the facts presented in this case are of the character which confronted the court in the Eureka Case. In the case of *Mining Co. v. Callison*, 5 Sawy. 439, Fed. Cas. No. 9,886, the court said, in speaking of the Eureka Case:

"It never was intended in that case to hold that every metalliferous country to which boundaries could be found must be regarded as one vein or lode, for this would reduce all mining districts to one lode."

Judge Sawyer, who was one of the judges who sat with Justice Field in the Eureka Case, also presided at the trial of this last case.

We hold, therefore, that what has been termed the "south vein" is no part of the Silver King lode, but a separate and distinct lode, meeting the usual definition of a "lode" or "vein"; that is, an aggregation of mineral matter containing ores in fissures of rocks. So far as this vein lies within the boundaries of Oriental No. 2 and the Red Cloud mining claims, it belonged to the appellees (the plaintiffs in the court below), and the appellant had no right to enter upon the same.

The appellant presents another question for consideration. It is claimed that, admitting that the south vein is no part of the Silver

King lode, still appellant should not be enjoined from entering upon the same, for the reason, as it is urged, that the end lines of the Silver King cut this vein. It would appear from the evidence that this south vein on its eastern strike does enter the Silver King ground, and passes out of its east end line. The apex of this vein is not shown to be in the ground at this point, but it is a fair presumption that it is, from its course and dip. The said vein, on its westerly strike beneath the surface, until it passes the westerly end line of the Silver King claim, is within the Oriental No. 2 and Red Cloud claims. The cropping of the apex of this vein, however, on the Red Cloud premises, has a course towards the south side of the Silver King lode. In fact, there are some croppings cut by this south side line that are supposed to belong to this vein. This is not, however, fully established. The evidence is not sufficient to show that the apex of this vein is found anywhere within the Silver King premises opposite to the Red Cloud lode. The burden of proving this was upon the appellant, as the vein in this locality beneath the surface of the Silver King is nowhere found. If the vein in its course from east to west should be found, along on its apex, to pass out of the Silver King lode and into the Oriental No. 2 ground, from this into the Red Cloud ground, and then back again into the Silver King premises, and westerly out of its west end line, there certainly could be no right in appellant to any part of the vein, the apex of which was not in the Silver King premises. The grant is to lodes having their apex in the ground patented. The fact that a part of the apex might be in the ground granted would not give any right to that part of the apex which is not therein, although the apex might be cut by both end lines of the granted premises. There is no case that supports this doctrine. The case of Bullion, Beck & Champion Min. Co. v. Eureka Hill Min. Co., 5 Utah, 3, 11 Pac. 515, is a case where the croppings were cut on the strike of the same by a side line of a location. The court gave the vein to the oldest locator. The case of Argentine Min. Co. v. Terrible Min. Co., 122 U. S. 478, 7 Sup. Ct. 1356, cannot be well understood from the statement of facts in the case. It is believed, however, that the facts in this case showed that the vein in dispute and its croppings on their strike passed out of one claim into the other in a circular course, and crossed the Adelaide claim from one side line to the other. The parties litigant came together in the Adelaide ground in following down from the croppings in the surface premises of each on the dip. The court gave the ground in dispute to the oldest locator. It would appear that, according to their locations, both had lateral rights. The only question that could arise, if the facts were as appellant claims, is whether it could follow down on the lode from that part of the apex thereof in its premises into the premises of appellees. This is a disputed question in mining litigation. As I have stated, however, the evidence does not warrant the court in saying that there is any part of the apex of the south vein in the Silver King premises opposite the Red Cloud claim. As to what would be the right of appellant in the Oriental No. 2 premises, if the south vein, after it passes on its strike into the Silver King ground, on its dip entered the Ori-

ental claim, we do not decide. The case is not argued and presented to us upon that state of facts. It does not appear that, from the point where the apex of the south vein going east may cross the south side line of the Silver King claim, the appellant has entered the Oriental No. 2 premises on the dip of the same. We have nothing presented, then, upon which to base a decision. The decree of the court below is therefore affirmed.

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INVESTOR PUB. CO. OF MASSACHUSETTS v. DOBINSON et al.

(Circuit Court, S. D. California. July 9, 1897.)

No. 632.

TRADE-NAMES—USE OF SIMILAR NAME—RIGHT TO INJUNCTION.

A corporation is not entitled to an injunction restraining another corporation from using the same corporate name, or from publishing a periodical having a name similar to one published by complainant, where defendant is incorporated, and its paper published in a state distant from complainant, and the names are used with distinguishing characteristics which render injury to complainant therefrom improbable, in the absence of proof that such injury has actually resulted.

Suit by the Investor Publishing Company of Massachusetts against G. A. Dobinson and the Investor Publishing Company for an injunction and accounting. Heard on bill and answer and agreed statement of facts.

Wells & Lee and Works & Lee, for complainant.  
Sheldon Borden, for defendant.

WELLBORN, District Judge. This is a suit for an injunction and an accounting. The bill alleges: That the plaintiff is a corporation formed and existing under the laws of the state of Massachusetts, and the defendant company a corporation formed and existing under the laws of the state of California; that for more than five years last past plaintiff has published, and still publishes, in the city of Boston, state of Massachusetts, in the city of New York, state of New York, and in the city of Philadelphia, state of Pennsylvania, a weekly trade and financial journal, named "United States Investor"; that said paper, under said name, has become widely and favorably known throughout the United States, Canada, the republic of Mexico, England, the continent of Europe, and Australia, and that plaintiff has also become widely and favorably known throughout said territory; "that defendant the Investor Publishing Company of California, on or about the 14th day of March, 1894, at the city of Los Angeles, state of California, began the publication of a trade and financial journal under the name of 'The Investor,' and the defendant G. A. Dobinson is the editor in chief of said trade and financial journal. And your orator charges that defendants, by adopting the name of 'The Investor' for such paper, and by printing at the head of its editorial column the words 'Published by the Investor Publishing Company, Incorporated,' the same as your orator's corporate name, has thereby diverted the trade belonging to your orator; that this similarity in the names has produced great

confusion in plaintiff's business, and is depriving your orator of the benefit of the reputation acquired by the high character and popularity obtained by your orator among investors and advertisers throughout the United States and elsewhere, whereby your orator has been and is greatly damaged. And your orator further says that he fears, and has reason to fear, that said defendant will continue to use the name and style of 'The Investor Publishing Company,' and will continue to publish the said trade and financial journal under the name of 'The Investor,' and thereby cause irreparable injury to your orator's exclusive right to the corporate name 'The Investor Publishing Company,' and to its exclusive right to the name of 'United States Investor.'" The bill prays that defendant may be decreed to account for and pay over the income and profits unlawfully derived from the violation of plaintiff's rights, and also for an injunction from the further use of the names 'The Investor' and 'The Investor Publishing Company,' or any imitation thereof.

The answer denies, for lack of information and belief, the allegations of the bill as to the corporate existence of plaintiff, and as to the publication circulation, and reputation of the journal mentioned in said bill; admits that defendant is a corporation existing under the laws of the state of California, and that on the 14th day of March, 1894, it began the publication of a trade and financial journal, under the name of "The Investor," and that defendant Dobinson is the editor in chief of said journal, and has been ever since said date; denies that there has been, through any act of the defendants, any diversion of or confusion in plaintiff's trade or business, or that the plaintiff has been thereby greatly or at all damaged; denies that plaintiff fears, or has any reason to fear, that defendants will continue to use the name and style of the "Investor Publishing Company" in connection with the publication of its journal. The answer then avers as follows:

"And these defendants further say that the allegations of complainant's bill relating to the use by the defendants of the corporate name of the 'Investor Publishing Company' and of the name of 'The Investor' for the defendants' said journal, and to the publication by defendants at the head of the editorial column in the said last-mentioned paper of the words 'Published by the Investor Publishing Company, Incorporated,' are, and each of them is, untrue, except as hereinafter expressly set forth and admitted. These defendants further say that at the time of the incorporation of the Investor Publishing Company as aforesaid these defendants were not aware of the existence of the complainant as a corporation, and had no knowledge or notice of the complainant's existence, or of its said newspaper, to wit, 'The United States Investor.' And these defendants say that the name adopted for their said newspaper, to wit, 'The Investor,' is, and ever since its first publication has been, published at the head of the first page of said last-mentioned journal in the following form, to wit:

**"THE INVESTOR.**

**"A Financial Guide to Southern California,**

**"AND WEEKLY JOURNAL OF FINANCE, INSURANCE, AND TRADE.**

**"LOS ANGELES, CAL., —, 189-.**

"And these defendants further say that the said name so published and circulated by it at the head of its said journal in no way resembles the name adopted by complainant, to wit, 'United States Investor,' and that the said title page of defendant's journal in no way resembles the title page of com-

plainant's journal, and is in no way calculated to produce confusion between the two journals. Defendants admit that on the interior page, known as the 'editorial page,' of their said journal, *The Investor*, they commenced the publication of the words, 'Published by the Investor Publishing Company, Incorporated,' but they allege and show that such publication was, on April 4, 1894, three weeks after the initial publication of the said journal, changed so as to read as follows: 'Published by the Investor Publishing Company, of Los Angeles,' and that said form of words was continued until December 12, 1894, at which time, in order to avoid any possible conflict with the complainant, these defendants discontinued the publication of the corporate name 'The Investor Publishing Company' in connection with its said journal, and substituted the words, 'G. A. Dobinson, Editor,' and they have ever since continued the publication of their said journal in that form, and without the use of the said corporate name in any manner in connection with the said publication. And these defendants further say that ever since the first publication of their said journal they have published, at the head of the said editorial page, the name, purpose, and place of publication of their said journal, in the following form, to wit:

"THE INVESTOR.

"A Financial Guide to Southern California, and Weekly Journal of Finance, Insurance, and Trade. Published every Thursday at 4-5 Bryson Block, Los Angeles, California. \* \* \* Entered at the post-office at Los Angeles, California, for transmission through the mails as second-class matter.'

"And these defendants further say that they have not at any time infringed the rights of the complainant to the use of the name 'United States Investor,' or in any manner diverted or received any portion of the receipts or profits which the said complainant might or would have received or derived from its said journal; and these defendants further say that they have not, nor has either of them, sought in any manner, directly or indirectly, to interfere with the rights of the complainant, if any it has, or to divert or appropriate any portion of the income or profits of complainant in the publication of its said journal or otherwise, and they deny that they have in any manner copied or imitated the form or style of the complainant's journal, or that the resemblance between the said journals, or between the captions, title pages, or editorial columns, is sufficient or would be likely to deceive or mislead any customer of the respective journals; and they deny that any portion of the complainant's reputation, popularity, receipts, or income have been diverted by these defendants by the publication of their said journal, *The Investor*, or otherwise, or at all."

The facts are stipulated in writing by the parties, as follows:

"(1) That the plaintiff in the above-entitled action, to wit, Investor Publishing Company of the State of Massachusetts, was incorporated under the laws of the state of Massachusetts, on or about the 10th day of November, 1891, under the corporate name of 'Investor Publishing Company.' That ever since the 10th day of November, 1891, the said plaintiff, under said corporate name of 'Investor Publishing Company,' has published in the city of Boston, state of Massachusetts, in the city of New York, state of New York, and in the city of Philadelphia, state of Pennsylvania, a weekly trade and financial journal named 'United States Investor.' That a copy of said 'United States Investor' is hereunto attached, showing the form in which said journal has been published during all of said time. That the said paper, under said name, has been widely and generally circulated throughout the United States, Canada, the republic of Mexico, England, the continent of Europe, and Australia, and the said Investor Publishing Company aforesaid has also become widely and favorably known through said territory; and it was at all times published in said paper that it was published by the 'Investor Publishing Company,' plaintiff aforesaid.

"(2) That the defendant the Investor Publishing Company became incorporated under the laws of the state of California on or about the 13th day of February, 1894, under the corporate name of 'The Investor Publishing Company.' That the said defendant the Investor Publishing Company, on the 14th day of March, 1894, at the city of Los Angeles, state of California, began the

publication of a trade and financial journal under the name of 'The Investor.' That the defendant G. A. Dobinson at all times has been, and is now, the editor in chief of said last-named trade and financial journal. That at the time of the adoption of said corporate name for said defendant Investor Publishing Company, and of the name 'The Investor' for said journal, none of the stockholders, officers, or directors of said corporation had any knowledge or information, nor had said defendant G. A. Dobinson any knowledge or information, of the existence of the plaintiff corporation, or that it was or had been publishing the said 'United States Investor,' or any other journal whatsoever.

"(3) That the defendant's said newspaper, in its first number, so issued on the 14th day of March, 1894, published its name at the head of the first page thereof, in the following form, to wit:

"THE INVESTOR.

"A Financial Guide to Southern California,

"AND WEEKLY JOURNAL OF FINANCE, INSURANCE, AND TRADE.

"LOS ANGELES, CALIFORNIA, MARCH 14, 1894."

"That on page 6 of said newspaper so published as aforesaid, at the head of its editorial column, it published its name in the following form:

"THE INVESTOR.

"A Financial Guide to Southern California,

"AND WEEKLY JOURNAL OF FINANCE, INSURANCE, AND TRADE.

"Published by

"THE INVESTOR PUBLISHING COMPANY.

"(Incorporated.)

"4 & 5 Bryson Block, Los Angeles, California.

"G. A. DOBINSON, EDITOR."

"That at the top of each of the pages of said newspaper so published as aforesaid by the defendants were the words, 'THE INVESTOR.' That a copy of said journal, 'The Investor,' marked 'A,' is hereunto attached, showing the form in which said journal was published from March 14, 1894, to March 28, 1894, being the first three publications of said journal.

"(4) That in each of said three issues of said defendants' newspaper aforesaid, which was issued weekly from and after the said 14th day of March, 1894, until the 28th day of March, 1894, the matter hereinbefore recited as having been published on the first page of said newspaper and on the sixth page thereof, and at the head of each page, was continued to be published as hereinbefore stated. That on the 28th day of March, 1894, said defendants were for the first time informed of the existence of the plaintiff corporation, and learned for the first time that plaintiff was publishing said 'United States Investor,' or that said last-mentioned journal was in existence. That such information was obtained through a letter from the plaintiff, complaining that defendants were infringing plaintiff's right to the use of the corporate name of 'The Investor Publishing Company,' and demanding that defendants desist from using said corporate name in connection with the publication of said journal, 'The Investor.' That, after receiving said letter, to wit, in its issue of April 4, 1894, the defendants changed the lines at the head of the editorial column on page 6 of said paper, 'The Investor,' by adding thereto, after the words

"Published by

"THE INVESTOR PUBLISHING COMPANY,"

—the words

"OF LOS ANGELES."

"That thereafter the said journal was continued to be published weekly and every week, with the said last-mentioned change (and no other) in the lines at the head of its columns, until and including the issue of December 5, 1894. That a copy of said journal, 'The Investor,' marked 'B,' is hereunto attached, showing the form in which said journal was published during said last-mentioned period, viz. from and including April 4, 1894, to and including December 5, 1894. That on the 10th day of December, 1894, and prior to the commence-

ment of this action, defendants altered the lines at the head of its said editorial column in type by omitting therefrom the words, 'Published by the Investor Publishing Company of Los Angeles,' and substituting in lieu thereof the words, 'G. A. Dobinson, Editor,' but such change was not printed or published until the next regular weekly edition of said journal, which was issued on December 12, 1894. That since said last-mentioned date the defendants have continued the publication of their said journal without the use in its columns of the words, 'Investor Publishing Company.' That a copy of said journal, 'The Investor,' marked 'C,' is hereunto attached, showing the form in which said journal was published on December 12, 1894, and in which it has ever since been published.

"(5) That said defendants' journal has been widely and generally circulated, since its publication, throughout the states of the United States.

"(6) That said defendants' journal has been issued and published, since the commencement of the publication thereof, once a week, every week, to wit, on Thursday of each week.

"(7) That this action was commenced by the filing of plaintiff's bill of complaint herein on the 11th day of December, 1894."

To said stipulation are attached the exhibits therein mentioned.

The equitable principles, as I understand them, applicable to the case made by the bill, are set forth in my opinion overruling demurrer, filed February 24, 1896, and reported in 72 Fed. 603. Defendants, however, insist that the case, as shown by the agreed statement of facts, is materially different from that made by the bill in several particulars; among others, the following: That from said statement of facts, but not the bill, it appears that the typographical devices, forms, and appearances of the two journals are wholly dissimilar; that these words on the first page of defendants' journal: "A Financial Guide to Southern California, and Weekly Journal of Finance, Insurance, and Trade. Los Angeles, Cal.," and on the editorial page, "4 and 5 Bryson Block, Los Angeles, Cal. G. A. Dobinson, Editor,"—are characteristic marks, which do not appear upon plaintiff's journal; that, on April 4, 1894, to still further distinguish their journal from plaintiff's, defendants added to the headline on the editorial page of their journal the words, "of Los Angeles, Cal."; that, although defendants' journal was published for many months prior to the commencement of this suit, no injury or damages of any kind were sustained by the plaintiff, no confusion produced in its business, and none of its trade diverted, nor its high character impaired. These particulars, except the last, are summarized thus in defendants' brief:

"When it is considered that the defendants' publication is issued on the extreme western coast of the United States, and that the plaintiff's journal, bearing a different name, printed in different type, and in a different form, is issued on the extreme eastern coast thereof; that the two journals distinctly indicate the places of publication; and that the defendants' journal bears all the distinguishing marks hereinbefore enumerated; and that the corporate name, as used by us, is distinctly limited and designated by the addition of the words 'of Los Angeles,' in type of equal size,—we submit that no cause of action is made out, and that injunction should be denied."

After much consideration, I am satisfied that the addition of the words, "of Los Angeles, Cal.," to the headline on the editorial page of defendants' journal, and the other above-mentioned distinguishing characteristics of said journal, together with the absence of any evidence of damage or injury to complainant, do present a case materially different from that made by the bill. While it is unquestion-

ably true, as stated in my former opinion on demurrer (72 Fed. 606), that the courts will protect a corporation in the use of its name, still it is equally true that there is no need of such protection when the corporation complained against, although adopting and using the same name, does so under such circumstances and in such a locality as not to interfere with the former corporation's prior right to the use of the name. In the case at bar there is no proof whatever sustaining complainant's rights, asserted in the bill, to damages or an accounting. Indeed, this part of the relief prayed for is abandoned. To this feature of the case the following quotation is peculiarly applicable:

"The rule which governs adjudications in respect to questions such as that presented by the case at bar is reasonably plain, and it is distinctly held that such a similarity of names as is likely to produce confusion in the minds of ordinary unsuspecting persons will be restrained. Therefore the question involved in this case is, was there such a similarity of names? We might indulge in speculation in reference to the likelihood of confusion arising from similarity of these names in the conduct of business, and that such similarity was calculated to deceive and impose upon the public and upon the purchasers of goods of the character in which the parties to this action were accustomed to deal. But the most satisfactory evidence in reference to the results likely to follow from alleged similarity is evidence of actual cases in which such deception and imposition has occurred. In the case at bar attempts have been made to show that confusion has arisen from the alleged similarity of names; but it is singularly barren of evidence showing that a single customer has been lost to the plaintiff by reason thereof, or any satisfactory evidence that a single person has been deceived into calling in the one store when he intended to visit the other. \* \* \*" *Richardson & Boynton Co. v. Richardson & Morgan Co.* (Sup.) 8 N. Y. Supp. 53.

The controlling influence of the circumstance that the two journals are published in localities widely distant from each other, with proper words to denote the locality of each, is presented, it seems to me, with unanswerable force in the following extract:

"It is difficult, if not impossible, to formulate any general principle which will be equally applicable to all, or by which all can be rendered consistent or reconcilable; nor is it necessary, as the conflict between them is apparent only, and not real. A name, whether of an individual or corporation, as well as any other mark or symbol, will be protected in a proper case; and that irrespective of whether such name is an arbitrary one or not, if the other considerations entitling it to such protection are present. It is evident, on the other hand, that the use of the same name would not be enjoined where the parties were doing a business thereunder entirely dissimilar and distinct; as, for instance, where one represented a banking business and another a locomotive works. Nor could the first national bank established enjoin every other bank from using the name 'First National Bank,' nor could the Mechanics' National Bank of New York enjoin the Mechanics' National Bank of New Jersey, nor the Fulton Bank of New York, the Fulton Bank of Brooklyn. And yet, if a bank like the Chemical Bank of New York, or any other bank, had acquired in the particular city a valuable interest or proprietary right in the name, the court would not hesitate to enjoin another bank of the same name from doing business in the same city, to its detriment, and the confusion of the public." *Farmers' Loan & Trust Co. v. Farmers' Loan & Trust Co. of Kan.* (Sup.) 1 N. Y. Supp. 47.

See, also, *State v. McGrath*, 92 Mo. 355, 5 S. W. 29, and *Trust Co. v. Nine* (Neb.) 43 N. W. 348.



In *Koehler v. Sanders*, 122 N. Y. 65, 25 N. E. 235, plaintiffs claimed an infringement of their firm name, "International Banking Company," but the court denied relief, partly on the ground that the defendants, Edward Sanders & Co., did not employ the designation objected to by plaintiffs, "International Bank," in such way as to confuse their business with that of plaintiffs, for the reason that defendants expressly advertised the "International Bank" as that of Edward Sanders & Co. That case is in perfect harmony with the doctrine—which, undoubtedly, must be correct—that, where one corporation adopts the name of another corporation already in existence, but uses it in a place and with distinguishing characteristics which render it improbable that injury could thereby result to the latter corporation, such use of the name will not be enjoined, in the absence of proof that injury has actually resulted therefrom.

In the unreported case of *Investor Pub. Co. v. Simons*, in the circuit court of the Western district of Missouri, cited by me in 72 Fed., at page 610, the defendant, in the publication of its journal called "The Investor," used the phrase "The Investor Publishing Company" (which was a pseudonym, the defendant not being a corporation), without any additional words or marks, so far as the record discloses, distinguishing it from complainant; and, furthermore, employed other words which were used by complainant's journal, and set forth in complainant's bill, as follows:

"That, although the first publication by defendant of his paper styled 'The Investor' was made on the — day of —, 18—, said paper has the words printed thereon, 'Volume IV., No. 28.' That the volume of the 'United States Investor' now being published by your orator is 'Volume IV.'; and your orator charges that the defendant, by adopting the firm name the same as your orator's corporate name, and by pretending that the issue of his paper has now reached the fourth volume, is fraudulently deceiving the public, and thereby diverting the trade belonging to your orator," etc.

Besides, the record does not show that there was any contradiction of the allegations of the bill as to complainant's damages. That precedent, therefore, while it supports the case made by the bill in the present suit, fails wholly to meet the case presented by the agreed statement of facts herein. For the reasons above indicated, I am satisfied that the stipulated facts do not entitle the plaintiff to any relief, and the bill will be dismissed.

JANOWITZ v. LEVISON.

(Circuit Court of Appeals, Second Circuit. July 21, 1897.)

**PATENTS—NOVELTY—DRESS STAYS.**

The Janowitz patent, No. 512,113, for a twin wire dress stay covered with rubber or other suitable waterproof material, preferably perforated in several places along the center between the seams, is void for want of novelty. 80 Fed. 731, reversed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was a suit in equity for alleged infringement of letters patent No. 512,113, issued January 2, 1894, to complainant, Janowitz, for a dress stay. The circuit court found that the patent was valid and infringed, and entered a decree for the complainant. 80 Fed. 731. The defendant has appealed.

Edwin H. Brown and Seabury C. Mastick, for appellant.

Louis C. Raegenier, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

**PER CURIAM.** The patent in suit is for a "dress stay," an article employed for stiffening women's garments, and belongs to the class in which steel is used as a substitute for whalebone, and covered with rubber or other suitable material to prevent the steel from breaking or rusting, and to enable the stay to be stitched in place on the garment. The patent contains three claims, which are as follows:

"(1) A twin wire stay, having a hard, resilient waterproof coating covering the two members of the stay on all sides, and forming a filling connecting the two contiguous edges of said members, substantially as described. (2) A twin wire stay covered with vulcanized rubber, having a filling of the same between the wires, firmly uniting their inner edges, substantially as and for the purpose specified. (3) A twin wire stay covered with vulcanized rubber, having a channeled filling of the same between the wires, firmly uniting their inner edges, substantially as and for the purpose specified."

The court below adjudged all these claims to be infringed by the defendant. The principal question upon this appeal is whether the patent is void for want of novelty. As described in the patent, the stay consists of two wires, arranged side by side at a short distance from each other, and surrounded by a covering of rubber or other suitable compound. The rubber is preferably perforated in several places along the center between the seams, the center being a longitudinal depression or channel between the two wires. The prior state of the art is approximately exhibited by the statement of the patentee in the patent itself. He says:

"Heretofore it has been proposed to cover single steel stays with rubber, and an example of this is shown in my patent No. 496,313; but such stays cannot be sewed through, as is required in making dresses of the better class, unless the steels are perforated; and, if so perforated, they are so weakened at the point of perforation as to be almost sure to break under the strain to which they are

subjected. To remedy this it has been proposed to use double or 'twin' stays, and cover them with textile material sewed onto the stays. This, however, is also objectionable, as the steels rust under perspiration and after washing, and this destroys the stitching, so that they not only iron-mold the clothing of the wearer, but they become loose and annoying besides. To overcome these difficulties is the object of my invention, which I do by embedding duplex or twin steels in a suitable composition, such as rubber or similar compounds."

It thus appears not only that steel stays covered with rubber were old in the prior art, but that twin stays covered with textile material were also old; and that it was customary to form the rubber coating with perforations to permit of stitching the stay to the garment. It appears abundantly by extraneous evidence that it was also old when the twin stays were covered with textile material to make them in the form of the stay of the patent, with perforations along the center or channel between the two wires, or without the perforations, in order to permit of stitching the stay to the garment either through the perforations or directly through the material of the channel. Consequently, the extent of the improvement made by the patentee was to substitute, when twin stays were used, the rubber covering for the textile covering. If the patentee had been the first to use a rubber covering for steel stays, this might have involved invention. But he was not even the first to use it for twin stays, as appears by the English patent to Knight, of October 31, 1890. If he had been the first to discover that a rubber covering could be stitched to the garment without perforating it, that might have involved invention; but he was not. Without referring to other evidence, it is sufficient to cite the patent of Van Orden of October 30, 1887, covering a steel stay enveloped in any plastic compound, including celluloid or rubber, and sewed to the garment through the projecting edges of the covering. We are constrained to conclude that, although the patentee was entitled to the credit of making a more artistic article than those who had preceded him, he did nothing new in the patentable sense. The form of his stay was old, the materials were old, and in bringing them together in the particular manner described in the patent he did not develop in either any new characteristics or capacity. The claims of the patent are devoid of novelty, and the judgment of the circuit court is reversed, with costs, and with instructions to dismiss the bill.

**NASHVILLE, C. & ST. L. RY. CO. v. McCONNELL et al. LOUISVILLE & N. RY. CO. v. DUCKWORTH et al. WESTERN & A. RY. CO. v. SAME.<sup>1</sup>**

(Circuit Court, M. D. Tennessee. August 19, 1897.)

**1. INJUNCTION—RESTRAINING BROKERAGE IN RAILWAY TICKETS.**

The managers of the Tennessee Centennial Exposition at Nashville secured from railroads the issuance of special round-trip tickets to such Exposition at greatly reduced rates. Such tickets were receivable for transportation over different roads from those issuing them, but were not transferable, providing by their terms that they should be void if presented by a person other than the original purchaser, and such purchaser was required to identify himself before validating agents appointed for that purpose at the Exposition. Defendants were ticket brokers or "scalpers" engaged at Nashville in buying such tickets from the holders, and in reselling the return portions to others for use in violation of the contract contained therein; giving a guaranty of their acceptance for passage, and assisting the purchasers in fraudulently identifying themselves as the original purchasers before the validating agents. *Held*, that the railroad companies were entitled to injunctions to restrain defendants from carrying on the business of so dealing in such tickets.

**2. SAME—MATTERS AFFECTING COURT'S DISCRETION—INJURY TO PUBLIC.**

In such suits the national and state character of the Exposition, its public importance, and the fact that its success is imperilled by the withdrawal of such tickets from sale by some of the roads, and their threatened withdrawal by others, in consequence of the acts of the defendants, are matters proper to be taken into consideration as factors moving the court to some extent to the exercise of its discretionary power to grant an injunction.

**3. SAME—JURISDICTION OF FEDERAL COURT—AMOUNT IN DISPUTE.**

In a suit for an injunction the amount in dispute, for jurisdictional purposes, is not determined by the amount which the complainant might recover from defendant in an action at law for the acts complained of, but by the value of the right to be protected, or the extent of the injury to be prevented, by the injunction.

**4. SAME—PARTIES—JOINDER OF DEFENDANTS.**

In a suit by a railroad company for an injunction to restrain the purchase from passengers of partly-used tickets, nontransferable by their terms, and their resale for use in violation of the contract contained therein, where different brokers are engaged in dealing in the same class of tickets they may be joined as defendants.

**5. SAME—PRINCIPLES GOVERNING THE REMEDY—NOVEL USE OF WRIT.**

In the use of the writ of injunction, courts exercise a sound discretion, governed by recognized principles of equity jurisprudence and regulated by analogy. It is not a fatal objection that the use of the writ for the particular purpose for which it is sought is novel.

**6. SAME—RESTRAINING INJURY TO BUSINESS.**

The right to carry on a lawful business without obstruction is a property right, and its protection is a proper object for the granting of an injunction, when the ordinary remedies are inadequate.

**7. SAME—SUBJECT-MATTER OF SUIT.**

A suit by a railroad company to restrain ticket brokers from buying and reselling railroad tickets to be used in violation of the contract contained therein is not based on such contract, but the subject-matter is the illegal use made of the tickets by defendants, not parties thereto, to the injury of the business of the complainant; and hence any remedy provided by the contract itself for its violation is not a bar to the relief sought.

**8. SAME—INDUCING THE BREAKING OF CONTRACT—INTERFERENCE BY THIRD PERSON.**

One who wrongfully interferes in a contract between others, and, for the purpose of gain to himself, induces one of the parties to break it, is liable

<sup>1</sup> See note at end of case.

to the party injured thereby; and his continued interference may be ground for an injunction, where the injury resulting will be irreparable.

**9. SAME—IRREPARABLE INJURY.**

Where it is clearly shown that a complainant's rights are being violated, and that injury results, and the only remedy at law is by a large number of suits for damages, which, by reason of their number and cost, will produce no substantial results, the injury is irreparable, and affords ground for injunction.

**10. SAME—RESTRAINING ACT PUNISHABLE AS A CRIME.**

It is not an objection to the jurisdiction of a court of equity to grant an injunction to protect property rights that the act sought to be enjoined is also a violation of the criminal law, nor that it might properly be made the subject of criminal legislation which the legislature has not seen fit to provide.

Suits in equity by the Nashville, Chattanooga & St. Louis Railway Company against George E. McConnell and others, by the Louisville & Nashville Railway Company against W. S. Duckworth and others, and by the Western & Atlantic Railway Company against W. S. Duckworth and others. Heard on motions for preliminary injunctions on the pleadings and proofs.

W. L. Granbery, for Nashville, C. & St. L. Ry. Co. and Western & A. Ry. Co.

J. M. Dickinson and Smith & Maddin, for Louisville & N. Ry. Co.

J. H. Acklen, Pitts & Meeks, and Lellyett & Barr, for brokers.

CLARK, District Judge. A restraining order was heretofore allowed on the bills in these cases, and they are now before the court on application for preliminary injunctions upon the pleadings and proofs offered to support and oppose the motion. The cases are heard together for convenience, the proofs being treated as offered in each case, so far as applicable and competent. The remedy now sought, if granted, will constitute a new application of the injunctive process of the courts, so far as I am advised, and so far as precisely the facts of this case are concerned. I deem it therefore proper to state the case, and my views in respect thereto, with sufficient fullness that the ruling may be clearly understood.

The suits grow out of what is known as the "Tennessee Centennial and International Exposition," now being held at the city of Nashville, Tenn.; the time appointed for keeping open that Exposition being from May 1 to October 31, 1897. In order to aid in the success of this Exposition, and to widely extend its benefits to the public, the leading railroad companies of the country, after some difficulty, were induced to enter into an agreement to issue and sell during the period of said Exposition a special contract ticket, conveniently designated as the "Tennessee Centennial Ticket." This is sold as a round-trip ticket only, and at one-third of the regular price at which tickets are sold in the ordinary business of the railroads. So far as the provisions of the contract of transportation affect the matter now under consideration, it is sufficient to say that the contract between the carrier and the passenger is for a round trip, both to and from the Exposition; it being agreed that in consideration of the special reduced rate the ticket issued as evidence of the contract shall not be transferable, and shall become and be void in the hands of any third

party acquiring it in violation of the agreement. The original purchaser is required to sign this contract in the ticket issued, and is further required to identify him or her self before persons known as "validating agents," appointed for that purpose at the place of the Exposition. In short, the contract clearly and distinctly provides that all parts of the tickets shall be used only by the original purchaser, and that it shall be valid and good for transportation only in the hands of such purchaser. These provisions are very plain, and very well understood. That special ticket contracts of this kind, restricting the use thereof to the original purchaser, are valid contracts, has not been made a question in the case, and could not be, the authorities being uniform in sustaining such contracts as valid obligations. It is disclosed by the record in the cases that a considerable number of persons, known as "ticket brokers" or "ticket scalpers," are located in the city of Nashville, the place of the Exposition, and engaged in the business of buying and selling the return portion of these tickets, in violation of the contract, and it is to restrain further prosecution of this particular branch of the brokers' business that the bills in these cases are brought. Without going into elaborate detail, it is sufficient to say that it appears that all of the defendants are engaged in buying and selling these special-contract tickets. In conducting their business, many, if not most, of the defendants have persons employed for the purpose of boarding incoming trains at Nashville, and diligently working the passengers with a view to buying the return coupons of these tickets, and also for the purpose of selling, as far as may be done, to such passengers coupons for other points. It does not distinctly appear that others of the defendants go further than to conduct their business at their office, and to deal in these tickets as far as may be done by diligent work at the office directed to this class of tickets. Some of the scalpers in this business are known as "foreign brokers"; being persons who have come from other states and places to the city of Nashville for the purpose, presumably, of carrying on this business during the period of the Exposition only. The brokers permanently located at Nashville, and there when the Exposition opened, are called, for convenience, "local brokers," to distinguish them from these "foreign brokers." When these return coupons are purchased, in order to effect a sale thereof, and make them available to subsequent purchasers intending to use them in violation of the contract, it becomes necessary for the scalper or broker to agree with such persons to refund the money paid in the event the fraud is detected, and the ticket therefore cannot be used. It further becomes necessary, of course, for the person purchasing from the broker to go before the validating agents and declare that he is the same person originally purchasing and using such ticket in coming to the Exposition. It is not necessary to add, what is plainly indicated by the situation, that the person using or attempting to use the return coupon makes before the validating agent, solemnly, a deliberate misrepresentation, and practices upon the company, in the event the ticket is used, an obvious fraud. The ticket providing that it shall become void in the hands of any person other than the original purchaser, the ticket is, in law, worthless; and it is obvious

enough that the company is damaged and sustains loss to the extent of the full regular fare for the mileage over which each one of these fraudulent coupons is used. There is no process of reasoning, however strained, which can, even as a matter of form, conceal this practical fact, that the company is deliberately cheated out of the value of the regular fare of every mile of its line over which travel is made under color of one of these void papers. It is not necessary to do more than thus state the facts to show to any fair mind that this is clearly the case. It further appears from the record that the purchasers of these tickets from the brokers are carefully instructed by them as to the safest method of making a false identification, in claiming to be the original purchaser, and that in many instances the fraudulent purchaser is accompanied by the broker's agent, and aided in making effectual the imposition. The particular details as to the manner of doing this need not now be stated. In addition to this, it also appears from the mutilated ticket contracts themselves, as well as the testimony in the cases, that by means of pasting parts of different tickets together, by cutting out dates and amounts, and plugging in place thereof false dates and amounts, by taking out the signature of the original purchaser by the use of acids, and by other thoroughly objectionable methods, the most obvious frauds, not to say forgeries, are committed, in order to effectually handle these fraudulently purchased and fraudulently sold coupons. Indeed, the defendants' eminent counsel do not controvert the existence of these methods, and the subject is dismissed with the statement that there are abuses in all lines of business. It is due, just in this connection, as a part of the statement of the case, to say that not all of the defendants are actually engaged in these ruder features of doing business; and it may be justly said that, with one or two exceptions, the business of the local brokers is not conducted in these more offensive methods. It might be regarded as unkind to be more specific just here, by giving names. The fact does remain, however, that the defendants all admit squarely that they are engaged in the business of buying, selling, and causing purchasers to use, these void coupons, with the distinct knowledge and intention that they will use them; and the court finds no difficulty in affirming the existence of the further fact that they aid in accomplishing this result beyond merely buying and selling to purchasers.

The right to make and issue this special form of ticket, furnishing a reduced rate, and thereby aiding in a great public purpose such as that of an Exposition, is fully recognized both at common law and by legislation. It has often been decided by the courts that the use of one of these tickets in violation of the contract by a person other than the original purchaser is a fraud upon the common carrier. This is no longer a question. These Centennial tickets having been issued under an agreement between the railroad companies to recognize over their lines such tickets, by whatever common carrier issued, there can be no doubt that every company named in such tickets, and over whose lines these tickets call for transportation, is a party to the contract,—as much so as the initial carrier issuing the ticket,—and entitled to the full benefits and subject to the full

obligations of the contract, whatever the result of this may be. Whatever relief or redress, therefore, any particular common carrier concerned in one of these tickets may be entitled to at law or in equity is available to such carrier on tickets issued by other carriers as well as those issued by such particular carrier; and the damage sustained by such carrier is not confined to the tickets which it issues, but also extends to tickets to which it is a party in the sense above explained, and the damages which are resulting and may probably result to the carrier are to be estimated in this aspect of his right to protection in respect of both classes of tickets. It is not necessary, after having stated the facts at length, to say that it is perfectly apparent that practically these complainants are without any adequate redress at law for violation of these ticket contracts, and that for damages which they may sustain, if there is no remedy in equity, there is none whatever, in any just sense. Indeed, I do not understand the eminent counsel for the defendants to contend that the multitude of suits at law, in any form in which they might be technically maintained, would bring any substantial result to the complainants. On the contrary, it is perfectly apparent that it would only involve the companies in further loss, in the outlay necessary to meet large bills of cost against insolvent persons, to say nothing of other difficulties which are obvious enough. It may be reasonably supposed that one of these brokers will purchase and sell at the lowest limit 500 tickets during the Exposition, with the average loss to the carrier on each ticket of \$5. If 500 separate suits at law for breach of the contract in each ticket is the only mode of redress to the carrier, it requires no comment to show that here is a striking failure of justice. The injury is obviously irreparable. It may make this point more clear if a right understanding is had of what constitutes an irreparable injury. In *Wahle v. Reinbach*, 76 Ill. 322, the supreme court of Illinois approved a definition of these terms in the following language:

"By 'irreparable injury' is not meant such injury as is beyond the possibility of repair, or beyond possible compensation in damages, nor necessarily great injury or great damage, but that species of injury, whether great or small, that ought not to be submitted to on the one hand or inflicted on the other; and, because it is so large on the one hand, or so small on the other, is of such constant and frequent recurrence that no fair or reasonable redress can be had therefor in a court of law."

In *Parker v. Woolen Co.*, 2 Black, 551, Mr. Justice Swayne, discussing the subject of interference by a court of equity on the accepted ground of a multiplicity of suits, said:

"It will also give its aid to prevent oppressive and interminable litigation, or a multiplicity of suits, or where the injury is of such a nature that it cannot be adequately compensated by damages at law, or is such as, from its continuance or permanent mischief, must occasion a constantly recurring grievance, which cannot be prevented otherwise than by an injunction. *Mif. Eq. Pl.*, by Jeremy, 114, 145; *Jeremy, Eq. Jur.* 300; 1 *Dick*, 163; 16 *Ves.* 342; *Corporation of the City of New York v. Schermerhorn*, 6 *Johns. Ch.* 46; *Railroad Co. v. Archer*, 6 *Paige*, 83."

So, in *Warren Mills v. New Orleans Seed Co.*, 65 *Miss.* 391, 4 *South.* 298, the facts were that complainant was in the business of buying, collecting, and crushing cotton seed, and was the owner of several



thousand sacks, all of which were legibly branded, and were necessary to be used in his business. The course of business was to distribute these sacks along the railroad and public landings, where producers, finding them, would fill them and ship them to complainant. The defendants were engaged in the same business, and were in the habit of taking complainant's sacks, and using them for their own business and for their own purposes, and sometimes concealed the use of complainant's sacks by covering them with sacks of their own. Complainant had brought numerous actions of replevin to recover possession of his sacks, in which actions the defendants had given bond. Bill was brought upon the ground that the remedies available to complainant at law were inadequate. The bill was brought for an accounting, and for an injunction against any further use of complainant's sacks by the defendants. The bill was held good on demurrer, and the judgment of the court below affirmed on appeal. The supreme court of Mississippi said:

"The separate remedy at law for each of such trespasses would not be adequate to relieve the injured party from the expense, vexation, and oppression of numerous suits against the same wrongdoer in regard to the same subject-matter. The ends of justice require, in such case, that the whole wrong shall be arrested and concluded by a single proceeding. And such relief equity affords, and thereby fulfills its appropriate mission of supplying the deficiencies of legal remedies. Affirmed and remanded, with leave to appellants to answer within thirty days after the mandate of this court herein is filed in the court below."

It seems clear to me that the cases at bar come within the definitions thus given.

In *Lembeck v. Nye*, 47 Ohio St. 354, 24 N. E. 690, the supreme court of Ohio, in answering the objection that there was an adequate remedy at law, said:

"The agreed statement of facts shows that the defendant Nye is insolvent, and that the financial condition of Andrews is doubtful; but, aside from this, and were they both solvent and fully able to respond to any damages that might be recovered against them in actions of trespass, yet it is apparent from the whole record that such actions would not afford an adequate remedy, for the violations of the rights of the plaintiff in error in the past and those threatened in the future were and are, during certain seasons of the year, of daily, if not of hourly, occurrence, under the claim of a right to do so; besides, the injury resulting from each separate act would be trifling, and the damages recoverable therefor scarcely equal to a tithe of the expense necessary to prosecute separate actions therefor."

What is thus said is fully applicable to the case in hand; and, to the same effect, see *Boyce v. Grundy*, 3 Pet. 210; *Wylie v. Coxe*, 15 How. 415. Indeed, as has been, in substance, said in other cases, the very fact that a right has been violated, and that this violation is constantly going on, and that a court of law cannot, in damages, compensate the injury or stop the wrong, furnishes the best possible reason for interference by court of equity; and the fact that an actual injury resulting from the violation of a right is small, and the interest to be affected by an injunction large, is not to weigh against the interposition of preventive power in equity, when it is clear that on one hand a right is violated, and on the other a wrong committed. *Sanford v. Poe*, 37 U. S. App. 378, 16 C. C. A. 305, and 69 Fed. 546, furnishes an illustration of the true doctrine, and an example of its practical application. Under the

scheme of taxation provided by an act of the Ohio legislature known as the "Nichols Law," the board of tax appraisers, after determining the amount of taxes, certified taxes upon the express companies to the auditors of the counties in the state,—87 in number. The express companies objected to this statute as invalid, and the question was whether that controversy might be presented and determined in one suit by injunction against the board of tax appraisers, or whether the express companies must wait until the amounts were certified to the auditors, which would give rise to a separate controversy with each county. It was held that, for the purpose of avoiding a multiplicity of suits, an injunction bill would lie against the board, if the assessments made were, for any reason, illegal. Giving the opinion of the court, Judge Lurton said:

"If the assessments complained of be illegal for any reason, the jurisdiction of a court of equity to enjoin the defendants from certifying them to the several county auditors of the state seems to be clear, upon the ground that a multiplicity of suits would result unless the assessment should be enjoined before the assessors should certify to each county auditor the proportion of the gross assessments collectible by each county auditor under the scheme of apportionment among the counties provided by the act of April 27, 1893. To require the complainants to pay each of the numerous county auditors, and then to sue to recover, or to enjoin each, would be most oppressive. We think, therefore, that the jurisdiction asserted in the bill, of avoiding a multiplicity of suits, was a sufficient ground to support the original bill, as well as the bills subsequently filed to enjoin the tax of 1894, assessed after the jurisdiction in the original case had attached. *Cummings v. Bank*, 101 U. S. 153, 157; *State Railway Tax Cases*, 92 U. S. 575; *Express Co. v. Seibert*, 142 U. S. 339, 348, 12 Sup. Ct. 250; *Shelton v. Platt*, 139 U. S. 591, 599, 11 Sup. Ct. 646; *Marshall v. Holmes*, 141 U. S. 589, 12 Sup. Ct. 52; *Express Co. v. Poe*, 61 Fed. 470."

It is not controverted, as I understand the line of argument, and could not be, I think, that the original purchaser, the ticket broker, and the subsequent purchaser who uses one of these tickets, are severally and jointly liable in an action at law to any or all of these companies in respect to a fraudulent ticket so used over the line of railway of such company or companies. If there had previously existed any doubt upon this subject, it has been put at rest by recent cases of the class to which belong the now leading case of *Angle v. Railway Co.*, 151 U. S. 1, 14 Sup. Ct. 240. It is said that the ground on which the liability of a third party for interfering with a contract between others was placed in that case was that the interference was malicious. It is clear, however, that the only motive for interference by the third party in that case, as well as in other cases cited, was the desire to make a profit to the injury of one of the parties to the contract. There was no malice in the case, beyond this desire to make an unlawful gain to the detriment of one of the parties to the contract; and the case, in principle, clearly controls the question of legal liability. The reasoning in the case is in other respects applicable here. It is, however, unnecessary to further pursue this point of the liability of each one of the parties to the violation of this contract in an action at law by any one of the companies injured. I think there is no doubt of such liability. The remedy at law, however, being obviously wholly inadequate, it only remains to determine whether the case is one in which a court of equity can furnish relief

against the manifest wrong; and the case, as thus presented on the equity side of this court, invoking equitable jurisdiction and equitable relief, presents a question much broader in its limits and in the measure of relief than any mere technical question of the liability in an action at law for the violation of these special-ticket contracts. It is true that the larger question and the full relief in equity depend, in a sense, upon the narrower definition of the right, and the limited form of redress at law. But this is no more than what happens in any case where the broader right and full relief in one suit in equity are being contrasted with the right and result of a multiplicity of separate suits at law. In the action at law, form is regarded, while in equity substance controls. The question, as fairly presented in these bills, is that of the protection of the business of the complainants being carried on during this Exposition in aid thereof, and in the form of these Exposition tickets. The wrong of which the complainants are complaining is not limited to the proposition that any particular one or more of these tickets has been violated, giving rise thereby to legal liability. The position here is that the business of the complainants is being seriously damaged, and will continue to be during the period of this Exposition. This loss, it is alleged, is being suffered by these complainants by repeated and continued purchases and use by these defendants of these tickets, and the question involves the entire loss which the complainants may sustain by the fraudulent use of such tickets from the beginning to the end of the Exposition. It is the protection of the whole of this form of business from the entire loss already sustained, and likely to be sustained between now and the end of the Exposition period. I repeat that it is not a question of enforcing a contract, or of recovery of damages for a breach, but it is protection of the business of the complainants from loss suffered and to be suffered by the frauds committed and likely to be committed against these companies by means of, and through the instrumentality of, these void tickets, and it is in these broader limits that the question is here considered.

A preliminary question is made on the jurisdiction of this court in respect of the amount or matter in controversy. Although this question is not first presented in argument, it must first be determined in ruling on the cases; for, if this court is without jurisdiction, it is not within its province to determine the other questions raised. The contention is that these bills are substantially suits upon the ticket contracts, to recover damages for a violation thereof, or for specific execution thereof, and that the right of action is separate upon each ticket, and that such rights or claims cannot be joined for the purpose of making up the jurisdictional amount, as against each one of the defendants, and, further, that the claims against the separate defendants cannot be joined together in this suit so as to make an amount that gives jurisdiction. It is agreed, in order to save a larger accumulation of costs, that, if the court entertains the opinion that there is jurisdiction against each defendant in a separate suit, no objection will be urged against entertaining suits against the defendants jointly. From what has been said, it will readily be seen that in my opinion these are in no just sense suits upon the contract, nor for

specific performance, but are suits to protect the business of the complainants against the irreparable mischief being suffered by reason of the fraudulent use and abuse of these ticket contracts; and the amount or value of the matter in controversy is not the damage that might be specifically recovered in a suit upon any one or more of these contracts, but is the protection furnished to the plaintiffs, and the loss prevented by the fraudulent use of any and all of these void papers. It is the value of the whole object of the suit to the complainant which determines the amount in controversy. In *Railroad Co. v. Ward*, 2 Black, 485, bill was brought to abate a public nuisance; and it was held that the true test of jurisdiction as to the amount was the value of the object to be gained by the bill, which object was the removal of the nuisance complained of. So, also, in *Railway Co. v. Kuteman*, 4 C. C. A. 508, 54 Fed. 552, the suit was by a railroad company for an injunction to restrain a shipper from prosecuting in the state courts a multiplicity of suits for overcharge in freight, the question being over the right of the company to maintain a schedule rate under which the charges were made; and the court held that the true test of the jurisdictional amount was the value of the right to maintain the rate, and not the particular sums involved in the separate suits. The exact language of the court is:

"In a suit for an injunction the amount in dispute is the value of the object to be gained by the bill. *Fost. Fed. Prac.* § 16. An injunction may be of much greater value to the complainant than the amount in controversy in cases of dispute which have already arisen. *Symonds v. Greene*, 28 Fed. 834; *Whitman v. Hubbell*, 30 Fed. 81. The maintenance of its rates is the real subject of dispute, and the object of the bill and the value of this object must be considered. *Railroad Co. v. Ward*, 2 Black, 485. This value not being liquidated or fixed by law, the alleged value, especially on demurrer to the bill, must govern."

In *Smith v. Bivens*, 56 Fed. 352, the bill for injunction was by the owner of a large body of land, valuable only for its pasturage rights and privileges, to protect that right from use by cattle and stock owners, neighbors of the land of complainant, under authority of an act of the legislature of South Carolina changing the previous law, which required owners of cattle and stock to keep them fenced in so as to exempt plaintiff's land, with other lands, from the operation of the act. The court held that the true test of the jurisdiction was the value of the entire pasturage right of the complainant which was to be protected, and not the amount as between the complainant and any one of the cattle owners proposing to use this right without compensation. Judge Simonton observed:

"The case comes within *Railroad Co. v. Ward*, 2 Black, 492; or as it is stated in *Railway Co. v. Kuteman*, 4 C. C. A. 503, 54 Fed. 552, in a suit for an injunction the amount in dispute is the value of the object to be gained by the bill."

After disposing of other questions, the learned judge, in answer to the objection to equity jurisdiction, said:

"With regard to the general equity jurisdiction there can be less question. By the operation of the act the complainant is exposed constantly to trespasses upon his land, and to the use and destruction of his property. Were he limited to relief at law, he would be involved constantly in a multiplicity of suits, and harassed by endless and unsatisfactory litigation. As long as the act remains of force this cannot be prevented. The owners of cattle are not required to fence

them in, and in despite of the efforts of complainant, and, we may say, even against the wishes of the cattle owners, these trespasses will go on."

In *Scott v. Donald*, 165 U. S. 107, 17 Sup. Ct. 262, the bill was filed in equity by the plaintiff against various persons claiming to act as constables of the state of South Carolina, under what was known as the "Dispensary Law." An injunction was sought to protect the alleged right of the plaintiff to import, for his use, ales, wines, and liquors, the products of other states and foreign countries. It was alleged in the bill that on several occasions packages of such wines and liquors belonging to complainant had been seized and carried away, and that complainant had instituted suits at law, and that notwithstanding such suits the constables of South Carolina continued to seize and carry away packages belonging to the complainant, and that protection of the complainant's right by actions at law involved, and would involve, a multiplicity of suits against the constables, and that the right to import wines, liquors, and other spirits was of the money value of upwards of \$2,000, and also that articles to be imported in the future by the complainant from time to time were threatened to be seized by the constables, and that the value of these would exceed the sum of \$2,000. A preliminary injunction was allowed. A number of defenses were set up, and among them the plea that the bill presented no cause upon which the jurisdiction of the court of equity could be founded, because there was a plain and adequate remedy at law for the injuries complained of. On final hearing the preliminary injunction was made perpetual. The case then went on appeal before the supreme court of the United States. The case made by the bill was stated by Mr. Justice Shiras, speaking for the court, as follows:

"The bill prays for an injunction on the several grounds of irreparable damage; that the acts complained of prevent the exercise by the complainant of his right to import, without molestation, lawful commodities, the products of other states; to avoid multiplicity of suits; and the want of adequate remedies at law."

There was a stipulation in the case in which it was agreed that the right of importation of ales, wines, and liquors was of the value of \$2,000 and upwards, and that the difference in the price to the consumer, like the complainant, of such liquors bought out of the state dispensary of South Carolina, and bought outside of the state, was about 50 to 75 per cent. in favor of imported liquors. The court, in regard to this, said:

"Such statements sufficiently concede that the pecuniary value of plaintiff's rights in controversy exceeds the value of two thousand dollars. Nor can it be reasonably claimed that the plaintiff must postpone his application to the circuit court, as a court of equity, until his property to an amount exceeding in value two thousand dollars has been actually seized and confiscated, and when the preventive remedy by injunction would be of no avail."

This case is applicable as to jurisdiction and the new use of the writ of injunction. The loss likely to result in the future enters into the value of the object of the suit for preventive relief. Close analogy is furnished in trade-mark and patent cases. In the case of a trade-mark, it is not the label which is protected by injunction, and which is of substantial value, but it is the business carried

on under the label which is the true test of value. Nor is the mere grant of letters patent any more than proper evidence of the exclusive right to make and sell the thing protected by the letters patent. This exclusive right is the real test of value. Other cases might be cited to the same effect, but those referred to sufficiently indicate that the value of the object to be gained by these bills is the protection of the Centennial business of the plaintiffs against frauds committed and threatened with resulting loss to the plaintiffs. Such being the true view, I am of opinion that the value of the matter in controversy is sufficient to make a case of jurisdiction against each one of these defendants. All damages suffered and likely to be suffered are estimated. Indeed, the answers of some of the defendants make admissions which go far to make out a case of jurisdiction. Moreover, I think the defendants may be properly joined in one suit. Plaintiffs' business is the subject-matter in each bill, and the right claimed is exactly the same against all the defendants. The injury complained of is the same, and is being inflicted by defendants in the same method and at the same time. 1 Pom. Eq. Jur. § 274; *De Forest v. Thompson*, 40 Fed. 378; 2 *Daniell*, Ch. Prac. (6th Ed.) marg. p. 1683.

The second objection to the exercise of the injunctive process is what counsel in argument calls a "fundamental objection," based upon the fact that it is a novel application of the writ of injunction, not sanctioned by previous precedents. It is said that although the general business of the ticket broker has been suppressed by legislation in a number of states, and the interstate commerce commission has for some years urged congress to enact similar repressive legislation in respect to interstate commerce, it has never been suggested that it was within the power of the courts to furnish protection against wrongs perpetrated in this business. I have carefully considered this objection, and also the full bearing of the question, not only as affecting the private rights here involved, but as affecting the still larger public interest. It has been often judicially recognized that the use of the injunctive remedy is subject to the regulated discretion of the court, and that the court may properly take into account the public bearing of its action, and whether the result will affect the public favorably or injuriously; and the soundness of this proposition is implied in the argument of defendants' counsel, in which strenuous effort is made to show that the business of the ticket scalper is beneficial, to an extent, at least, to the public. It is perhaps just to say that this argument was directed more to sustain the general business of the broker than this particular method of doing business in regard to Centennial tickets, as brought to light in this record; for it will certainly never be seriously maintained before a tribunal or legislative body that the continuance of a fraudulent practice, thoroughly demoralizing in all its tendencies, is demanded by the public good, or what is called "public policy." It must be observed in this connection that the question now considered relates alone to the broker's method of dealing in these special Centennial Exposition tickets. I am not now concerned with the general business of the broker. Keeping this fact in mind will

serve to bring the discussion of the question, as well as its bearing, within narrower limits.

I return now to the argument based on the ground that this is a novel application of the injunction, not sanctioned by previous precedent directly in point. This argument, carried to its full logical result, would have prevented the enunciation of the first equitable principle and the establishment of the first equitable precedent for the preventive remedy. It is, indeed, an age-worn argument. It has been employed from the beginning of equity jurisprudence as a part of the objection to the extension of the equitable remedy to new conditions and new cases. This is the well-known history of the subject. Of course, this contention has been overruled, and precedent after precedent established from time to time to meet new conditions and to do full justice, until the argument has long since lost most of its force, although it is still maintained in form. It has been in answer to arguments like this that the great chancellors have stated time and again that they decline to lay down any definite rules as to when a court of equity will interpose by injunction. In fact, to do so would at once put a limit to all progress in equitable jurisprudence. The most that has been said is that in the use of the writ of injunction the court exercises sound discretion regulated by analogy; by what would be manifestly just in view of all the existing conditions, and requiring as a condition that there is no adequate remedy at law. Beyond this the courts have not gone, in the way of placing a limit on their power. It must be recognized that jurisprudence, both legal and equitable, both in respect of the right and the remedy, is progressive, that it is expansive, and that, while its great principles remain good for one time as well as another, these principles must be extended to new conditions, and this involves an extension of the remedy, and often a change in the form of the remedy. Making the injunction mandatory as well as preventive is an example of such a change. Any system of jurisprudence coming short of this would fail to meet the demands of civilization. A similar objection that novel use was being made of the writ of injunction was pressed in the case of Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co., 54 Fed. 751, and was answered by the court as follows:

"Every just order or rule known to equity courts was born of some emergency, to meet some new conditions, and was, therefore, in its time, without a precedent. If based on sound principles, and beneficent results follow their enforcement, affording necessary relief to the one party without imposing illegal burdens on the other, new remedies and unprecedented orders are not unwelcome aids to the chancellor to meet the constantly varying demands for equitable relief. Mr. Justice Brewer, sitting in the circuit court for Nebraska, said: 'I believe most thoroughly that the powers of a court of equity are as vast, and its processes and procedure as elastic, as all the changing emergencies of increasingly complex business relations and the protection of rights can demand.' Mr. Justice Blatchford, speaking for the supreme court in *Joy v. St. Louis*, 138 U. S. 1, 11 Sup. Ct. 243, said: 'It is one of the most useful functions of a court of equity that its methods of procedure are capable of being made such as to accommodate themselves to the development of the interests of the public in the progress of trade and traffic by new methods of intercourse and transportation.' The spirit of these decisions has controlled this court in its action in this case."

This objection is substantially the same as was urged against the power to employ the writ of injunction in the Strike Cases, out of which arose the contempt proceeding in *U. S. v. Debs*, 64 Fed. 724. The objection was overruled. The jurisdiction of the court, and the rightful exercise of the power to enjoin, were affirmed in this case to the fullest extent. In *re Debs*, 158 U. S. 565, 15 Sup. Ct. 900. The argument of Mr. Trumbull, counsel for the defense, against the jurisdiction of the court, was based in part upon the ground that the proceeding was novel and extraordinary, and the case one over which the national government had not before, or but seldom, exercised jurisdiction, and, further, that the case was outside of the jurisdiction of a court of equity, and the injunction, therefore, void, and a violation of the same could not be punished in a contempt proceeding. It was further objected that the bill in the original case was filed in the name of the United States, which was itself new. Answering the objection that the suit was brought by the government, Mr. Justice Brewer, speaking for the court, said:

"It is said that seldom have the courts assumed jurisdiction to restrain by injunction in suits brought by the government, either state or national, obstructions to highways, either artificial or natural. This is undoubtedly true, but the reason is that the necessity for such interference has only been occasional. Ordinarily the local authorities have taken full control over the matter, and by indictment for misdemeanor, or in some kindred way, have secured the removal of the obstruction and the cessation of the nuisance."

And referring to the point made that the proceeding was extraordinary and new in the exercise of national jurisdiction, it was observed:

"Constitutional provisionals do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation. The law of the common carrier is the same to-day as when transportation on land was by coach and wagon, and on water by canal boat and sailing vessel; yet in its actual operation it touches and regulates transportation by modes then unknown,—the railroad train and the steamship. Just so it is with the grant to the national government of power over interstate commerce. The constitution has not changed. The power is the same. But it operates to-day upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop."

The court, disposing of the objection that the facts constituted a criminal offense, and that the case was one proper for criminal procedure, and not within the jurisdiction of equity, said:

"Again, it is objected that it is outside of the jurisdiction of a court of equity to enjoin the commission of crimes. This, as a general proposition, is unquestioned. A chancellor has no criminal jurisdiction. Something more than the threatened commission of an offense against the laws of the land is necessary to call into exercise the injunctive powers of the court. There must be some interferences, actual or threatened, with property or rights of a pecuniary nature; but when such interferences appear the jurisdiction of a court of equity arises, and is not destroyed by the fact that they are accompanied by, or are themselves, violations of the criminal law. Thus, in *Cranford v. Tyrrell*, 128 N. Y. 341, 28 N. E. 514, an injunction to restrain the defendant from keeping a house of ill fame was sustained, the court saying on page 344, 128 N. Y., and page 515, 28 N. E.: 'That the perpetrator of the nuisance is amenable to the provisions and penalties of the criminal law is not an answer to an action against him by a private person to recover for injury sustained, and for an injunction against the continued use of his premises in such a manner.' And in *Port of Mobile v.*



Louisville & N. R. Co., 84 Ala. 115, 126, 4 South. 106, is a similar declaration in these words: "The mere fact that an act is criminal does not divest the jurisdiction of equity to prevent it by injunction, if it be also a violation of property rights, and the party aggrieved has no other adequate remedy for the prevention of the irreparable injury which will result from the failure or inability of a court of law to redress such rights."

So, in *Shoe Co. v. Saxey*, 131 Mo. 212, 32 S. W. 1106, the supreme court of Missouri held that a court of equity might interfere by injunction to prevent persons from attempting, by intimidation, threats, or other unlawful means, to force employes to quit work and join a strike, and that a court of equity might enjoin acts threatening irreparable injury to property rights, notwithstanding such acts were also a violation of the criminal law. *Klein v. Livingston Club*, 177 Pa. St. 224, 35 Atl. 606, *Davis v. Zimmerman* (Sup.) 36 N. Y. Supp. 303, and *Elder v. Whitesides*, 72 Fed. 724, are in accord.

At this point I wish to make some observations upon the condition of things that I am just now dealing with. Here is a great international exposition,—an exposition of incalculable interest and benefit to the public. It has come to be one of the greatest institutions of our time. It is a sure and successful method of wide dissemination of practical knowledge to all the people. It furnishes a ready and entertaining means whereby the citizens of the state and of the Union may learn, in the way of an object lesson, something of the progress of a great country, and its best results. It stimulates pride, and encourages large effort and the highest appreciation of one's own country. Recognizing the public interest involved in the success of the Exposition, it has received liberal appropriation by the national and state legislatures and by the counties and citizens of the state. The great public benefits are so manifest that the court of last resort in the state has judicially declared that it is a public and county purpose for which an appropriation may be made by a county, although the Exposition is to be celebrated outside of the territorial limits of the county making the appropriation. *Shelby Co. v. Tennessee Centennial Exposition Co.*, 96 Tenn. 653, 36 S. W. 694. Judge Caldwell, speaking for the supreme court of the state, pointed out the great public advantages of the Exposition in fitting terms, as follows:

"In view of the fact that the event to be celebrated is one of no less note and importance than the birth of a great state into the American Union, and of the further fact that the Exposition is reasonably expected to attract great and favorable attention throughout the country, and be participated in and largely attended by intelligent and enterprising citizens of numerous other states, at least, it is beyond plausible debate that such an exhibition is well calculated to advance the material interests and promote the general welfare of the people of the country making it. It will excite industry, thrift, development, and worthy emulation in different avenues of commerce, agriculture, manufacture, art, and education within the county, thereby tending to the permanent betterment and prosperity of her whole people. In short, it will encourage progress, and progress will insure increased intelligence, wealth, and happiness for her people, individually and collectively. Undenably, that which promotes such an object and facilitates such a result in any county is, to that county, a county purpose, in the truest sense."

Vast sums of money have been invested in this great public enterprise. There is involved in the success of the Exposition not only the sums of money thus put into it, but the still larger indirect bene-

fits which result in the way above referred to. It is a thing in which the citizens of the state in general, and of Davidson county and the city of Nashville in particular, take just pride. It is not to be denied that the maintenance of the favorably low rate of travel enormously increases the number of people who attend the Exposition, and thereby insures its success. It is disclosed by this record, and not controverted, that the flagrant abuses to which this special Centennial rate is being subjected, with the resulting loss to the carrier companies, have caused the withdrawal of the Centennial ticket low rate by the association of railroads known as the "Trunk-Line Association," comprising all of the leading railroads east of Washington, D. C., and that such carriers refuse to restore such rate because of the loss entailed by this business of the scalpers at Nashville. It is perfectly obvious that, if every carrier in the country should withdraw its low-rate Exposition tickets, a full justification for such course of conduct is found in the facts in this record. It is equally certain that owners of lines of railway remotely situated from the Exposition, and without the local interest which controls the management of other roads, could hardly be supposed to hold the public importance of the Exposition in sufficient appreciation to submit to the great wrong and the great loss which they are sustaining. There is good ground, therefore, for the apprehension that it is now a vital question whether the Exposition shall be the success hoped for, or whether it shall go down in defeat, with state pride humiliated, simply in order that the particular practice complained of may continue. I refer to these public considerations because, as before stated, they are matters which justly appeal to the discretion of the court in determining what action shall be taken. Are the great public purposes of this Exposition to be thus put in the balance and weighed against this particular branch of the ticket scalpers' trade? It is to be just here repeated that this particular business, in its conception and execution, is, from first to last, an obvious fraud, open and obtrusive, and without a single redeeming feature, so far as I can see. Is it to be declared that we are under a system of jurisprudence which furnishes no remedy for a purely civil wrong such as this? Are the courts of the country powerless to deal with the situation, and must they make the humiliating confession that, great as this wrong is, we have no civil remedy to which appeal may be made for protection? I am certainly unwilling to accede to a proposition such as this. It is further urged that the evil is one which can only be met by appropriate legislation,—by the enactment of a criminal statute suppressing the business through the strong arm of the criminal law. In this view I do not concur. Many acts constitute at the same time a public wrong and the invasion of a private right, and the fact that adequate punishment may be provided or may not be provided for a public wrong done is not in the way of the court furnishing redress for a civil wrong also inflicted in the same act. Indeed, this same objection was urged in the Debs Case, just as it is by defendants' eminent counsel here, and the argument was met by the court in language as follows:

"The law is full of instances in which the same act may give rise to a civil action and a criminal prosecution. An assault with intent to kill may be punished

criminally, under an indictment therefor, or will support a civil action for damages, and the same is true of all other offenses which cause injury to person or property. In such cases the jurisdiction of the civil court is invoked, not to enforce the criminal law and punish the wrongdoer, but to compensate the injured party for the damages which he or his property has suffered, and it is no defense to the civil action that the same act by the defendant exposes him also to indictment and punishment in a court of criminal jurisdiction. So here the acts of the defendants may or may not have been violations of the criminal law. If they were, that matter is for inquiry in other proceedings. The complaint made against them in this is of disobedience to an order of a civil court made for the protection of property and the security of rights. If any criminal prosecution be brought against them for the criminal offenses alleged in the bill of complaint, of derailing and wrecking engines and trains, assaulting and disabling employes of the railroad companies, it will be no defense to such prosecution that they disobeyed the orders of injunction served upon them, and have been punished for such disobedience."

The case simply calls for an application of the injunctive process to prevent complainants' business from fraud and obstruction, and a business is just as much the subject of suit, with a right to protection, as ordinary forms of tangible real and personal property. Whatever doubt may have been expressed at any time, the cases are now agreed upon this proposition. It needs no extended statement to make it manifest that the right to carry on a business without interference, without fraud, and without obstruction, is one of the most valuable of all rights. Indeed, in the commercial world the right of greatest value is the right to freely carry on a lawful business without unlawful interruption. It is a substantial right, which may be protected by any remedy known to the court as fully as a constitutional or statutory right, and as fully as a right in the ordinary forms of property. In *Scott v. Donald*, 165 U. S. 108, 17 Sup. Ct. 262, already referred to, it was held by the supreme court of the United States that the constitutional right of the complainant to import for his use, from time to time, ale, wines, and liquors, the products of other states, might be protected by injunction from repeated invasion by seizure of goods under color of an unconstitutional statute of the state of South Carolina. The ruling was based on the ground of avoiding a multiplicity of suits, and the want of adequate remedy at law. In *Arthur v. Oakes*, 11 C. C. A. 209, 63 Fed. 310, it was held (Mr. Justice Harlan delivering the opinion of the court) that, while a contract for personal services could not be enforced by injunction, nevertheless, when employes quitting the service of their employer combine to obstruct the business of such employer by force, threats, or other unlawful methods, such as inducing other employes to quit, and deterring others from taking the places of those leaving, such an injury might be prevented by injunction, and the right to carry on the business without molestation protected. This, too, would be a novel use of the injunction. In *Davis v. Zimmerman*, already referred to, it was expressly adjudged that the business of a person, if lawfully conducted, is a property right, and may be protected by injunction from injury or destruction. In a full note to the case of *Arthur v. Oakes*, as reported in 10 Am. Ry. & Corp. Rep. 443 (s. c., 63 Fed. 310), cases are cited in which the same principle is applied to railroads, carriers by water, manufacturers, producers, and others. All these lines of business

are protected by injunction when the ordinary remedies are inadequate. Other cases are cited at the bar, but I do not deem it necessary to further accumulate authorities upon this point. I may here make reference to the case of *Lumley v. Wagner*, 6 Eng. Ruling Cas. 652. A contract had been made by a lady, in writing, with the plaintiff, upon proper consideration, to sing and perform at his theater for a specified period, and that during her engagement with the plaintiff she would not sing elsewhere without his license in writing. Afterwards a contract was made to sing at a different theater during the same period specified in her engagement with the plaintiff. Upon bill by the plaintiff praying that the defendant might be restrained from singing and performing elsewhere than at his theater during the period specified, the court granted an injunction accordingly. The court, on motion to dissolve, admitted that a contract for personal services could not be directly executed, but it held that it was entirely within the power of the court to prevent by injunction a violation of the contract by singing at another theater. The court did not doubt its power to prevent her from violating her contract by singing at the other theater. This is known as negative enforcement of contract by injunction. In referring to the ground on which the court allowed the injunction, the lord chancellor said:

"Let us see for a moment what is the principle of the jurisdiction of the court. That principle is to bind men's consciences to a fair and liberal performance of their agreements. I have always thought you may attribute a great deal of the right feeling and fair dealing that exists between Englishmen to the exercise of this jurisdiction. Men are not suffered by the law of this country to depart from their contracts at their pleasure. It does not leave the party with whom the contract has been broken to the mere chance of what a jury may give in the shape of damages, but it enforces, where it can, the literal performance of the contract; and this, I believe, has mainly tended to produce the good faith that exists to a greater extent in this country than in many others. Although the jurisdiction of the court is not to be extended, a judge would desert his duty if he did not act up to the rule which predecessors have laid down as the proper exercise of a most valuable and wholesome jurisdiction. Where is the mischief in this case of exercising that jurisdiction? It is objected that, if I refuse this application, I exclude this lady from performing at Covent Garden, when I cannot compel her to perform at the Queen's Theater. I cannot compel her to perform, of course. That is a jurisdiction that the court does not possess, and it is very proper that it should not possess that jurisdiction; but what cause of complaint is it that I should prevent her from doing an act which may compel her to do what she ought to do?"

There is contained in this statement of the lord chancellor a great truth, worthy to become the subject of much thought. The fact that the "right feeling and fair dealing that exists between Englishmen" is in a large measure due to the fact that the English courts vigorously and promptly enforce the law, execute proper contracts, and restrain lawlessness, is a truth of wide application. Just as the courts of any country uphold the law and repress fraud and wrong, just to that extent will there exist "right feeling and fair dealing," confidence in the courts, and respect for lawful authority. In regard to a criminal statute, it is to be remarked that, if it existed, it could furnish no substantial redress for a civil wrong, but only for a public wrong, except such protection as might ultimately result from a total suppression of the business. It may be that in respect of a given pro-

tice a criminal enactment is desirable as a remedy for the public wrong, and to protect the public interest. This is within the legislative province. But when by the same practice a private civil injury is being done this is a subject for the judicial department, by appeal to the courts; and the courts cannot justifiably desert their duty, imposed by constitutional mandate, to administer justice. Whether or not a criminal enactment, if put upon the statute book, would be adequate to suppress the evil, would depend upon whether a criminal court should promptly and fairly avail itself of the new legislative remedy thus placed in its hands. Ours is a government of co-ordinate departments, each department exercising power constitutionally defined and limited. It cannot, compatibly with a government thus constructed, be claimed that the legislature shall be called upon to meet by criminal enactment a question of private wrong, growing out of the new conditions incident to constant changes in business relations and methods. The criminal statute could only operate prospectively, and there would be a complete failure of justice as to all past private injury, however great or shocking. Moreover, as before suggested, what remedy would the criminal law furnish for the private wrong? This question was answered by the court in *Shoe Co. v. Saxey*, cited above, in these words:

"Equity will not interfere when there is an adequate remedy at law. But what remedy does the law afford that would be adequate to the plaintiffs' injury? How would their damages be estimated? How compensated? The defendants' learned counsel cites us to the criminal statute. But how will that remedy the plaintiffs' injury? A criminal prosecution does not propose to remedy a private wrong. And, even if there was a statute giving a legal remedy to plaintiff, it would not oust the equity jurisdiction. The legal remedy that closes the door of a court of equity is a common-law remedy. Where equity had jurisdiction because the common law affords no adequate remedy, that jurisdiction is not affected by a statute providing a legal remedy. What a humiliating thought it would be if these defendants were really attempting to do what the amended petition charges, and what their demurrer confesses! that is, to destroy the business of these plaintiffs, and to force the eight or nine hundred men, women, boys, and girls who are earning their livings in the plaintiffs' employ to quit their work against their will; and yet there is no law in the land to protect them."

So, aside from other questions in the case, I have no difficulty about the right to employ the writ, so far as the novelty of this application is concerned, which is supposed to be a fundamental objection. Under our system of jurisprudence, the theory is that at any moment of time there is a sufficient remedy, legal or equitable, for every civil, private wrong; and the courts are under a duty, by proper process, to make this theory good in fact.

Another point made is that this special-ticket contract, providing as it does for forfeiture of all rights under the ticket by transfer thereof, has in that way provided a remedy for a breach of such contract, and that this is exclusive of all other forms of relief. It is sufficient to repeat what has already been said, to wit, that these are suits to protect the plaintiffs' business, and in no sense suits upon these ticket contracts, to enforce the same, or to recover damages for breach thereof. These suits are to restrain these defendants from the continued and repeated use of these contracts as instruments and means whereby to commit frauds upon complainants' business. They are

not suits between the parties to these contracts, but against third parties, to restrain the fraudulent use of the contracts as means of committing such wrong. This contention is therefore inapplicable, and this question does not call for judgment by the court. The defendants' counsel, not as a separate point, but in aid of other objections to the relief asked, says that the ticket broker's business is, to an extent, at least, beneficial to the public, and, to an extent, contributes to the success of the Exposition. It was not made entirely clear to the court whether this suggestion related to the general business of the ticket broker, or to that particular business which is now under examination, but the illustration put may speak for itself in this respect. It is said that a person at Chicago, desiring to go East, but not specially intending to come to the Exposition, may be induced to do so if he can buy a low-rate Centennial ticket from Chicago to Nashville and return, and, coming by way of Nashville, sell to the broker the return coupon, and buy at a like cheap rate the return coupon on an Eastern-sold ticket, and in this way go to New York on a low rate, taking in the Exposition on the way. Whether it is best that all of the parties to such a transaction, as a matter of public policy, should be thus permitted to violate a contract and practice an imposition is a question which may be safely left for answer before those who are thoughtful of the deeper consequences involved. It is further evident, in the very nature of the case, that, where one person visits the Exposition in this manner and under such circumstances, hundreds attend for the sole purpose of the Exposition and its benefits; and the number of those who may be induced to come to the Exposition in the way suggested is as one to hundreds, and is relatively wholly insignificant in its importance to the question of much larger importance, of maintaining open to all persons this favorably low-rate ticket designed to promote the success of the Exposition. The use of these tickets in the method hereinbefore pointed out is demoralizing, and subversive of public good and of public morals, and at the same time a private, civil injury; and this, I think, is made sufficiently plain by what has been said. Just before passing away from this point, it may not be inappropriate, in view of the suggestion made, to remark that the question of whether the ticket scalpers' business is one of public good is not a new question, and the view I take of this particular branch which is now under consideration is by no means a new view of the same subject. The highest authorities in the country, both legislative and judicial, have examined this business, and have pronounced judgment upon it. The Interstate Commerce Commission, in its annual report for 1896, after a study of the subject extending over some years, referred to ticket brokerage in terms as follows:

"In our last annual report we took occasion to comment with some severity upon the unlawful practices of a considerable class of persons who engage in the unauthorized sale of interstate passenger tickets, and who are commonly referred to by the expressive name of 'scalpers.' What was then said is, in part, as follows: We deem it a special duty to call your attention to the persistent survival and continued increase of the illegitimate business known as 'ticket brokerage' or 'scalping.' So far from showing any signs of diminution, it appears to be steadily enlarging in scope and volume. It is impossible to give any reliable estimate of the number of persons who take advantage of this means of procuring

unlawful transportation, but it is evident that a considerable percentage of railroad passenger travel is accomplished through the medium of tickets bought at reduced rates of so-called 'brokers.' In every city, and in many of the smaller towns, offices are to be found whose proprietors sell railroad tickets to very many points at much less than the published tariffs. The streets are placarded with alluring advertisements, incoming and outgoing travelers are openly solicited, while in hotels and other public places, and not infrequently in regular railroad stations, the runners and agents of these clandestine dealers invoke participation in transportation bargains, which upon their face, to give them no harsher term, are an obvious evasion of the law. This disregard of law to which we thus referred has apparently continued during the current year, and assumed still greater and more serious proportions. This illegitimate traffic has become a positive scandal, and decisive measures should be taken to put an end to these illegal transactions. The remedy for this evil is easily found. A simple enactment would be sufficient, in our judgment, to prevent these abuses and effectually check this species of misconduct. We therefore recommend that it be made a penal offense for any person to engage in the business of selling interstate passenger tickets unless he is an authorized agent of the carrier, duly constituted such by written appointment, and that every such person be required, under appropriate penalty, to expose in his place of business a certificate of his authority. We also call attention to the fact that extensive frauds upon the public are accomplished by the printing and sale of counterfeit tickets. It has come to our knowledge that hundreds of innocent persons have been victimized by the purchase of spurious tickets from those whose identity could not be clearly established after the fraud was discovered. The actual money loss thus resulting to unsuspecting travelers amounts to a considerable sum, while the distress and annoyance to which innocent persons have been subjected because they have been induced to purchase these sham tickets can be easier imagined than described. It is a defect in the federal statutes that the counterfeiting of railroad tickets is not made a criminal offense, and we earnestly recommend the correction of this defect by an appropriate enactment."

In 1890 the commissioner had said, in part:

"The business is therefore hurtful both to the roads and to the public, in a financial sense, and the extent of the injury it is scarcely possibly to measure. The harm done by an army of unscrupulous depredators upon a legitimate business cannot be computed by any known standard. Lawless greed recognizes no limits, and weak compliance by its victims only stops at exhaustion. But the moral injury both to railroad officials and to the public is even greater. To railroad officials the business serves as an invitation and an excuse for dishonest practices. It is used as a cover—deceitful and transparent, it is true—for evasions of law, and for dishonorable violations of compacts among competing roads to maintain agreed schedules of rates. The public morals are affected by the natural inference that railroad officials are deficient in sense of honor and integrity, and that, if the railroad code of ethics permits one road to cheat another, it is equally permissible for the public to cheat the railroads. The inevitable tendency of the practice, therefore, is to eliminate the moral element, and the rule of action that element inculcates,—business honor,—from the practical field of transportation. In whatever aspect ticket scalping may be viewed, it is fraudulent alike in its conception and in its operation. The competition of roads affords the opportunity for the work of the scalper. Without rival roads competing for business, he could have no field. The prospect of selling more transportation at a discount than at the established rate, and so diverting business dishonestly from a competitor, is the temptation to a road to let a scalper do for it secretly what it does not dare do openly. The weak excuse of every road that transgresses in this manner is that some competitor does it. Fraud, therefore, is the incentive to the business, and in its conduct every step is one of actual fraud. The scalper's vocation, the necessity for his occupation, is to sell transportation at less than published and established rates; in other words, below lawful charges. Every such sale is a fraud upon the law, a fraud upon competing roads, and a fraud upon the stockholders and the creditors of the road for which sale is made."

In addition to this, a number of the states of the Union—among them leading states, like Illinois, Texas, New York, and Pennsylvania

—have enacted legislation suppressing the ticket brokerage business, and this legislation has been upheld by the courts of last resort, as justified by the exercise of the police power of the state. In *Minnesota v. Corbett*, 57 Minn. 345, 59 N. W. 317, the supreme court of Minnesota held such legislation valid; and in the progress of the opinion, referring to the scalpers' business, the court said:

"With these elementary propositions in mind, we proceed to consider the evils, or supposed evils, which the legislature designed to remedy, and the measures which they have adopted to accomplish that end. It was commonly asserted and believed (to what extent correctly is not important) that spurious and stolen tickets, and tickets which had expired by limitation, or that were not transferable, were often put on the market to such an extent as to work great frauds upon both the public and the carriers; that frequently those selling such tickets were irresponsible, so that the party defrauded had no redress; that the business of trafficking in such tickets often furnished an inducement to railway employes to steal tickets, or issue spurious ones, and put them on the market. It was also commonly believed that, in order to evade statutes designed to secure uniformity of rates and to prevent discriminations, some carriers of passengers were in the habit of placing large blocks of their tickets with 'scalpers,' ostensibly not their agents, for sale at cut rates. To remedy these and similar abuses, real or supposed, this statute was passed. That all its provisions have some relation to, and tendency to accomplish, this end, is quite clear. Do they transcend any constitutional limitation upon legislative power? It seems to us that most of the objections to the act—certainly the first two—are based upon a radical misconception of its provisions, and of the character of transportation tickets as property. Counsel for the defendant seems to assume—First, that such tickets are vendible chattel property, which are the legitimate subject of barter and sale, the same as any other chattels; and, second, that this statute is designed to be a 'license law,' in the ordinary sense of that term. With these two premises assumed, the task of successfully assailing the validity of the act is a very easy one. While a railroad ticket is, in one sense, property, yet it is not merchandise or chattel. It is merely the evidence of the contract of the carrier to transport the holder between the points, and on the condition, therein named. Treating it as a contract itself, it is in the nature of a chose in action. No one with whom a carrier makes such a contract has any inherent constitutional right to insist that it should be assignable. At common law, all choses in action were nonassignable, and if the legislature had deemed it necessary, in order to prevent the supposed evils, to provide that all transportation tickets should be nontransferable, or even to prohibit the issue of tickets altogether, and require carriers of passengers to collect fare in cash, we fail to see why they had not the power to do so."

If the contention that ticket brokerage is beneficial to the public in any sense can be made good, it is necessary to discredit this legislation and the opinions of these great tribunals. That such legislation was enacted, and the judgment of the courts pronounced, only after the most thorough examination and study of the subject, will readily be conceded. Whatever future investigation or study of the subject may disclose as to the ordinary business of the ticket scaler, and whatever may be the final word in any state as to such business, it is certain that methods of the kind which form the subject of the present suit can never be justified from any standpoint of public or private good; and if by such methods the entire business, in all of its branches, is brought into such disrepute as to demand total suppression, it will only make manifest the repetition of history in the end which has come to all such practices.

Another defense urged is that these companies have not themselves adopted proper methods of business whereby to protect themselves against this imposition, and that they are practically not entitled to



relief at the hands of the court of equity. I quite fully agree with counsel that the plaintiffs asking protection of the court of equity must have adopted in good faith, and executed, all proper measures to protect themselves before invoking the power of the court, and I was much impressed with this view when presented at the bar with much power. It is said that the complainant companies have been guilty of discrimination with respect to the public, by issuing an open ticket and an ironclad ticket, without any sufficient reason for the distinction. The ironclad ticket is the one which is required to be signed by the purchaser, and contains stipulations against transfer or use by any other person, while the open ticket is issued in a similar form, and at the same rate, but without the signature, and without provision against transfer. Upon examination it appears that the companies have what they call a "zone" or "radius" of, say, 80 to 100 miles around the city of Nashville, and that within this zone the open Centennial tickets are issued and sold, while beyond the zone limit ironclad tickets only are used. So, too, it does appear that in some instances at the same point both forms of ticket have been sold, and that at particular places, like Jackson, Tenn., and Birmingham, Ala., the ironclad ticket only is sold, while open tickets are put in evidence as having been sold on either side of these places. So far as the zone limit is concerned, I must say that I do not consider the reason offered for establishing such a limit as very satisfactory. Whether this is because the business requires expert knowledge, I do not know, but I fail to see any good reason for this. Be this as it may, the public have made no complaint on this score, and I do not think it is open to these defendants to say, in opposition to the relief, that they should be allowed to continue the injury inflicted on these complainants, and also, it would seem, upon the public, upon the ground that the companies have established this limit arbitrarily. So far as the other irregularities presented are concerned, I find, after an examination of these, that they are extremely few and unimportant, when compared with the whole volume of business transacted in regard to these tickets. By an order in effect June 10, 1897, most of the irregularities were corrected. The Western & Atlantic Railway Company is comparatively free from any irregularity whatever. The Nashville, Chattanooga & St. Louis Railway Company has allowed but few, and the chief of these was due to the fact that an unsuspecting agent was imposed on by the grossest form of misrepresentation by a ticket broker. There are some circumstances in the record to support the belief, and create strong suspicion, that since the institution of these suits a considerable number of the irregularities presented have been brought about at the suggestion of these defendants, by misleading unsuspecting agents, for the purpose of using the irregularities in these suits. The greater number of the failures to have the tickets properly signed and witnessed on the Louisville & Nashville Road may be due to the larger volume of business transacted, and the greater number of employes in its service. In the nature of the case, these large concerns, employing as they do so many persons, cannot at any given time have in their service employes all of whom are sufficiently intelligent and watchful. I am unable to say, even if the objection

were one coming from a proper source, that the defaults on the part of the companies have been such as to deprive them of relief, so far as this ground of objection is concerned.

I have now disposed of all of the grounds of objection urged by the defense. In doing so I have given to the subject that careful study demanded by its importance, and by the earnest ability with which the objections to the bills have been pressed. The use of the writ of injunction is a serious, delicate duty, in any case. It is a striking manifestation of the strong arm of civil authority. My conclusion is that the plaintiffs are entitled to an injunction as prayed for in these bills, upon the execution in each case of bond in the sum of \$20,000, to be approved by the clerk of the court, with the usual conditions required by law,—among them, to satisfy and pay all such damages as defendants may sustain by reason of the wrongful suing out of the injunction, in the event the suits shall not be successfully prosecuted. If this amount is not deemed adequate, the defendants are at liberty at any time to ask that the bonds be increased. It may serve to clear up the situation to particularly point out that the injunction now allowed is operative against defendants only in respect to the Centennial low-rate tickets duly signed by the original purchaser in ink, and not in pencil, and not by initial; but, within these limits, it may be well if this injunction is obeyed without indication. It may further conduce to a clear understanding to say that according to the cases *Ex parte Lennon*, 12 C. C. A. 134, 64 Fed. 320, and *In re Lennon*, 166 U. S. 548, 17 Sup. Ct. 658, persons who have knowledge of this injunction are rendered amenable thereto, although not parties to this suit; and it may be well if this fact is kept in mind. It is apparent enough, without being repeated, that the general business of the ticket scalpers is not here in question, and is not interrupted or interfered with by this injunction. It is only the scalpers' practice of dealing in the particular Centennial tickets when duly signed and executed in the manner suggested above.

#### NOTE BY THE JUDGE.

That tickets with conditions and restrictions like those contained in the Centennial ticket are valid and binding on the purchaser has been often decided. Among many cases, *Mosher v. Railway Co.*, 127 U. S. 390, 8 Sup. Ct. 1324, *Boylan v. Railroad Co.* 132 U. S. 146, 10 Sup. Ct. 50, *Drummond v. Southern Pac. Co.*, 7 Utah, 118, 25 Pac. 733, and *Cody v. Railroad Co.*, 4 Sawy. 114, Fed. Cas. No. 2,940, may be cited. *Knight v. Railroad Co.*, 56 Me. 234, and *Railroad Co. v. Connell*, 112 Ill. 295, are cases holding that through tickets in form of coupons constitute a contract with each company over whose line transportation is called for. See, also, *Railroad Co. v. Weaver*, 9 Lea, 38.

#### INJUNCTION—IN WHAT CASES A PROPER REMEDY RESTRAINING CRIMINAL ACTS.

Injunction will lie, at the suit of the state, against a corporation, when it is misusing and abusing its corporate franchises and privileges, and is maintaining its property as a nuisance, though its acts also constitute a crime. *Columbian Athletic Club v. State*, 143 Ind. 98, 40 N. E. 914, and 2 Am. & Eng. Dec. Eq. 340. And wherever an individual can show a distinct and irreparable injury to himself, apart from the public in general, he may maintain a bill for injunction against the acts complained of, although criminal, and although the party complained of is liable to prosecution for such acts. Such injunction will be granted where the element of irreparable injury exists in the case. *Columbian Athletic Club v. State*, before cited; *Shoe Co. v. Saxey* (decided by the supreme court of Missouri)

32 S. W. 1106; In re Debs, before referred to,—all reported in 2 Am. & Eng. Dec. Eq. 340, 356, 364. In valuable and extended notes to these cases as reported will be found modern cases illustrating the use of the injunction as a preventive remedy, wherever the facts show that the common law affords no adequate remedy for the acts when once accomplished; and it is no objection to the injunction in such cases that the acts are also criminal, as criminal prosecution furnishes no redress for a private injury sustained. See, also, *Stamping Co. v. Fellows*, 163 Mass. 191, 40 N. E. 105, and 2 Am. & Eng. Dec. Eq. 599, and note.

#### PROTECTION OF TRADE OR BUSINESS AGAINST FRAUD.

A lawful business may be protected against fraud by injunction, although not carried on under monopoly of a valid trade-mark. So, if a person is using something to designate his articles, the exclusive right to use which cannot be claimed as a trade-mark, nevertheless, if such person can show to a court of equity that another person is selling an article like his in such way as to induce the public to believe that it is his, and that he is doing this fraudulently, he may have relief by injunction to prevent such piracy. It is a fraud for one person to palm off his manufactures as those of another person, although he commits fraud by the use of names which are not a subject of trade-mark property. *California Fig Syrup Co. v. Frederick Stearns & Co.*, 43 U. S. App. 234, 20 C. C. A. 22, and 73 Fed. 812; *Salt Co. v. Burnap*, 43 U. S. App. 243, 20 C. C. A. 27, and 73 Fed. 818. Modern cases clearly are to the effect that a lawful business is entitled to protection by injunction against fraud, regardless of any question of trade-mark. *Lawrence Manuf'g Co. v. Tennessee Manuf'g Co.*, 138 U. S. 537, 11 Sup. Ct. 396; *Coats v. Thread Co.*, 149 U. S. 562, 13 Sup. Ct. 966. See, also, *Oxley Stave Co. v. Coopers' International Union*, 72 Fed. 695; *Wire Co. v. Murray*, 80 Fed. 811; *Central Trust Co. of New York v. Citizens' St. R. Co.*, Id. 218. In *Blindell v. Hagan*, 54 Fed. 40 (affirmed in 6 C. C. A. 86, 56 Fed. 696), it was decided that jurisdiction of the circuit court to entertain suit to enjoin a combination of persons from interfering with and preventing shipowners from shipping a crew could be maintained on the ground of preventing a multiplicity of suits at law, and because damages at law for interrupting the business and intercepting the profits of pending enterprises and voyages must, in their nature, be conjectural, and not susceptible of certain proof. It was alleged in that case that complainants could not obtain a crew without a restraining order of the court.

#### FEDERAL AND STATE COURTS—WHEN INJUNCTION WILL BE GRANTED BY FEDERAL OR STATE COURTS AGAINST THE PROSECUTION OF SUITS IN EACH OTHER'S JURISDICTION.

In regard to this question, although not specially related to the question of the principal case, the following statement is found in 36 Am. Law Reg. & Rev. (July, 1897) p. 462: "As a general rule, the federal courts will not enjoin the prosecution of a suit in a state court, being prohibited by statute. Rev. St. U. S. § 720; *Diggs v. Wolcott* (1807) 4 Cranch, 179; *Dillon v. Railway Co.* (1890) 43 Fed. 109; *Haines v. Carpenter* (1875) 91 U. S. 254; *Dial v. Reynolds* (1877) 96 U. S. 340; *The Mamie* (1884) 110 U. S. 742, 4 Sup. Ct. 194. But cases may arise which fall without the statute. *Fisk v. Railway Co.* (1873) 10 Blatchf. 518, Fed. Cas. No. 4,830; *French v. Hay* (1874) 22 Wall. 250; *Railway Co. v. Kuteman* (1892) 4 C. C. A. 503, 54 Fed. 547. So, though a state court generally will not enjoin the prosecution of a suit in a federal court,—*Riggs v. Johnson Co.* (1867) 6 Wall. 166; *U. S. v. Keokuk*, Id. 514; *Mead v. Merritt* (1831) 2 Paige, 402; *Schuyler v. Pellissier* (1838) 3 Edw. Ch. 191; *Town of Thompson v. Norris* (1882) 63 How. Prac. 418,—it may do so in a proper case, and punish the offender for contempt if he persists,—*Hines v. Rawson* (1869) 40 Ga. 356." See, also, *Simpson v. Ward*, 80 Fed. 561; *Holt Co. v. National Life Ins. Co. of Montpelier*, Id. 686.

#### BREACH OF INJUNCTION BY PERSONS NOT ENJOINED OR A PARTY TO THE ACTION—AIDING AND ABETTING—COMMITTAL.

In the late case of *Seward v. Patterson* [1897] 1 Ch. 545, the English court of appeal affirmed the decision of North, J., and held that the court had jurisdiction to commit for contempt a person not included in an injunction or a party to the action, but who nevertheless, knowing of the injunction, aided and abetted a defendant in committing a breach thereof. It was said there was a clear distinction between a motion to commit a man for breach of an injunction on the ground

that he was bound by the injunction, and a motion to commit a man on the ground that he aided and abetted in the breach of such injunction.

With respect to the use of the injunction and the parties who may be made defendants to the same bill in respect to the same subject-matter, the following cases may be referred to generally: *Lembeck v. Nye* (decided May 20, 1890) 47 Ohio St. 336, 24 N. E. 686; *Morgan Envelope Co. v. Albany Perforated Wrapping-Paper Co.*, 40 Fed. 577; *Supply Co. v. McCready*, 4 Ban. & A. 588, Fed. Cas. No. 295; *Snyder v. Bunnell*, 29 Fed. 47; *Wallace v. Holmes*, 9 Blatchf. 65, Fed. Cas. No. 17,100; *Chemical Works v. Hecker*, 2 Ban. & A. 351, Fed. Cas. No. 12,133; *Tie Co. v. Simmons*, 106 U. S. 89, 1 Sup. Ct. 52; *Tilghman v. Proctor*, 102 U. S. 707; *Travers v. Beyer*, 26 Fed. 450; *Alabastine Co. v. Payne*, 27 Fed. 559; *Cuervo v. Jacob Henkell Co.*, 50 Fed. 471; *Von Mumm v. Frash*, 56 Fed. 830; *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.*, 25 C. C. A. 267, 77 Fed. 268. See, also, *Id.*, 65 Fed. 620; *Cooley, Torts*, p. 153; 1 Jagg. Torts, § 123; *Varick v. Smith*, 5 Paige, 137; *Emigration Co. v. Guinault*, 37 Fed. 523; *Story, Eq. Pl.* § 284.

With special reference to the protection of business from injury by conspiracy or combination, directly or indirectly, the following well-considered cases may be consulted with much advantage: *Sherry v. Perkins*, 147 Mass. 212, 17 N. E. 307; *Curran v. Galen*, 152 N. Y. 33, 46 N. E. 297; *Murdock v. Walker*, 152 Pa. St. 595, 25 Atl. 492; *Barr v. Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881; *Vegelahn v. Guntner* (Mass.) 44 N. E. 1077; *Spinning Co. v. Riley*, L. R. 6 Eq. 551 (decided in 1868); *Carleton v. Rugg*, 149 Mass. 550, 22 N. E. 55; *Littletton v. Fritz*, 65 Iowa, 488, 22 N. W. 641; *State v. Crawford*, 28 Kan. 726; *Kansas v. Ziebold*, 123 U. S. 626, 8 Sup. Ct. 273.

## LONE JACK MIN. CO. et al. v. MEGGINSON.

(Circuit Court of Appeals, Ninth Circuit. June 28, 1897.)

No. 345.

### 1. APPEAL—OBJECTIONS IN LOWER COURT—EQUITY JURISDICTION.

In an equity proceeding to quiet title, where the trial court had jurisdiction of the subject-matter, an objection to the jurisdiction, on the ground that the complainant had a plain and adequate remedy at law, comes too late when made for the first time on appeal.

### 2. EXECUTION—SHERIFF'S DEED—LAWS OF CALIFORNIA.

The grantee in a sheriff's deed, made by the successor in office of the sheriff who sold mining property on a valid decree of foreclosure against the owner, has title to such property by virtue of Code Civ. Proc. Cal. § 700, which provides that "upon the sale of real property the purchaser is substituted to and acquires all the right, title, interest, and claim of the judgment debtor thereto," and the act of 1858 authorizing sheriffs to make deeds for lands sold by their predecessors (St. Cal. 1858, pp. 95, 96).

### 3. MORTGAGES—FORECLOSURE SALE—STATUTORY JUDGMENT LIEN.

The lien enforced upon a foreclosure sale is not a statutory judgment lien, but the contract lien of the mortgage, and the title of the purchaser rests upon such lien. Code Civ. Proc. Cal. § 671, prescribing the period for which a judgment shall live or be a lien, has no application to such sale.

### 4. SAME—TIME OF SALE.

A sheriff's sale under foreclosure, made more than five years after entry of the decree, is not void by reason of the provision of Code Civ. Proc. Cal. § 681, that execution may be issued at any time within five years after entry of judgment, if the order of sale was issued within the five years.

### 5. MINING CLAIMS—LOCATION BY ALIEN—DECLARATION OF INTENTION.

The subsequent declaration of intention to become a citizen, by an alien who had explored and located a mining claim on public lands, relates back to the date of the location, and, in the absence of adverse rights attaching prior to the declaration, operates to validate the location.

Appeal from the Circuit Court of the United States for the Northern District of California.

George D. Collins, for appellant.

Reddy, Campbell & Metson and Ira D. Orton, for appellees.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. William Megginson brought a suit in the circuit court against the Lone Jack Mining Company, a corporation, J. F. Turner, Jacob Bertz, Humphrey Lawrence, and George L. Brown to quiet his title to mining property known as the "Lone Jack Quartz Mine," in Slug gulch, El Dorado county, Cal.; alleging in his bill that he was the owner and in possession of said property, and that the defendants claimed an interest therein adversely to him. The bill was taken pro confesso as to all the defendants except the Lone Jack Mining Company. In its answer to the bill that corporation denied that the complainant owned, or was then or ever had been in possession of, the mining property, and alleged substantially the following facts: That on November 28, 1888, it had duly located the mining property described in the bill, and had taken all the necessary steps to protect and secure said location, and that for five years continuously prior to the commencement of the suit it had occupied and claimed the same, and paid taxes thereon, and maintained the boundaries thereof. It further alleged that prior to making its location, in 1888, there had been a mortgage lien of \$6,000 upon the property in favor of John Hanley and Julius Johnson; that on March 21, 1884, said mortgagees had commenced a suit to foreclose the mortgage, and on October 4, 1887, obtained a decree of foreclosure; that thereafter Julius Johnson died, and administration was had of his estate, and on September 2, 1890, an administration sale was duly ordered of his interest in the said judgment and decree, and on October 10, 1890, the administrator sold the same to J. Davey for \$100; that said Davey, in purchasing said decree, acted as trustee for the Lone Jack Mining Company, and purchased the same with money furnished by that corporation through its president, J. F. Turner, but that on September 28, 1890, said Turner secured from Hanley and Davey an assignment and transfer of said decree to one A. E. Bolton, who was the agent and attorney of the corporation, and said Bolton received the same in trust for the corporation; that on September 19, 1892, the said Hanley and Davey, notwithstanding the former transfer, fraudulently assigned said decree to Lawrence S. Megginson, and that said assignment was made at the instigation of Turner, and for the purpose of securing Megginson for moneys previously loaned to Turner, but that Megginson had notice that the corporation was the owner of said decree; that on November 30, 1892, Lawrence S. Megginson, at the instance of Turner, and for the purpose of defrauding the corporation, obtained an order of sale directing the sheriff of El Dorado county to sell the said property under said decree of foreclosure, and that thereupon C. P. Winchell, the sheriff of said county, did, on October 29th, make sale thereof to Lawrence S. Megginson for the alleged consideration of \$9,415.25, and on the same date the said sheriff executed to said purchaser a certificate of sale of said prop-

erty, and thereafter said certificate was transferred to the complainant, William Megginson, but that the latter took the same with notice of the rights of the corporation; that on April 29, 1893, the certificate of sale was surrendered, and a sheriff's deed to said property was obtained from the sheriff of El Dorado county to the said complainant. There are other averments and defenses set up in the answer, but the foregoing is sufficient for the purposes of this appeal. Upon the issues and proofs the court found the equities to be with the complainant, and entered a decree adjudging that the defendants have no interest in said property, and quieting the complainant's title thereto. The assignments of error are mainly directed to the rulings of the trial court on the admissibility of evidence. The most of these rulings are ignored in the appellant's brief on the appeal, and it will not be necessary to consider them. The assignments of error which were relied upon on the argument are the following: (1) The corporation being in possession, the suit is not maintainable. (2) That the appellee failed to show title. (3) The decree includes patented land conveyed by the owner to the corporation.

The appellant's principal contention is that the circuit court had no jurisdiction of the cause, for the reason that it appeared from the evidence that the complainant had no actual possession of the premises which were the subject of the suit. While admitting the doctrine sustained by the decisions of the supreme court in *More v. Steinbach*, 127 U. S. 70, 8 Sup. Ct. 1067, *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. 495, and *U. S. v. Wilson*, 118 U. S. 86, 6 Sup. Ct. 991, that under the statute of California, and other statutes similar thereto, a suit in equity to quiet title may be maintained in the federal courts whether the complainant be in or out of the possession of the premises, the appellant contends that the doctrine is applicable only to suits concerning property whereof neither the complainant nor the defendant has the actual possession, and that equity has no jurisdiction of a bill whose office it is to perform the function of an action in ejectment, or to recover the possession of property which is in the actual and adverse possession of the defendant. This point is made for the first time in this case on the argument on the appeal. No objection was made to the jurisdiction at any time in the court below, nor is such objection included in the appellant's assignment of errors. The general assignment "that the said circuit court erred in rendering a decree herein against the said Lone Jack Mining Company" is not sufficiently specific to point out the error, if error it was, which is now complained of. The objection comes too late. *Perego v. Dodge*, 163 U. S. 160, 16 Sup. Ct. 971; *Reynes v. Dumont*, 130 U. S. 354, 9 Sup. Ct. 486; *Kilbourn v. Sunderland*, 130 U. S. 505, 9 Sup. Ct. 594; *Brown v. Iron Co.*, 134 U. S. 530, 10 Sup. Ct. 604. In *Reynes v. Dumont* the court approved the rule stated in 1 *Daniell*, Ch. Prac. (4th Am. Ed.) 555, as follows:

"If a defendant in a suit in equity answers and submits to the jurisdiction of the court, it is too late for him to object that the plaintiff has a plain and adequate remedy at law. This objection should be taken at the earliest opportunity. The above rule must be taken with the qualification that it is competent for the court to grant the relief sought, and that it has jurisdiction of the subject-matter."

The present case comes within the terms of the rule, with its qualification. It is a case of which the court would have had jurisdiction if ejectment had been brought by the appellee against the appellant to recover the possession of the property.

It is next contended that the appellee failed to prove title in himself, for the reason that the sheriff's deed purporting to convey to him the property which was sold at the mortgage foreclosure sale was void. Its invalidity is said to consist in the fact that the sale was made by one Winchell, who was sheriff at the date of the sale, whereas the deed which followed was made by one Hilbert, his successor in office. To support this contention, reference is made to *Anthony v. Wessel*, 9 Cal. 103, where it was held that the proper person to execute the sheriff's deed was he who held the office at the date of the sale, notwithstanding the fact that at the date of making the deed his term of office had expired. Very soon after that decision was made, and evidently for the purpose of correcting the evil to which it directed attention, the legislature of California enacted that a sheriff should have the authority to make a deed of property which had been sold by his predecessor. St. 1858, pp. 95, 96. In section 700 of the Code of Civil Procedure it is provided as follows:

"Upon a sale of real property, the purchaser is substituted to and acquires all the right, title, interest and claim, of the judgment debtor thereto; and when the estate is less than a leasehold of two years unexpired term, the sale is absolute. In all other cases, the property is subject to redemption as provided in this chapter."

In *Robinson v. Thornton*, 102 Cal. 675, 34 Pac. 120, the supreme court of California, in construing this provision of the Code, said:

"The execution of the deed gave to the purchaser at the sale no new title to the land purchased by him, but was merely evidence that his title had become absolute. Upon the sale, he acquired all the right, title, interest, and claim of the judgment debtors thereto (Code Civ. Proc. § 700), subject to be defeated by redemption within six months."

Under these provisions of the statute and the Code of Civil Procedure, it is clear that such title to the premises as was sold upon the foreclosure sale passed to the purchaser thereof, and that the sheriff's deed could not lawfully have been otherwise made than as appears in the record.

It is further contended that the sheriff's sale was void, for the reason that at the time when it was made a period of more than five years had elapsed since the date of the foreclosure decree. The record discloses, however, that the order of sale was made and issued within the period of five years, and that upon its issuance steps were immediately taken to sell the property in pursuance thereof. It is provided by section 681, Code Civ. Proc., that an execution may issue at any time within five years after the date of the judgment entry. It has been held that an order of sale is an execution, within the meaning of this section. *Dorland v. Smith*, 93 Cal. 120, 28 Pac. 812; *Rowe v. Blake*, 99 Cal. 167, 33 Pac. 864. If an execution may issue at any time within five years, it follows that the execution so lawfully issued may be enforced. There is no provision of the laws of California providing otherwise, and no decision of the courts of that state

is found holding to the contrary. The general rule is therefore clearly applicable. In *Southern Cal. Lumber Co. v. Ocean Beach Hotel Co.*, 94 Cal. 217, 29 Pac. 627, it was said:

"The levy is the essential act by which the property is set apart for the satisfaction of the judgment, and taken into the custody of the law; and, after it has been taken from the defendant, his interest is limited to its application to the judgment, irrespective of the time when it may be sold. \* \* \* The same reasons which uphold the validity of a sale by the sheriff after the return day of the writ, where the levy was made in its lifetime, uphold a sale in cases where no levy is required."

Counsel for the appellant relies upon decisions of the supreme court of California applying the provisions of section 671, Code Civ. Proc., which prescribe the period for which a judgment lien shall live, and holding that after the expiration of the time so limited the lien expires. This provision of the Code and these decisions have no bearing upon the question under consideration. The lien which was enforced upon the foreclosure sale was not a statutory judgment lien, but was the contract lien of the mortgage; and, if this were the case of a sale upon a judgment lien, there would be no application of that rule to the present proposition, for the reason that there is here no question of the priority of liens, and no rights whatever dependent upon the question whether or not a statutory or judgment lien existed at the time when the levy was made. The complainant's title rests upon the mortgage lien, and upon the foreclosure sale made in pursuance thereof, and the rights of the parties are those of the mortgagors and the mortgagee.

It is urged that no title is shown in the appellee, for the reason that the original location made by John Hanley on September 21, 1880, was void. At that time Hanley was not a citizen of the United States, and had not declared his intention to become a citizen. On March 10, 1883, he conveyed an undivided one-half interest in his claim to Julius Johnson. On October 3, 1884, he made his declaration of intention, and on March 19, 1886, he and Johnson conveyed the claim to Orth and Anderson, who subsequently executed the mortgage through which the appellee derails title. Section 2319, Rev. St., declares that the mineral lands belonging to the United States shall be open to "occupation and purchase, by citizens of the United States and those who have declared their intention to become such." It has been held that an alien who explores and locates a mining claim on public lands may hold his interest, as against all the world except the United States, notwithstanding the fact that the statute just quoted confines the right of exploration, purchase, and occupation to citizens of the United States, or to persons who may have declared their intention to become such. *Billings v. Smelting Co.*, 2 C. C. A. 252, 51 Fed. 338; *Id.*, on rehearing, 3 C. C. A. 69, 52 Fed. 250. In the latter case it was said:

"If a party is seeking to procure the title to mining property from the United States, if taken at the proper time, the objection of alienage would prevent the acquirement of title, and such objection may be made by any one adversely interested. In such cases the sovereign is a party in fact to the proceeding, which is a direct one for the procurement of title; and the objection of alienage, no matter by whom suggested, is based solely upon the right of the government to interpose the fact of alienage as a bar to procuring or holding an interest in



reality. If, however, the grant of title, or the equivalent, is made to an alien, it cannot be attacked by any third party."

In *Manuel v. Wulff*, 152 U. S. 505, 14 Sup. Ct. 651, the principle involved in the foregoing quotation was applied to the case of a conveyance of a mining claim by a qualified locator to an alien; and it was held that the conveyance operated to transfer the claim to the grantee, "subject to question in regard to his citizenship by the government only." But if the right of Hanley as a locator could now be brought in question, upon the ground that he was an alien at the time when the location was made, we are of the opinion that his subsequent declaration of intention to become a citizen related back to the date of his location, and, in the absence of adverse rights attaching prior to the date of the actual declaration of intention, operated to validate the location. In *Manuel v. Wulff* the supreme court quoted with approval the ruling of the secretary of the interior in *Re Krogstad*, 4 Land Dec. Dep. Int. 564, in which it was held that an alien having made homestead entry, and subsequently filed his intention to become a citizen, the alienage at the time of entry would not, in the absence of an adverse claim, defeat the right of purchase; and the decisions in the cases of *Gouverneur's Heirs v. Robertson*, 11 Wheat. 332, and *Osterman v. Baldwin*, 6 Wall. 116, in which it was held that "naturalization has a retroactive effect, so as to be deemed a waiver of all liability to forfeiture, and the confirmation of title."

The appellant makes the further point in its reply brief that the Hanley location was abandoned after the transfer to Anderson and Orth, and that Hanley went into possession and did the assessment work of 1886 and 1887 to prevent forfeiture, and that the work so performed by him inured to his benefit under his original notice, thereby reinstating him and destroying the title of his grantees, and that when Hanley and Johnson surrendered the possession to the appellant, in November, 1888, the surrender constituted an abandonment of the claim, and left the same open to relocation. This point is not found in the assignments of error, and if the determination of it involved an extensive examination of the evidence, or a decision of the facts from conflicting evidence, we would be inclined to give it no further consideration; but the contention is disposed of by the plain facts of the record. It appears from the transcript that when the appellee was about to offer evidence of the performance of the assessment work the appellant expressly stipulated that the work had been done up to the year 1888. The stipulation is susceptible of no other construction than that the work done was done for the benefit of the title which became vested in the appellee. It was proven, also, that the appellant first acquired title to the mining claim by deed from Anderson and Orth on May 15, 1886, and that it went into possession under this conveyance, and performed the assessment work of that year.

It is admitted by the appellee that through inadvertence the decree includes patented land that was conveyed to the appellant by the owner, and which is not covered by the title which was vested in the appellee through the foreclosure proceedings. No application was made in the court below to amend the decree in this regard, and no

objection was taken thereto either by motion or by assignment of error. The cause will be remanded to the circuit court, with permission to amend the decree in conformity with this admission of the appellee. In all other respects the decree will be confirmed, with costs to the appellee.

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RICHARDSON v. D. M. OSBORNE & CO.

(Circuit Court, N. D. New York. July 7, 1897.)

No. 6,156.

**PATENTS—SUIT FOR INFRINGEMENT—LACHES—EXCUSE FOR DELAY.**

A patentee, who has quietly acquiesced in the open and notorious infringement of his patent for 16 years, cannot maintain an action for such infringement. It is no excuse for such delay that his co-owners of the patent would not agree to prosecute infringements.

William H. Chapman and Thaddeus B. Wakeman, for complainant.  
Frederick P. Fish, James J. Storrow, and A. D. Salinger, for defendant.

COXE, District Judge. This is an equity action for the infringement of letters patent, No. 181,664, granted to Thaddeus Fowler, August 29, 1876, for an improvement in grain-bundling machines. One of the defenses is laches. The patent expired August 29, 1893. This action was commenced June 10, 1893, about two months and a half before the patent expired. As no injunction can issue the only relief which can, in any event, be granted is an accounting. The patent has never been operated. Only one experimental machine was made; it collapsed on its first trial and disappeared from view. No machine for actual use in the field was ever built, no license was ever granted, no royalty was ever paid. The patent was never of any practical use. It was infringed almost from its issue. The complainant concedes that it was infringed for 13 or 14 years and the proof indicates a considerably longer period. This infringement was general, open and notorious. The complainant testifies that "practically all the binders and harvesters made in the United States during the last twelve or fourteen years contain the invention of the Fowler patent." And yet knowing, as he must have known, that hundreds of farmers all over the land were using his invention he calmly folded his hands and permitted them to plunder his patent without a word of protest. He says that he notified the defendants, in the latter part of 1883, that they were infringing and he also says that he commenced an action at law in 1891 against a Minnesota corporation, which suit was compromised. This was the only suit ever brought and this, it will be observed, was when the patent had only two years more of life. No excuse, which the law can recognize, is offered for this unprecedented supineness and neglect. Financial ability to pursue infringers is admitted. The only excuse offered is that the complainant's brothers who, prior to 1890, owned the patent jointly with him had no faith in its validity and declined to spend their money in an enterprise which they thought must only lead to

disaster. Cui bono? Can it be possible that the public loses its right to use the machine, which otherwise would be indefeasible, because of secret disputes among the owners of the patent? To the world at large, to the farmers and dealers, the conduct of the complainant and his brothers was a plain notice that the patent was not worth defending and might be infringed with impunity. The public acted upon this tacit permission. After 14 years of quiet and unmolested enjoyment it is too late to ask a user to turn over his entire profits upon the theory that it was impossible to proceed sooner because of disagreements between the owners of which the user had no notice. Besides, the excuse cannot be maintained as matter of law. The complainant could have proceeded without the co-operation of the other owners. If they refused to be complainants he could have made them defendants. *Onderdonk v. Fanning*, 4 Fed. 148. If the opposition of his brothers was the sole cause of his inaction it may be pertinent to inquire why he did not proceed promptly when, in October, 1890, he acquired the entire interest? With the exception of the unique and nebulous litigation in the Northwest he remained passive for three years more.

So far as the defendant is concerned the complainant gave no intimation that at last he was ready for the conflict. His lethargic slumber was apparently unbroken by even a dream of prospective profits. In 1883 the notice was given. In 1893 the suit was commenced. The defendant was, therefore, permitted to infringe without a word of protest for at least ten years. But the defendant was justified, when it received the notice in 1883, in taking into consideration the fact that even at that time the owners of the patent had acquiesced for years in its infringement. There is, of course, no force in the suggestion that the complainant is not responsible for laches occurring before he became the sole owner. If this were otherwise a party could revive a dead cause of action by assignment. Equity will not permit the mere act of transfer to convert a stale claim into a fresh one.

The reason advanced for neglecting to operate under the patent is unfounded in fact and inadequate in law. It is said that Deering & Co., to whom the experimental machine was sent in 1876, were under obligation to exploit it and introduce it to the public. Assuming that such an agreement is proved,—and it is not,—the complainant had no right to rely upon it after it became apparent that Deering & Co. recognized no such obligation and were doing nothing to push the patent. It might have been an excuse for a few months but not for 16 years.

It is unnecessary to pursue the subject further. Suffice it to say that the record presents one of the most flagrant cases of laches with which the court is familiar. If this action can be maintained a patentee has simply to pocket his patent, wait until the field is full of infringers and begin his suit two months before the patent expires. When charged with laches he has simply to assert that until he commenced his suit he thought the chances of success dubious and, therefore, did not call the infringers to account. It is plain that the public rights cannot depend upon considerations so shadowy, unilateral

and inequitable. Unless the court is prepared to say that the defense of laches will no longer be enforced in a patent suit it must find for the defendant on this issue. The law of laches is so well understood that it is unnecessary to restate it. It is thought that no case can be found excusing such delay as this record discloses. See *McLean v. Fleming*, 96 U. S. 245; *Gallihier v. Cadwell*, 145 U. S. 368, 12 Sup. Ct. 873; *Menendez v. Holt*, 128 U. S. 514, 9 Sup. Ct. 143; *Hardt v. Heidweyer*, 152 U. S. 547, 14 Sup. Ct. 671; *Hammond v. Hopkins*, 143 U. S. 224, 12 Sup. Ct. 418; *Lane & Bodley Co. v. Locke*, 150 U. S. 193, 14 Sup. Ct. 78; *Abraham v. Ordway*, 158 U. S. 416, 15 Sup. Ct. 894; *Piatt v. Vattier*, 9 Pet. 405; *Manufacturing Co. v. Williams*, 15 C. C. A. 520, 68 Fed. 489; *Owen v. Ladd*, 76 Fed. 992; *Wyeth v. Stone*, 1 Story, 273, Fed. Cas. No. 18,107; *Fosdick v. Machine Shop*, 58 Fed. 817; *Keller v. Stolzenbach*, 28 Fed. 81; *Prince's Metallic Paint Co. v. Prince Manuf'g Co.*, 6 C. C. A. 647, 57 Fed. 938; *New York Grape-Sugar Co. v. Buffalo Grape-Sugar Co.*, 24 Fed. 604; *McLaughlin v. Railway Co.*, 21 Fed. 574. It follows that the bill must be dismissed.

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BOSTON LASTING-MACH. CO. v. WOODWARD et al.

(Circuit Court of Appeals, First Circuit. July 20, 1897.)

No. 191.

1. PATENT INFRINGEMENT SUITS—ESTOPPEL AGAINST ASSIGNOR.

The rule that a patentee who has assigned his patent is estopped to deny its validity does not apply, either as against him or his co-defendants, where the latter are the principal infringers, and he is acting merely as their employé.

2. SAME—CONSTRUCTION OF CLAIMS—LASTING AND TACKING MACHINES.

The Woodward patent, No. 248,544, for a "lasting and fastening machine," fairly construed in view of the patentee's earlier patent for a power tacking machine, covers merely the combination, with an automatic fastening-driving mechanism, of a jack,—either an ordinary jack, or a jack with a special adjustment, and the claims are void for want of invention.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

This was a bill in equity by the Boston Lasting-Machine Company against Erastus Woodward, James Barrett, and Thomas Barrett, for alleged infringement of letters patent No. 248,544, issued October 18, 1881, to the said Erastus Woodward for a "lasting and fastening machine." The complainant was the owner of the machine by assignment. The circuit court held that there was no infringement, and dismissed the bill. 75 Fed. 272. Complainant has appealed.

Frederick P. Fish and William K. Richardson, for appellant.

George O. G. Coale and James E. Maynadier, for appellees.

Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

PUTNAM, Circuit Judge. This patent has previously been before this court, in *Woodward v. Machine Co.*, wherein two opinions were passed down, one March 5, 1894, reported in 8 C. C. A. 622, 60

Fed: 283, and one June 23, 1894, reported in 11 C. C. A. 353, 63 Fed. 609. The questions then disposed of were those of estoppel and infringement.

We are again pressed with the proposition that the respondents below are estopped from denying the validity of the claims of the patent now in issue. The situation in this respect is, however, essentially different from that existing when the patent was previously under consideration. Then the respondents were nominally the same as now, namely, Woodward, who was the patentee and the assignor of the patent, and James Barrett and Thomas Barrett; and in both cases all these respondents were and are, in a general sense, co-operating. The essential difference, however, is that in the prior suit, Woodward, who was the only person directly subject to the rule of estoppel, was the principal, and the other respondents, so far as the evidence showed, were acting at his suggestion, and in subordination to him. Now, so far as the evidence shows, the other respondents are the principals, and Woodward is their employé, and no estoppel applies to them, by reason of their engaging Woodward in a subordinate position. Even though all might be properly regarded as joint tort-feasors, if any wrong has been committed, yet they have no joint interest in the sense of the law, and Woodward, being a mere subordinate, cannot be enjoined, under the circumstances of this case, unless his principals are also subject to injunction. *Belknap v. Schild*, 161 U. S. 10, 25, 16 Sup. Ct. 443. Under the rules laid down in that case, he cannot be holden to account for profits; so there is no ground of equitable jurisdiction against him severed from the persons who employed him. While a person occupying a subordinate position may be in privity with his principal, in the sense in which that word may properly be used in this connection, the reverse is not ordinarily true. Therefore, in the present suit, the question of the validity of the claims in issue is open for determination.

No claims have been presented for our consideration except the second, third, and fourth, as follows:

"(2) In an organized lasting and tacking machine, the combination of a jack for holding a last and presenting it to automatic fastening-driving mechanism, the said automatic fastening-driving mechanism, and an actuating device for starting the fastening-driving mechanism, constructed substantially as set forth, and adapted to be moved in the act of presenting the work in proper position for receiving the fastening, whereby the fastening may be driven at the instant that the work is so located, all substantially as and for the purposes described.

"(3) In an organized machine for lasting and tacking the uppers of boots and shoes, the combination of a jack for holding and presenting the last to an automatic fastening-driving device, the automatic fastening-driving device, and the means for setting said fastening-driving device in operation, arranged or located to be automatically moved upon the placing in position of the last, whereby a fastening is driven at the instant the last is so located, all substantially as and for the purposes described.

"(4) In an organized machine for lasting and tacking the uppers of boots and shoes, the combination of a jack for holding and presenting the last to an automatic fastening-driving device, the automatic fastening-driving device, and the means for starting and stopping its operation, adapted to be operated or moved automatically upon the placing in proper position of the last or work in relation to the nozzle, whereby, upon the instant said work is so located, a fastening is

driven, and the machine automatically stopped, all substantially as and for the purposes described."

Almost simultaneously with the issue of the patent in suit, and preceding its date only 49 days, Woodward obtained a patent for a machine, described as a "power tacking machine," with "means for starting it, and then stopping it automatically," whereby it was made "impossible to drive more than one tack at a time." The specification also said:

"I herein describe my invention as being operated by means of the work held by the operator, or by a jack which is moved by the operator, although, of course, I do not confine myself to this especial manner of operation, as the machine may be started by hand or by foot, or in any other desirable way."

The specification of the patent in suit describes an adjustable jack, by the aid of which the work can be presented to the tacking mechanism in a suitable manner for coming into proper line at different points of action. The adjusting mechanism of the jack is separately claimed and fully described in claim 9 of the patent in suit, and it is also claimed in combination in others of its claims. The specification of the patent now in suit refers to Woodward's prior patent, and states that the patentee prefers to use the invention for driving fastenings described in it. Nevertheless, the complainant below maintains that, on the true construction of the specification and claims, other automatic fastening-driving mechanisms are covered by the combination in issue. Assuming this to be correct, the claims in issue, fairly interpreted, notwithstanding their verbosity, consist simply in combining, with an automatic fastening-driving mechanism, a jack,—either an ordinary jack, or a jack with a special adjustment. The means of putting the tacking mechanism in motion are described in Woodward's prior patent, already referred to, and constitute an essential element of the machine made under that patent. They cannot be separated from it, and made a third element of the combination in the patent now in suit; so that there are only two substantial elements in the later patent, as already stated. It is too apparent that, for work of the character for which these machines are intended, the mere addition of an ordinary jack in this way involves no invention, and is not patentable. If, however, claims 2, 3, and 4 are to be so construed that the words "a jack" shall intend a jack with an adjustment substantially as explained in the specification, then it is not maintained that they are infringed. But if they are construed to intend any jack with an adjustment, which is the only other hypothesis remaining open to the complainant below, it becomes again plain that the combination was not patentable. The suggestion that "a jack," meaning "any jack," be made an additional feature for any fastening machine used in the art of manufacturing boots or shoes, or, indeed, that an adjustable jack, meaning any adjustable jack, be made such a feature, covers what is too common in this art to involve in itself invention.

The complainant urges on us very strenuously *Machine Co. v. Lancaster*, 129 U. S. 263, 9 Sup. Ct. 299, maintaining that the combination covered by the claims in issue here should receive a liberal support, as did the invention in the case cited. The device there

was the first automatic one for sewing buttons upon fabrics of the kind to which the machine was adapted, and so the complainant here maintains that its machine was the first one which accomplished the purpose for which it was intended. It is very usual for patentees to assert that *Machine Co. v. Lancaster* has a very general application. On the other hand, it was exceptional, and the invention in suit there is easily distinguished from the great mass of patented combinations. Its underlying idea was novel. As was said by the supreme court, at page 273, 129 U. S., and page 302, 9 Sup. Ct., the mechanical function performed by the machine covered by the patent was as a whole entirely new. In the present suit, however, the entirely new function is found in the device of Woodward's earlier patent, and the patent now in issue shows nothing except a method of making the new function more useful. In this particular the case is essentially unlike the conditions of the hypothesis stated in *U. S. v. Berdan Firearms Co.*, 156 U. S. 552, 565, 15 Sup. Ct. 420, as it is entirely plain that the device described in the claim in issue would infringe the device in Woodward's prior patent, although an improvement on it. It is true it is now claimed that Woodward's earlier patent related only to a tacking machine, and that the device in issue was the first capable of doing automatically the whole work of lasting, except stretching the upper into position, thus leaving the hands free for that purpose. Yet the specification of the earlier patent stated that the invention was "especially desirable for use in the process of lasting the uppers of boots and shoes, where it is very necessary to drive a tack very quickly, and yet not drive more than one at a time." All this, however, is merely refining upon words, as the fact remains that the only addition to the device of the prior patent was a jack. It would operate very unjustly on the holder of the earlier patent, whoever he may be, to bar him from the right of combining any adjustable jack whatever with the device covered by that patent, when adjustable jacks were already well-known devices in the art, and when there are no special circumstances to overcome the consequent presumption that such a combination involves no patentable invention.

The decree of the circuit court is affirmed, and the costs of this court are adjudged to the appellees.

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#### BATES v. KEITH.

(Circuit Court, D. Massachusetts. July 20, 1897.)

No. 647.

#### PATENTS—INVENTION AND INFRINGEMENT—WELT-GUIDES.

The Bates patent, No. 419,239, for a welt-guide to be used with sewing machines for sewing welts on cork-sole shoes, and in which the only essentially new feature consists in the addition to the ordinary welt-guide of another passage, concentric and elongated, adapted to guide the outside casing enveloping the core of the cork-welt, if valid at all, in view of the prior state of the art, is not infringed by a guide which passes a coupled cork-sole welt through one passage and the usual welt through the other.

This was a suit in equity by George A. Bates against George E. Keith for alleged infringement of letters patent No. 419,239, for a welt-guide for sewing machines.

James E. Maynadier, for complainant.  
William Quinby, for defendant.

PUTNAM, Circuit Judge. This is a bill alleging infringement of a patent issued for a welt-guide to be used in connection with sewing machines for sewing welts on cork-sole shoes. The welts for which these guides are adapted differ from the usual welts, in that the usual welt constitutes the core for them, which core is in part enveloped in a casing, so that the welt and the casing make a compound welt, which is described by counsel as "a cork-welt." Prior to the device in suit, this cork-welt, or the core and its casing, had always been guided by hand in the process of machine sewing, and it is claimed that the complainant's guide very materially reduces the cost of the shoe. The entire pith of the device presented to the court, so far as it contains anything which can be claimed to be essentially new, lies in the fact that partly around the guide passage intended for the core, and which is admitted by the specification to be in all respects like the welt-guide in common use, there lies another passage, concentric and elongated, intended to guide the casing; so that, as the core and the casing emerge from the guide, the casing will take exterior concentric shape around at least one edge and one surface of the core. The specification of the claim describes various details, among which are edge-guides and the rib intended to enter the ordinary groove in the welt; but all these incidents are necessary elements which will be found in every welt-guide; so that it is maintained by the complainant that the single essential feature is that the device has two passages, one for the core and the other for the casing, arranged substantially as we have described. Therefore the complainant further maintains that not only is his device a tool, as distinguished from a mere combination, but that also the detailed elements stated in his claim are not essential in connection with the consideration of alleged infringements. The court need not stop to consider what the complainant means by characterizing his device as a tool, or whether such a distinction has any foundation; nor whether the complainant's proposition as to the construction of his claim, assuming it to cover a combination, is correct, or whether, on the other hand, under the circumstances of the case, the claim is not to be construed strictly, and all the elements enumerated therein to be held essential, on the rules stated in *Reece Buttonhole Mach. Co. v. Globe Buttonhole Mach. Co.*, 10 C. C. A. 194, 61 Fed. 958, 961, and in *Wright v. Yuengling*, 155 U. S. 47, 52, 15 Sup. Ct. 1. So far as these propositions are concerned, we, for the purposes of this case, yield to the complainant the benefit of his entire invention, and assume that his claim is such as to cover the whole of it. Nevertheless, with reference to the extent of his invention, we must regard the state of the art, and we must also, with due regard for exceptional cases, regard the rule laid down by the court of appeals for this circuit in *Long v. Manufacturing Co.*, 21



C. C. A. 533, 537, 75 Fed. 835, 839, and restated in *Boston & R. Electric St. Ry. Co. v. Bemis Car-Box Co.*, 25 C. C. A. 420, 80 Fed. 287, 290, as follows:

"It is plain, nevertheless, on all rules, that so much of the mere form given in the specification, drawings, and claim is essential, and must be retained, as is necessary in order to accomplish all the functions expressly enumerated therein."

Therefore the whole case comes down to the questions: First, whether there is a patentable invention in making a double guide of the general character which we have described; and, second, whether, if there is anything patentable in such a device, the invention which it covers can be regarded as of so broad a nature that the device of the respondent can be held to infringe. We refer again to that part of the specification which says that the device is connected to the lever of a welt-sewing machine too well known to require description; that it is connected to this lever by a tang in the usual way; that, like the welt-guide in common use, it has a guide passage for the single welt constituting the core of the compound welt; that this passage is the same as that in common use, with some changes which are clearly mere matters of detail; and that the edges of the walls of the guide are slotted and curved, "being," as the specification says, "in this respect the same as the cover in general use." The specification further proceeds that, in operation, one end of the core is placed in its proper passage, and one end of the casing in its proper passage; that a lasted shoe is then presented to the machine, the awl passing through the core and the casing, and also through the upper and a part of the inner sole, precisely as in sewing on the ordinary welt; that, after the core and its casing are thus sewed to the upper and inner sole, the product is the same as if they had been sewed on by hand; and that "the other operations to complete the shoe are in all respects the same as usual in making this kind of shoe." This makes it entirely clear that the only novelty is the superimposing on the usual passage for a welt the concentric overlapping passage to which we have referred, also intended for the casing. The specification also shows clearly that the patentee had in contemplation, so far as his device was concerned, nothing beyond that subdivision of the art of sewing welts which concerns welts of the compound character which we have described. A proposition of this kind does not necessarily limit the rights of a patentee, because the law has been stated over and over again that this fact alone would not prevent the inventor from reaping the advantage of any function which could be found to be within the claim as properly construed, available without a modification of the machine which involves the use of further inventive faculty, although known to him, and omitted in the specifications without fraud, or not known to him. *Long v. Manufacturing Co.*, at page 535, 21 C. C. A., and page 837, 75 Fed. The proposition, however, becomes important in connection with other facts to which we will call attention.

The respondent constructed his device in accordance with a patent held by him, so that, perhaps, on the ordinary rule, so far as any presumptions arising from the issue of a patent are concerned, the par-

ties stand in equilibrio. The purpose intended to be accomplished by the respondent, and shown by the device actually used by him, was plainly in accordance with the statement of the specification of his patent as follows:

"The object of my invention is to provide a shoe-sewing machine with a guide capable of properly presenting to the action of the awl and needle an imitation cork-sole welt, as well as the usual welt, and supporting these welts firmly against any lateral motion or 'creeping' out of their proper path of movement."

Thus he commences with the compound welt as a completed element; and so it happens that, instead of the ordinary guide passage for the core, with the overlapping concentric passage for the casing, the passages of his guide are adapted to pass the completed cork-sole welt through one passage with the usual welt through the other, and are in no essential respect like the complainant's guide, as shown in his specification and drawings, except in the fact that it contains two guide passages. The respondent's device is, therefore, incapable of performing the essential and only function had in contemplation by the complainant's specification. This fact, in connection with the rule stated in *Long v. Manufacturing Co.*, *ubi supra*, that so much is essential as is necessary to accomplish all the functions expressly enumerated in the patent, is sufficient to dispose of this case; but we can take a somewhat broader view of it. Guides used in connection with sewing machines, and for innumerable other purposes, have been so common in the arts, and have been used from time immemorial for so many purposes, that it would be an unreasonable state of the law which would deny as a common right to every artisan and manufacturer freedom to procure or frame guides suited for his art, or for his particular subdivision of any art. In this respect it is impossible to draw any essential distinction between the common right and privilege of every person to adapt guides to his own peculiar necessities and the like right to shape gouges or plane-irons, or combine them of different shapes, according to the changing necessities or desires of carpentry, or to devise, subdivide, and change the forms of boxes, or other packing cases, according to the necessities of each particular trade. It may be that for any established art, or any subdivision of any special art, there would be invention in so adapting or shaping guides, gouges, packing boxes, or any other common tools and means, as to adapt them to the special art or to the special subdivision; but whoever does this cannot, where the field is so common, encroach on any other person's special art or subdivision. Therefore, in this case, with reference to so common a device as a guide, even if the complainant could successfully maintain that there is invention in devising one suitable for the particular purpose which he had in mind,—that is, for directing the two elements of a compound welt in the manner pointed out in his specification,—yet he could not prevent the respondent from adapting and freely using a guide which would be suitable for his own special subdivision, although in the same general art. Therefore, if the patent covers anything which is patentable, which may well be doubted, any claimed construction of it which would bar the respondent from using the guide especially

devised by him would, in view of the considerations we have stated, be too unreasonable to be sustained. In view of our conclusions in other respects, the mercantile considerations urged by the complainant have no application to this case. *Manufacturing Co. v. Holtzer*, 15 C. C. A. 63, 67 Fed. 997; *De Loria v. Whitney*, 11 C. C. A. 355, 63 Fed. 611, 621. Let the respondent, on or before the 2d day of August next, file a draft decree dismissing the bill, with costs, and complainant, on or before the 5th day of August next, file corrections thereof.

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THE ST. PAUL.

MERRITT et al. v. THE ST. PAUL.

SAME v. INTERNATIONAL NAV. CO.

(District Court, S. D. New York. July 24, 1897.)

1. SALVAGE—COMPENSATION—PROMPTNESS OF SALVORS.

Promptness of salvors in reaching a stranded steamer, and thus preventing her from going further up the beach, and in getting everything in readiness to haul her off at the first possible opportunity, and thus avoiding the great damage incident to long-continued grounding, is an important element in determining the compensation.

2. SAME—WRECKING APPLIANCES.

In fixing the amount of salvage, the importance of maintaining wrecking companies with powerful and costly appliances, ready at a moment's notice, by night or day, to repair to the scene of a disaster, is to be taken into consideration.

3. SAME—AMOUNT OF COMPENSATION.

\$160,000, awarded for 11 days' salvage operations by a large part of the wrecking force of the Atlantic coast, the total value of the appliances used being some \$400,000, with the services of 205 men, and an outlay of about \$10,000 in cash, which operations resulted in getting off the beach near Long Branch, N. J., the liner *St. Paul*, which was 535 feet long, valued at \$2,000,000, with a cargo worth \$1,999,139, and freight amounting to \$16,902.

4. UNLADING AND DELIVERY OF CARGO—SEVERANCE OF INTERESTS.

Where a vessel is stranded near the end of her voyage, so that the cargo may be unloaded and delivered to the consignees, and such unlading is equally necessary for the lightening of the ship in order that she may be got off, and for the safety of the cargo, this part of the salvage operation is to be regarded as done in the common interest and for the common benefit, and the award, therefore, borne in common; but by such unlading and delivery there is a severance of interests, and the subsequent expense of getting the ship afloat must be borne by her alone.

5. SAME—CHARGE AGAINST SPECIE CARGO.

No distinction can be made in the proportion of the salvage award charged against different portions of the cargo, and specie must bear the same pro rata charge with the rest of the cargo.

These were two libels, one in rem against the steamship *St. Paul*, and the other in personam against her owner, the International Navigation Company, to recover for salvage services rendered to the said steamer by the libelants, Israel J. Merritt and Israel J. Merritt, Jr., composing the Merritt Wrecking Organization, and the president and the directors of the Insurance Company of North America.

Cowen, Wing, Putnam & Burlingham, Carpenter & Park, Harrington Putnam, and Samuel Park, for libelants.

Robinson, Biddle & Ward and Henry Galbraith Ward, for claimant International Nav. Co.

Butler, Notman, Joline & Mynderse and Wilhelmus Mynderse, for interveners Crossman & Bro.

Carter & Ledyard, Edmund L. Baylies, and Walter F. Taylor, for interveners Van Bergen & Co.

BROWN, District Judge. The above libels were filed to recover compensation for salvage services rendered to the steamship St. Paul, which was stranded on the Jersey coast in a dense fog at North Long Branch, about 14 miles south of Sandy Hook, at about 10 minutes past 1 o'clock in the morning of January 24, 1896. She was got off on the 4th of February following. She was a new steel steamship of the finest class, finished about four months previous at a cost of \$2,650,000. Her cargo was valued at \$1,999,139, more than half of which was in gold coin and bars, and the rest, about 700 tons, was of miscellaneous merchandise. This was all unladen into barges within a few days after the stranding, and was delivered to the consignees in New York before the steamer was got off the beach. The parties not having been able to agree upon the salvage compensation, the above libel in rem was filed on the 11th day of June, 1896, and an additional libel in personam was also filed soon after against the owners of the steamer, who had taken general average bonds from the consignees of cargo on its delivery to them for the payment of the shares of the salvage award properly chargeable against the cargo.

Crossman & Bro., consignees of the gold valued at \$1,125,000, intervened in defense of their interests, claiming that a separation of the interests of the ship and cargo had been made before the ship was got off, and that the coin, from its small danger and easy handling, should be charged with but a small share of the whole award.

Van Bergen & Co., consignees of other portions of the cargo, likewise intervened for their interests, claiming that while the cargo should bear a less pro rata proportion of the whole salvage award than that charged to the ship, the rate charged against the cargo should be uniform, according to its value, without any distinction between the gold and the rest of the cargo. The shipowners contend that the danger of the steamer, as she lay ashore, was not serious; and that the whole amount awarded should be only a very moderate sum. The questions litigated concern the amount of the salvage award and the proportions in which the award should be distributed as between the ship and cargo. Most of the material facts have been agreed upon, or have been proved without serious controversy.

The St. Paul is 535 feet long on the water line and 63½ feet beam. Her ordinary draft when loaded is 26 feet; at the time of stranding she drew 24 feet. The bottom of the beach where she went ashore is of shifting sand, with clay, and occasionally some rocks to the southward and outside of where the St. Paul lay.

Within two or three hours after she stranded word was received by telegraph at the offices of the Merritt Wrecking Company and of

the Chapman Derrick & Wrecking Company, in New York, both of which had large steamers specially fitted up with all appliances for wrecking purposes; and between 3 and 4 o'clock a. m., one large steamer was dispatched by each of those companies running by the lead down the coast through the thick fog. The tug Chapman was the first to reach the St. Paul. The tug Merritt arrived soon afterwards. The St. Paul was lying easily on the beach, heading southwest half south, or about three points towards the shore from the line of the beach. There was then considerable sea, and the spray was flying over the steamer's deck. As the sea receded the steamer had a list to port of 10 or 15 degrees, and her bow was in about 10½ feet of water at low tide.

The wrecking operations, by direction of Capt. Shackford, the marine superintendent of the International Navigation Company, the owners of the St. Paul, were put in charge of Capt. Merritt. When the news of the stranding reached Philadelphia, the president of the Insurance Company of North America directed the master of his wrecking steamer at the Delaware breakwater to proceed immediately to render assistance. She left the breakwater at 11:20 a. m. and reached the St. Paul a few hours afterwards. The wrecking steamer J. D. Jones was also ordered by the Merritt Company from Norfolk, and three large barges of the same company were also employed. The Chapman Company also sent another large tug, the Hustler, and also the Morse, and both companies supplied a great quantity of wrecking appliances and hired a considerable number of extra men and tugs for the unloading and transportation of cargo, as well as for other uses in the wrecking operations. The value of all the vessels and other property thus employed in the salvage operations by the three companies amounted to about \$400,000; the number of men to 205, and the cash outlay up to the time when the steamer was floated, was from \$10,000 to \$11,000; the expenditure of the Chapman Company not having been precisely stated.

When the Chapman first reached the St. Paul, two wrecking anchors with cables of 200 fathoms were planted, leading from the port quarter of the steamer. On Capt. Merritt's arrival a few hours afterwards, these were shifted more to the northward, and two other large wrecking anchors were run out with 16-inch manilla cables to the St. Paul's starboard quarter. The wrecking anchors weighed from 6,000 to 7,000 pounds each. The passengers were all disembarked during the afternoon of Saturday, January 24th, by means of surf boats. For several hours before and after high water, which was about midnight, heaving on the lines was applied at intervals, until about 3 o'clock in the morning of Sunday, the 25th, during which time the ship was moved 156 feet astern. During the next three days, the sea being calm, with winds from off shore, i. e., from the westward, the ship could not be moved at all. During this time the cargo was all unladen into barges hired by the salvors, towed to New York and delivered to the shipowners, by whom it was soon delivered to the consignees on the execution of the average bonds as above stated before the ship was got off, or her situation materially changed. The discharge from the ship was completed by 10 a. m.

of Wednesday, the 28th. The specie was put on board the barge Hagerty during the forenoon of Tuesday, the 27th, and was taken to New York the same day.

At every tide, whenever there was any chance of moving the ship, efforts to move her were made, but for the first 10 days with no important results. On the 29th she was moved 24 feet astern; on the 30th, 6 feet; on the 31st, 6 feet; on Sunday, February 1st, 13 feet; on February 2d, none; on Tuesday, February 3d, in the forenoon, 28 feet. In the afternoon of that day a moderate gale sprang up from the eastward, which at night became strong, with a rough sea, and by 1:15 a. m. of February 4th, the ship was moved astern 276 feet. The gale continued from the northeast, with sleet and snow and a rising sea, and at a little past 9 a. m. of the 4th, with all the tugs towing, and at the same time heaving on the cables, with the steamer's starboard engine reversed full speed, the ship's stern swung out, and she was shortly carried well clear of the beach. She proceeded to New York under her own steam, and reached her berth early the same afternoon with comparatively small damage from the stranding. The whole time occupied in the salvage operation was a little over 11 days.

1. The enormous difficulty of this enterprise, owing to the vast size of the St. Paul, the great values of the ship and cargo, the success of the work, and the means and skill necessary to effect it, make the case one of peculiar merit.

To float the ship a very considerable part of the whole wrecking force of the country was brought into requisition, with plants organized and maintained at great expense for wrecking purposes alone, and the skill of persons engaged from 20 to nearly 50 years in this business. When it is urged, as the claimants do urge, that the danger of the steamer was not great as she lay stranded upon the beach, and that she was sure to come off when a rough sea and the lifting power of high waves should make it possible to pull her off, the help of all these extensive appliances and the trained skill and experience able to use them successfully, are presupposed. Without these powerful appliances and experience and skill in using them, I do not see the least reason to suppose that the St. Paul could ever have been got off the beach. The northeast storms, common in this locality and often heavy in winter, would naturally have carried her further up the beach, until some storm of exceptional severity, such as usually comes at least once during the winter or spring season, would have carried her high up, where relief would have been impossible. To prevent this and to save the ship, ordinary tugs and ordinary salvage work would have been impotent and useless. In my judgment, therefore, the St. Paul, without the immediate aid of great salvage appliances and skill, such as were here employed, would have been in extreme danger; and if none were supplied, she would have become substantially a total loss. Her engines might have been removed and a quantity of strippings taken from her; but the value of these would have been but a small fraction of the value of the steamer which the salvors saved comparatively unharmed.

Besides this, as it seems to me, there was an important element of

uncertainty in the whole enterprise, arising from the great length of the *St. Paul* (535 feet). Lying nearly parallel with the beach, there was danger, unless very speedily relieved, that by some unequal bearings of the keel or bilges upon the sand, which was liable to be eaten out by currents or by seas along different parts of her keel from stem to stern, or by her bearing in some places upon rocks or a hard bottom, she might be very greatly strained, or even broken, as was the iron steamship *Russland* a few years ago on the same beach; and this would involve either total loss or extreme damage. In the mild weather that preceded getting her off, the *St. Paul* was greatly favored; she lay easy, and yet suffered damage in her hull to the extent of about \$100,000, besides the sum of \$50,000 more in the sanding of her machinery, through the working of her propeller in getting off. Had she been driven up the beach by intervening storms before she could be got off or held secure in her position, as was the case with *L'Amerique* a few years before, near the same locality, the damage to her must have been far greater. The promptness of the salvors in reaching the steamer and thus preventing her going further up the beach, and in getting everything in readiness to haul her off at the first possible opportunity, and thus avoiding the great damage incident to long-continued grounding, is a most important element in this case. *The City of Worcester*, 42 Fed. 913. I must, therefore, regard the services of these salvors as of very high merit, not merely in rescuing the *St. Paul* from what, without any salvage aid, would have been nearly a total loss, but for the promptness of the aid which their great appliances enabled them to render, and thus to prevent any large damage to the ship. Without such ready means no adequate aid could probably have been prepared for such a ship as the *St. Paul*, without such delay as would have made rescue extremely doubtful. During the week following the day she was floated there were three easterly gales, during one of which the velocity of the wind was registered at 80 miles per hour—the highest ever registered in this vicinity. In fixing the amount of salvage awards, the importance of maintaining wrecking companies with powerful and costly appliances ready at a moment's notice by night or day to repair to the scene of disaster, has been repeatedly recognized. *The Susan*, 1 Spr. 499, Fed. Cas. No. 13,630; *Coast Wrecking Co. v. Phoenix Ins. Co.*, 13 Fed. 127, 134; *The Egypt*, 17 Fed. 359; *The City of Worcester*, 42 Fed. 916; *Kenn. Civ. Salv.* 117, 118.

Considering all the circumstances, and after referring to the cases cited by counsel, and finding, for the reasons stated below, that 1.45 per cent. on the value of the cargo will be its proper share of the whole award, I have come to the conclusion that \$160,000, including all the cash outlays, will be a proper award for the whole service. This award I should consider insufficient had the services been of long duration, or accompanied by any considerable danger to the persons or the property of the salvors. But these dangers were avoided by the favorable weather during which all the preliminary operations were performed, including the lightening of the ship to the utmost extent possible, consistent with her stability, by unloading all the cargo and by removing all her ballast that could be safely spared. No

previous salvage task has equaled this in magnitude, and the ship was saved with comparatively small damage. The amount awarded on the other hand, though not large, if measured by a percentage upon the values involved, seems to me to be a sufficient recognition of the importance of the services of the salvors, the necessities of the ship and the success achieved; and also to be sufficiently liberal to serve as an inducement to the maintenance, in the most efficient condition, of such wrecking companies as were here employed, without which the safety of the St. Paul could not have been so completely effected, nor could other steamers of her class, when stranded, be saved from great injury, and perhaps total loss.

2. Cargo. The circumstances of the present case, as respects the limited extent of the danger that was common to both ship and cargo and the consequent limited community of interest between them; and as respects the rights of cargo owners to a speedy delivery of their goods on a stranding like this, so near the close of the voyage, and the corresponding duty of the master as their representative, are almost identical with the circumstances in the case of *L'Amerique*, 35 Fed. 835, in which this court held, upon consideration at length, that the community of interest, and consequently the community of burden or expense, as between ship and cargo, were severed from the time they parted company. The unloading of the vessel being indispensable for the purpose of lightening her in order that she might be got off, and equally necessary for the safety of the cargo, this part of the salvage work was there regarded as done in the common interest and for the common benefit; and, therefore, under the adjudged cases, required to be shared in common; but it was held that in circumstances like the present, where the cargo has been unloaded for the purpose of making delivery of it to the owners by other means, there is no longer any community of interest between ship and cargo in the subsequent expenses of getting the ship afloat. The cargo has no interest in that work, not only because the ship is no longer needful to the cargo, but because it is not intended to make any use of the ship for the further prosecution of a joint adventure. The separation of interests is, therefore, complete from the time ship and cargo part company.

In cases like the present, it is obvious from the first that the necessities of the ship and cargo are wholly different. The work of relieving the ship is likely to be long, difficult and doubtful in result; relief for the cargo comparatively quick and sure. The dangers to the ship are not only much greater, but for the most part different in kind, from the danger to the cargo; and the means available and the measures required for the relief of each are so different, that no real community of interest exists between them beyond the time when the cargo is unloaded. After that is finished and the cargo is in safety, the principal and most difficult part of the work of getting the ship off still remains to be done. To hold the cargo chargeable for the expense of that work when it has no interest in the result of the work, would be an arbitrary appropriation and sacrifice of the cargo for the ship's use, with no benefit or intended benefit to the cargo, present or prospective; a sacrifice contrary to common reason and



equity and to the recognized mutual rights of ship and cargo. See *L'Amerique*, *supra*.

If the stranding is light and the ship can be got off and is got off with the cargo on board, no doubt the whole service is a common charge. Reasonable efforts to that end, according to the circumstances, or if those efforts are not successful, then the unloading of cargo, which becomes equally indispensable to the safety of each, should be at the common charge pro rata, because wholly incurred for the common benefit. Beyond that the common charge should cease.

In deciding the case of *L'Amerique*, the adjudged cases up to that time were considered. I find no later cases holding differently under similar circumstances; while in the *City of Worcester*, 42 Fed. 916, a similar case, Judge Shipman made the same separation of interests between ship and cargo, and awarded about 1.2 per cent. on the value of the cargo, and about 13.4 per cent. upon the value of the ship, and this was affirmed on appeal. 45 Fed. 119. In the case of *Pacific Mail S. S. Co. v. New York, H. & R. Min. Co.*, 20 C. C. A. 349, 74 Fed. 564, also a similar distinction was made on appeal as respects specie removed before the salvage operations began; although in this court it was considered that the specie in that case ought to be held for its proportion of the salvage service in pumping out and raising the ship, because that service was made necessary by a previous voluntary act of sacrifice for the common benefit of the ship and specie alike, and because the salvage operation merely diminished the general average burden which the previous act of sacrifice had already imposed upon the whole cargo while the specie was still on board; the same as in the case of salvage services rendered to a ship and her cargo which had been voluntarily stranded for the common safety, or in case of goods necessarily jettisoned, and subsequently rescued by salvors.

The decisions above cited must be followed here. They require the pro rata charge to be limited to the period during which the salvage service was rendered for the common benefit. This was for a period of four days, viz., up to 10 a. m. of Wednesday, the 28th of January, when the unloading was completed. The whole salvage service occupied 11 days. The cargo is evidently not entitled to exemption for the first day's work, during which the passengers and mails were removed, and efforts made to move the ship without unloading. The removal of the passengers was the first duty of the master as the representative of the whole adventure, and that must be at the charge of the whole; and the efforts to move the ship before unloading were in the common interest.

No authorities, moreover, warrant treating the salvage of the ship and the salvage of the cargo as two distinct operations from the first; the exigencies of the ship would not permit two wholly independent salvage operations at the same time. There was but one salvage operation in fact; and, as I have said, there is no authority for severing it by construction, so long as the work is carried on for the common benefit.

Nor do the authorities justify any distinction in the proportion charged against different parts of the cargo. This point was well

considered by Sir R. Phillimore in the case of *The Longford*, 4 Asp. 385, and any such differences, even in favor of specie, were disallowed as illogical and liable to lead to great difficulties and embarrassments.

The proctors of the libelants and of the shipowners have stipulated that \$1,500,000 may be taken as the value of the vessel. As the proctors of the cargo owners, however, do not agree to this, I cannot accept it in fixing the pro rata share of the cargo; and upon the other evidence I think the ship should be considered worth \$2,000,000. Her pending freight was \$16,902.

For the first four days' work, therefore, the share of the cargo will be a little less than two-elevenths of the whole award of \$160,000; or more accurately, 1.45 per cent. on the cargo values. I therefore fix upon that percentage (1.45) as the proportion chargeable upon the cargo, amounting to \$28,987.52, for which a decree may be entered in the libel in personam, with costs; and in the libel in rem, a decree may be entered for the residue of \$131,012.48, with costs.

## THE PILOT.

### PHILLIPS v. THE PILOT.

(District Court, E. D. Pennsylvania. July 18, 1897.)

#### 1. MASTER AND SERVANT—NEGLIGENCE—ORDINARY RISKS OF EMPLOYMENT.

A master of a tugboat who ordered one of the crew to jump ashore to attach a line, is not guilty of negligence if the latter, by reason of his being unaccustomed to jumping, received injuries in attempting to execute the master's order, where it does not appear that the master had knowledge of his inability, since a master of a tugboat is justified in assuming that a member of the crew is accustomed to all ordinary duties required of men on such vessels.

#### 2. MASTER AND SERVANT—NEGLIGENCE—ORDINARY RISKS OF EMPLOYMENT.

In such case the master is not guilty of fault, unless the distance from the wharf was so great as to render the service unnecessarily dangerous to a man of ordinary strength and activity.

#### 3. MASTER AND SERVANT—NEGLIGENCE—EMERGENCY.

The plaintiff, who while jumping ashore to attach a line failed to light upon the wharf, and slipping down its breast into the water was struck by the boat and injured, alleged as negligence on the part of the master his failure to keep the boat off from the wharf after the plaintiff had fallen in the water. *Held*, that the master was not guilty of negligence, since it appeared that he had acted in the emergency with which he was confronted in a manner which seemed best to him under the circumstances.

S. Morris Waln, for libelant.

Henry Flanders and Edward F. Pugh, for respondent.

**BUTLER**, District Judge. The undisputed facts are that the libelant was a member of the respondent's crew, as fireman; that on January 10, 1895, when the tug rounded to at Point Coal Piers, he attempted to jump ashore, to attach a line; that he failed to light upon the wharf, and slipped down its breast into the water, where he was struck by the boat and hurt; that the tide was strong ebb, and the wind east, driving the boat towards the wharf, although her engine had stopped. The libelant charges that he was ordered up from below and directed to jump, by the master; that he hes-

itated, but on receiving a second order, jumped; that the master did nothing to keep the boat off subsequently, although by backing he could have done so. These charges are severally denied, and the testimony respecting them is conflicting.

The case presents but two questions that need be decided: First, was the master blamable for ordering the libelant to jump, supposing he did so? Second, was he blamable for not keeping the tug off subsequently? As respects the first, the libelant was subject to be called to the duty he undertook when jumping. On such vessels the entire crew assists about whatever is to be done when required. In ordering the libelant to jump the master was not, therefore, guilty of fault unless the distance from the wharf was so great as to render the service unnecessarily dangerous, to a man of ordinary strength and activity. There is no evidence that the distance was such. The libelant puts it at five feet, which was certainly not a very long jump; and in his brief (page 1) he assigns his failure to reach the wharf safely to the fact that he is not "accustomed to jumping." The master was justified in assuming that he was accustomed to all the ordinary services required of men on such vessels. This service of jumping ashore to attach a line is required many times daily, and one member of the crew is nearly as liable to be called to its performance as another. If the libelant was deficient in capacity to jump he should at least have said so; if he had, and notwithstanding had been required to jump, the result might possibly be different. His fall into the water must be regarded, under the circumstances, as the result of unfitness for the duty he undertook, and the folly of undertaking it. But even if the distance had been greater, and the master had given the order through error of judgment (and that is the most that could be charged in such case) the order could not be regarded as a fault which would render the vessel liable. The fall into the water under such circumstances, would be an accident, incident to the employment, and contemplated by the contract. *The City of Alexandria*, 17 Fed. 396; *Paulson v. The Governor Ames*, 55 Fed. 327.

Is the master blamable for not keeping off subsequently? If he did what seemed to him best under the circumstances, he is not chargeable with negligence, although it might now seem that something else would have been better. He was confronted with an emergency, was required to think and determine what should be done with no time for deliberation and a mistake under such circumstances would be excusable. The proofs do not satisfy me, however, that he made a mistake, or could have done better than he did. Possibly an effort to back might have been better, but it seems as probable that it would have been worse. It seems improbable that an attempt to back would have been serviceable; before the engine could have affected the motion of the boat it would have been likely to strike the libelant as it did; and if its motion had been thus affected earlier it is not unlikely that the blow would have been harder.

The other allegations of fact on which the libelant depends are thus seen to be unimportant.

The libel must, therefore, be dismissed with costs.

## STANDARD OIL CO. v. BELL et al.

(Circuit Court of Appeals, Fifth Circuit. June 16, 1897.)

No. 598.

**APPEAL AND ERROR—MOTION TO DISMISS AND AFFIRM.**

Where the determination of a motion to dismiss a writ of error and affirm the judgment below involves the examination of a voluminous record, it will not be considered in advance of the regular call.

In Error to the Circuit Court of the United States for the Southern District of Florida.

On motion to dismiss the writ of error and affirm the judgment of the circuit court.

J. C. Cooper, W. W. Howe, W. B. Spencer, and C. P. Cocke, for plaintiff in error.

H. Bisbee, for defendants in error.

Before PARDEE and McCORMICK, Circuit Judges, and MAXEY, District Judge.

**PER CURIAM.** This is an action of ejectment, tried in the circuit court without a jury, and brought here for review on a transcript of 307 printed pages, with 12 assignments of error. Counsel for defendants in error have submitted the following motion, to wit:

"Come now the defendants in error, by H. Bisbee, their attorney, and move to dismiss the writ of error in the above-entitled cause upon the following grounds: First, because no exceptions were taken to any rulings or decisions of the court below in such manner and form as to entitle the plaintiff in error to any review thereof in this court. Second, because no exceptions were taken to the rulings and decisions of the court below upon which the assignments of error can be based. And defendants in error further move for the judgment of this court affirming the judgment of the court below on the ground that it is manifest that a writ of error was taken for delay only; second, on the ground that the objection to the jurisdiction of the court below is too frivolous to need argument."

The record plainly shows that, of the 12 assignments of error, at least half present rulings of the trial judge not reviewable on writ of error. The others, however, assign error as to the ruling of the court on the question of jurisdiction, and as to the rejection of evidence on the trial of the case, based upon exceptions duly taken, and in rulings on other questions, all proper subjects for review on writ of error. It is therefore clear that the writ of error cannot be dismissed for any of the reasons assigned in the motion. To pass upon the motion to affirm requires a careful examination of the entire record, which the court is indisposed to make in advance of the regular call, and without opportunity to the plaintiff in error to present argument on the points involved. The motion to dismiss and affirm is therefore denied.

**CRYSTAL SPRINGS LAND & WATER CO. et al. v. CITY OF LOS ANGELES.**

(Circuit Court, S. D. California. July 9, 1897.)

No. 583.

**1. FEDERAL COURT—JURISDICTION—MEXICAN GRANTS.**

When both parties claim under Mexican grants, confirmed and patented by the United States in accordance with the provisions of the treaty of Guadalupe Hidalgo, and the controversy is only as to what were the rights thus granted and confirmed, the suit is not one arising under said treaty, so as to confer jurisdiction on a federal court.

**2. SAME—ALLEGATIONS OF BILL—EFFECT OF DISCLAIMER ON ANSWER.**

When the only ground of federal jurisdiction grows out of allegations in the bill that defendant's claim of title is based in part on certain acts of a state legislature which attempt to transfer to him the title held by complainant's grantors at the time of their passage, the court will not retain jurisdiction when an answer is filed by the defendant denying such allegations and disclaiming any title or claim of title not held by him before the passage of said acts.

This was a suit in equity by the Crystal Springs Land & Water Company and S. G. Murphy against the city of Los Angeles to quiet title to certain waters, water rights, and works connected therewith. A demurrer to the bill was overruled (76 Fed. 148), and defendant now moves to dismiss the bill for want of jurisdiction.

White & Monroe and Chapman & Hendrick, for complainants.  
W. E. Dunn, W. E. Lee, and Lee & Scott, for defendant.

**WELLBORN, District Judge.** The present hearing is on a motion to dismiss the bill for want of jurisdiction. Jurisdictional issues were raised at an earlier stage of the suit by demurrer. Complainants then maintained that the suit was one of federal cognizance, on two grounds: First, that the suit arose under the treaty of Guadalupe Hidalgo; second, that defendant's claim to the water properties described in the bill was based, in part, at least, on acts of the legislature of California, which acts, if construed as making the grants claimed by defendant, are repugnant to the constitution of the United States, and therefore the case is one arising under said constitution. Defendant controverted both grounds. The demurrer was overruled, the court resting its decision on the latter of the above-stated grounds, leaving the former undecided. See 76 Fed. 148. Defendant has since filed its answer, and entered a motion for a dismissal of the suit, on the ground that the answer disclaims, as against vested rights of complainants, any title to said waters through said acts of the legislature. On this motion to dismiss the argument has not been confined to the effect of defendant's alleged disclaimer, but by permission of the court the question as to whether or not the suit arises under the treaty above mentioned has been reargued. The allegations of the bill, as summarized in complainants' last brief, are these:

"On the 22d of March, 1843, a grant was made by the then Mexican governor to Maria Ygnacio Verdugo of a certain tract of land known as the 'Los Feliz Rancho,' which was subsequently confirmed by the proper authorities of the United States; and on the 18th of April, 1871, a patent was duly issued by the United States to the Mexican grantee. \* \* \* And another grant was made

on the 20th of October, 1784, by Pedro Fajes, then the governor under the Spanish government of California, to Julio Verdugo, of another certain tract of land known as the 'San Rafael Rancho,' and which was subsequently, in 1798, confirmed by the Mexican government, and patented on the 28th day of January, 1882, by the said government of the United States, the claim having been finally confirmed on June 4, 1857. \* \* \* On the 26th of October, 1852, the city of Los Angeles filed its petition with the commissioners to settle private land claims for the confirmation of their title to a tract containing sixteen square leagues, granted by the Mexican government to it on the 25th day of August, 1844. The claim was confirmed to four square leagues, rejected as to the rest, and the patent issued on the 9th of August, 1866, and the tract conveyed to the city by that patent upon the said confirmed grant is bounded on the north by the Rancho Los Feliz and Rancho San Rafael. \* \* \* The Los Angeles river rises to the north of the city, flows down through the two ranchos named, and through the city, entering the city on the northern boundary, at or near its middle point, and flowing in a southerly direction. \* \* \* The Crystal Springs Land and Water Company acquired a certain tract in the Los Feliz Rancho, claimed under the said Mexican grant, and patented [giving a description of the tract]. On June 14, 1896, G. J. Griffith owned about 4,900 acres of the Rancho Los Feliz, and granted to the Los Angeles City Water Company the right to develop water on that part of the Los Feliz Rancho belonging to him. \* \* \* The Crystal Springs Land and Water Company had acquired a part of the San Rafael Rancho, and still own it, subject to the rights of Griffith. \* \* \* A certain portion of that rancho contains a large amount of percolating water. \* \* \* The Crystal Springs Land and Water Company had acquired the rights of the Los Angeles City Water Company. \* \* \* Under these rights, to wit, the ownership of a certain portion of the land, and the grant of the right to develop on other portions, they had, within the limits of their ownership, excavated in the soil, and gathered together of the percolating waters about seven hundred inches, measured under a four-inch pressure, which they conducted, by means of pipes, to a gate house, at which point the waters so developed are united together, and conveyed through pipes to the city, for the purpose of furnishing the inhabitants of the city with water for domestic purposes. \* \* \* They are the owners of the waters so developed, by virtue of the rights and incidents of ownership passing by the Mexican grants, and their confirmations and the patents of the United States to the said lands. \* \* \* The waters percolating in the soil passed with the grants, and became the property of the owners of the land, and the rights of the plaintiffs are derived from, through, and under the said grants made by the Spanish and Mexican governments, and the confirmation thereof by the United States, and the patents issued, and they are protected by the treaty between the United States and Mexico; and the title in said waters and rights, and to the use thereof, were confirmed by the authorities of the United States, as aforesaid. \* \* \* Other lands, both north and south of the patent boundaries of the city, through which the Los Angeles river flows, were acquired from the Mexican and Spanish governments; and other lands, which became vested in the United States upon the acquisition of California from the Mexican government, through which the river flows, have since been acquired by private parties from the United States, and patents issued. The rights of these parties, both under other Spanish and Mexican claims, and also by patents from the United States, were as riparian owners, and they were entitled to the waters of the river, and the waters percolating in the soil, by virtue of their ownership of the land, whether they ultimately found their way into the Los Angeles river or not. \* \* \* All the waters so taken by the plaintiffs do not diminish the quantity of water flowing in the river. \* \* \* Certain acts of the legislature, one passed on the 26th of March, 1874, undertook to grant to the city of Los Angeles certain rights, and among them the full, free, and exclusive right to all the water flowing in the river from its sources to the intersection of the river with the south boundary of the city, and the right to develop, economize, use, and utilize all waters flowing beneath the surface in the bed of said river, between the points of termini therein, but excepted and reserved from the operation of said grant of the water flowing in said river, unless the same should be condemned for public use, all vested private rights to the said water flowing upon the surface or beneath it in the bed of said river. \* \* \* An act passed the first day of April, 1876, made a similar grant.

\* \* \* In another act of the same kind, passed in March, 1878, the exceptions in favor of private rights were not made. \* \* \* The city of Los Angeles claims that the city, as the successor of the Mexican pueblo of Los Angeles, and by virtue of the laws of Mexico governing, regulating, and fixing the rights of the pueblo to the waters of the river flowing through it, and the said several acts of the legislature referred to, is the sole and exclusive owner of all the waters flowing in the Los Angeles river, from its sources to the southern boundary of the city, and the exclusive right to develop waters percolating under the bed of the river, or elsewhere, which flow into or become a part of the waters of said Los Angeles river, and claims that the development made by the Crystal Springs Land and Water Company was without right, and the water belonged to the city."

The prayer of the bill is for a final decree, quieting the title of the complainants to said waters, water rights, and the works therewith connected.

The answer of defendant, or those parts of it which are material to the pending motion, denies the rights asserted by complainants to the water properties in dispute, and that by the laws of Spain or Mexico, or any other laws, the waters percolating in the soils of the Ranchos San Rafael and Los Feliz passed by the grants of said ranchos; and admits that defendant claims, as the successor of the Mexican pueblo of Los Angeles, by virtue of the laws of Mexico, and said several acts of the legislature of California, said water properties; but denies that it claims that said acts of the legislature "granted to the city of Los Angeles \* \* \* any vested private right, if any, to the water flowing or being upon the surface or beneath it in the bed of said Los Angeles river, or any water or right whatsoever, if any, which was at the time of the passage of said acts of the legislature vested in said Los Angeles City Water Company, or its predecessor in interest, or in the predecessor in interest of said Crystal Springs Land and Water Company; but, on the contrary, this defendant disclaims having acquired, under any of said acts of the legislature, any right, if any, to the water flowing upon the surface or beneath it in the bed of said river, or any other water or right whatsoever, if any, which was at the time of the passage of said acts vested in the said Los Angeles City Water Company, or its predecessor in interest, or in the predecessor in interest of said Crystal Springs Land and Water Company, or in any private individual or corporation; and this defendant denies that it claims, or ever claimed, under or by virtue of said acts of the legislature, or any of them, the right to develop waters percolating in the bed of said river, or elsewhere, without having first obtained the right of entering upon the land so to develop from the owner of the soil where such development should be made, either by grant from such owner or by condemnation of such right and making compensation to said owner therefor or otherwise." And further denies "that it claims, or ever claimed, that there was granted by said acts of the legislature, or any of them, to the city of Los Angeles, \* \* \* any right, if any, to develop waters percolating under the bed of said Los Angeles river, or elsewhere, which was at the time of the passage of said acts vested in any private individual or corporation, or in said Los Angeles City Water Company, or its predecessor in interest, or in the predecessor in interest of the said Crystal

Springs Land and Water Company; and this defendant disclaims that said acts of the legislature, or any one or more of them, had the effect of granting to this defendant any right, if any, to develop water percolating in the bed of said Los Angeles river, or elsewhere, which was at the time of the passage of said acts vested in any private person or corporation, or in said Los Angeles City Water Company, or its predecessor in interest, or in the predecessor in interest of said Crystal Springs Land and Water Company." And further "denies that it claims under or by virtue of said acts of the legislature, or any of them, or any other act of said legislature, the right, if any, to develop the waters alleged to be percolating in the land mentioned in said paragraph 23, which was at the passage of said acts vested in any private individual or corporation, or which was at the passage of said acts vested in said Los Angeles City Water Company, or its predecessor in interest, or in the predecessor in interest of said Crystal Springs Land and Water Company, and which has not since been acquired by this defendant other than by said acts of the legislature; and this defendant disclaims having acquired any such right under or by virtue of said acts of the legislature, or any of them."

As already indicated, the questions to be decided on the pending motion, and the pleadings, whose material averments I have recapitulated, are two: First. Does the suit arise under the treaty of Guadalupe Hidalgo? Second. Assuming, what has heretofore been decided by me (76 Fed. 148), that, on the face of the bill, by reason of its allegations to the effect that defendant's claim is based upon said acts of the legislature of California, and that said acts, if construed in accordance with such claim, are violative of the constitution of the United States, a federal question is presented, does the answer of the defendant contain such a disclaimer as eliminates from the suit this federal question?

1. A careful review of the arguments advanced and precedents invoked respectively by complainants and defendant satisfies me that *Phillips v. Association*, 124 U. S. 605-612, 8 Sup. Ct. 657, and *Powder Works v. Davis*, 151 U. S. 389-391, 14 Sup. Ct. 350, cannot, as to their essential features, be distinguished from the case at bar, but are conclusive against complainants' contention that the suit arises under the treaty of Guadalupe Hidalgo. The principle of the two cases last cited, as I understand them, is this: Where the parties claim under Spanish or Mexican grants, confirmed and patented by the United States, and the controversy is only as to what were the rights acquired by the parties respectively, or their predecessors in interest, under the Spanish or Mexican governments, it being conceded that the rights so acquired, whatever they may have been, were included in the confirmation and quitclaimed through the patent of the United States, federal jurisdiction does not exist; and it is immaterial whether such rights were acquired through the original grants or transactions subsequent thereto. In the case at bar, as appears from the pleadings, defendant concedes the validity of the Mexican and Spanish grants, and patents issued thereon, through which complainants derive title, and that said grants and patents include the lands



they purport to grant. The matter in dispute is whether or not the waters percolating under said lands passed with the original grants thereof, and the determination of this question does not require a construction of the constitution or any treaty or statute of the United States, but depends upon the laws of Mexico and Spain. Careful re-examination of *New Orleans v. De Armas*, 9 Pet. 224, dismissed for want of jurisdiction, further satisfies me that I did not give to said case, in my former opinion, suitable weight or scope. Whether or not that case sustains the contention in support of which it was invoked by the defendant herein, namely, that complainants' title is not protected by the treaty of Guadalupe Hidalgo, is immaterial, in view of the ruling which I have just indicated. For, if it be conceded that complainants' title is protected by said treaty, still, in legal contemplation, the suit does not arise thereunder, because the controversy which it involves is not over the construction of the treaty, but as to the validity of conflicting claims of title under Spanish and Mexican grants prior to the treaty. The purpose for which I have adverted, in this connection, to the case of *New Orleans v. De Armas*, is to call attention to the fact that some of the utterances of the court therein are strongly confirmatory of the principle enunciated in *Phillips v. Association and Powder Works v. Davis*, *supra*. The first paragraph of the syllabus in said case of *New Orleans v. De Armas* is as follows:

"A lot of ground situated in the city of New Orleans, which was occupied, under an incomplete title, for some time, by permission of the Spanish government, granted before the acquisition of Louisiana by the United States, was confirmed to the claimants under the laws of the United States, and a patent was issued for the same on the 17th day of February, 1821. The city of New Orleans, claiming this lot as being part of a quay dedicated to the use of the city in the original plan of the town, and therefore not grantable by the king of Spain, enlarged the levee in front of New Orleans so as to include it. The patentees from the United States brought a suit in the district court of the state of Louisiana for the lot, which pronounced judgment in their favor, and that judgment was affirmed by the supreme court of the state. The judgment was removed to this court, under the twenty-fifth section of the judicial act. A motion was made to dismiss the writ of error for want of jurisdiction."

And directly in point are the following quotations from the opinion of the court:

"The appellees claim title to a lot of ground in the city of New Orleans, as purchasers from the heirs of Catherine Gonzales, the widow of Thomas Beltrau, alias Bertrand, who had been in possession of the lot for several years, by permission of the Spanish government. This incomplete title was regularly confirmed under the laws of the United States, and a patent was issued for the premises to Catherine Gonzales on the 17th of February, 1821. The city of New Orleans, claiming this lot as being part of a quay dedicated to the use of the city in the original plan of the town, and therefore not grantable by the king, has enlarged the levee so as to embrace it. The appellees brought their petitory action in the district court of the state of Louisiana, praying to be confirmed in their rights to the said lot of ground, and that the corporation might be enjoined from disturbing them in the exercise thereof. \* \* \* The controversy in the state court was between the two titles; the one originating under the French, the other under the Spanish, government. It is true, the successful party had obtained a patent from the United States, acknowledging the validity of his previous incomplete title under the king of Spain. But this patent did not profess to destroy any previous existing title, nor could it so operate, nor was it understood so to operate by the state court. It appears from the petition filed in

the district court that the patent was issued in pursuance of the act of the 11th of May, 1820, entitled 'An act supplementary to the several acts for the adjustment of land claims in the state of Louisiana.' That act confirms the titles to which it applies 'against any claim on the part of the United States.' The title of the city of New Orleans would not be affected by this confirmation. But, independent of this act, it is a principle applicable to every grant that it cannot affect pre-existing titles. *U. S. v. Arredondo*, 6 Pet. 738. The judgment of the state court appears on the record to have depended on, and certainly ought to have depended on, the opinion entertained by that court of the legal rights of the parties under the crowns of France and Spain. The case involves no principle on which this court could take jurisdiction which would not apply to all controversies respecting titles originating before the cession of Louisiana to the United States. It would also comprehend all controversies concerning titles in any of the new states, since they are admitted into the Union by laws expressed in similar language."

These quotations, in so far as they state the facts and enunciate the principles on which the court denied the federal character of the controversy there involved, apply with uncommon aptness and precision to the case at bar.

The authorities relied on by complainants have had from me close attention, but I do not think they overthrow the principle of the cases hereinbefore cited.

In *Glasgow v. Baker*, 128 U. S. 560, 9 Sup. Ct. 154,—writ of error to the supreme court of Missouri,—plaintiffs and defendants respectively claimed under different acts of congress, the final decision of the state court being in favor of the defendants, and therefore the suit was clearly within the jurisdiction of the supreme court.

*Knight v. Association*, 142 U. S. 161-216, 12 Sup. Ct. 258,—writ of error to the supreme court of California,—was also clearly a suit of federal cognizance, because the contest was between titles derived, one through a grant from the state of California, and the other through a patent issued by the government of the United States; and the decision of the state court was against the validity of the title claimed under authority of the United States. The same remarks, substituting the state of Oregon for the state of California, apply to *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. 548.

*McDonogh v. Millaudon*, 3 How. 693,—writ of error to the supreme court of Louisiana,—cannot be regarded as favorable to complainants herein, as shown by the following quotation:

"The state court held McDonogh's title to be valid to every extent that it has been recognized by the United States, and only applied the local laws of Louisiana in its construction, so far as they had a controlling influence on the manner in which the side lines should be extended from the Mississippi river towards Lake Maurepas; and as, in so doing, neither the treaty of 1803 nor any act of congress or authority exercised under the United States was drawn in question, this court has no jurisdiction to revise the decision of that court, for which reason the cause must be dismissed."

*Baldwin v. Starks*, 107 U. S. 463, 2 Sup. Ct. 473, was wholly unlike the case at bar, as shown by the following extract from the opinion of the court:

"This is a writ of error to the supreme court of the state of Nebraska, and the jurisdiction of this court is questioned. The substance of the original bill in the state court is that, in a contest for the right to enter a tract of land between Starks and Van Pelt, before the land department, the secretary of the interior

erroneously decided in favor of Van Pelt, to whom a patent was issued; and the prayer of the bill is that Baldwin, who holds under Van Pelt, shall be decreed to hold the title in trust for Starks, and convey it to him, and be enjoined from prosecuting further an action of ejectment against plaintiff, which he has commenced for the land in controversy. That the decree which granted this relief denied to plaintiffs in error the right which they asserted under the patent from the United States, and was a decision against the title so asserted, and is, therefore, within section 709 of the Revised Statutes, is too well settled by numerous similar cases decided in this court to admit of further question."

To show, at a glance, the precise point of this decision, I quote that part of said section 709 pertinent thereto, as follows:

"A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had \* \* \* where any title \* \* \* is claimed under the constitution, or any treaty or statute of, or commission held, or authority exercised under, the United States, and the decision is against the title \* \* \* specially set up or claimed by either party under such constitution, treaty, statute, commission or authority, may be re-examined and reversed or affirmed in the supreme court, upon a writ of error."

Thus it will be seen that the ground on which federal jurisdiction rested was that plaintiffs in error relied on their patent as an authority emanating from the United States, about whose validity there was real, substantial controversy, and the decision of the state court was against the title so claimed. Undoubtedly the case was within the provision which I have quoted from said section 709 of the Revised Statutes of the United States.

Owings v. Norwood's Lessee, 5 Cranch, 344, was ejectment, originally brought in the state courts of Maryland, between citizens of said state, in which defendant set up an outstanding title in a British subject, one Jonathan Scarth, which title defendant contended was protected by the treaty of peace with Great Britain of 1794 against the confiscatory acts of the state of Maryland, through which plaintiff claimed, and, therefore, that the title to said land was out of the plaintiff. The court of appeals of Maryland, being the highest court of law and equity in that state, decided against the title thus set up. On writ of error the supreme court of the United States held that said action was not a case arising under the treaty, for the reason that Scarth was not a party to the suit, and that neither his title nor that of any person claiming under him could be affected by the decision of the case, and the writ of error was accordingly dismissed. From the opinion of the court, complainants' counsel quote the following:

"Whenever a right grows out of, or is protected by, a treaty, it is sanctioned against all the laws and judicial decisions of the states; and, whoever may have this right, it is to be protected. But if the person's title is not affected by the treaty, if he claims nothing under a treaty, his title cannot be protected by the treaty. If Scarth or his heirs had claimed, it would have been a case arising under a treaty. But neither the title of Scarth nor of any person claiming under him could be affected by the decision of this cause."

In determining the scope of those words in the quotation upon which complainants seem to rely, namely, "whenever a right grows out of or is protected by a treaty, it is sanctioned against all the laws and judicial decisions of the states," and, "if Scarth or his heirs had

claimed, it would have been a case arising under a treaty," it must be remembered that in the supposititious case, to which the words apply, there would have been, not only a claim of protection by, but a real, substantial controversy over the construction of, the treaty. Furthermore, said words were observations of the court, outside the facts of the case, and cannot be accepted as authority to overturn principles enunciated in later cases, and upon facts requiring the application of such principles.

In *Kansas Pac. R. Co. v. Atchison, T. & S. F. R. Co.*, 112 U. S. 414-423, 5 Sup. Ct. 208, the third paragraph of the syllabus is as follows:

"A controversy arises upon laws of the United States where two corporations claim title to the same land under different acts of congress, and the decision depends upon the construction given to those acts."

Obviously, no such facts exist here.

*U. S. v. Kingsley*, 12 Pet. 475, was a petition for confirmation of certain lands in East Florida, which petitioner alleged had been granted to him on the 20th of November, 1816, while East Florida was held by the crown of Spain. The grant was conditional, and the only issue in the case was whether or not the condition had been complied with. The supreme court, on appeal, declared, among other things, that in maintaining rights of property protected by the Florida treaty reference should be had to "those laws and customs by which such rights were secured before Florida was ceded, or by which an inchoate right of property would, by those laws and customs, have been adjudicated by the Spanish authorities to have become a perfect right." No question whatever was made as to the jurisdiction of the court. The case undoubtedly was one of federal cognizance, not, however, because, in determining its issues, Spanish laws and customs were to be applied, but because the jurisdiction was expressly conferred by the sixth section of the act of congress of May 23, 1828, entitled "An act supplementary to the several acts providing for the settlement and confirmation of the private land claims in Florida" (4 Stat. 285), the tract of land claimed by the petitioner containing a larger quantity of land than the commissioners referred to in said several acts were authorized to decide upon by any of said acts. The other authorities cited by complainants are numerous, and it would unnecessarily prolong this opinion to further pursue their examination in detail. It is sufficient to say that to my mind all of them are readily distinguishable from, while none impair the force of, *Phillips v. Association and Powder Works v. Davis*, supra, upon which last two cases, as already indicated, I rest my decision of the point now under consideration.

2. The other question involved in the motion to dismiss relates to the effect of defendant's disclaimer. Complainants contend that said disclaimer does not disturb the federal jurisdiction apparent upon the face of the bill, because, among other reasons, of the qualifying words in said disclaimer as to the vested rights of complainants and other private parties. This contention is expressed at page 9 of complainants' brief, as follows:

"And when it disclaims having acquired rights which were vested in any private parties by those acts, it manifestly means, and cannot be construed otherwise than as meaning, simply that it claims that no private party had any private rights to be affected by the grant."

While the disclaimer embraces what is thus suggested by complainants, it goes further, and concludes the defendant, if there were rights vested in private persons at the passage of said acts of the legislature, from asserting title through said acts as against said vested rights. Furthermore, this suit is one to quiet title, and complainants, for cause of action, allege ownership of the property, defendant's claim thereto, and that said claim is unfounded. According to my previous rulings herein, the only ground of federal jurisdiction grows out of the allegations of the bill that one of the claims of the defendant is that certain acts of the legislature of California attempt to transfer to it the title held by complainants at the time of their passage, and that said acts, if construed as supporting such claim, are repugnant to the constitution of the United States. Now, if the defendant claims for said acts no other effect than that they transfer to or continue in the city of Los Angeles, as the successor in law of the Mexican pueblo of Los Angeles, only those rights which belonged to the latter, then said acts, if construed as supporting said claim, do not impair or affect any vested rights of complainants, and therefore are not repugnant to the constitution of the United States; and it makes no difference, so far as this question is concerned, that defendant claims that the property in question, at the time of the passage of said acts, was the property of said pueblo, and denies that under the laws of Spain and Mexico the waters percolating in the soil of the Ranchos San Rafael and Los Feliz passed by the grants of said ranchos. Such claim and denial by the defendant do not, for their support, require any construction of said acts of the legislature which would make them repugnant to the constitution of the United States. Under the circumstances of this case it cannot be that a technical disclaimer—that is, such an absolute renunciation of title as, by the general rules of equity pleading and practice, would authorize a decree, without costs, quieting complainants' title as against the defendant—is necessary to overcome the jurisdictional allegations of the bill. It is sufficient for this purpose if the answer renounces that particular claim of title which is alleged in the bill as the ground of federal jurisdiction. These jurisdictional allegations, as already stated, are to the effect that defendant makes a particular claim, namely, that certain acts of the legislature of California transfer to it property which, at the date of said acts, belonged to complainants' grantors. Obviously, if the defendant makes no such claim, although it does assert ownership through other sources, the ground of federal jurisdiction alleged in the bill does not exist. This is precisely the situation presented by the answer of the defendant, the city of Los Angeles, and brings the case within the principle announced in *Robinson v. Anderson*, 121 U. S. 522-524, 7 Sup. Ct. 1011. In that case the court says:

"Upon the pleadings the court dismissed the suit, evidently for the reason that it did not really and substantially involve a dispute or controversy within the

jurisdiction' of that court. Such was the clear duty of the court under the act of 1875, unless from the questions presented by the pleadings it distinctly appeared that some right, title, privilege, or immunity on which the recovery depended would be defeated by one construction of the constitution, or some law or treaty of the United States, or sustained by an opposite construction. *Starlin v. City of New York*, 115 U. S. 257, 6 Sup. Ct. 28. Even if the complaint, standing by itself, made out a case of jurisdiction, which we do not decide, it was taken away as soon as the answers were in, because, if there was jurisdiction at all it was by reason of the averments in the complaint as to what the defenses against the title of the plaintiffs would be; and these were of no avail as soon as the answers were filed, and it was made to appear that no such defenses were relied on. The circuit court cannot be required to keep jurisdiction of a suit simply because the averments in a complaint or declaration make a case arising under the constitution, laws, or treaties of the United States, if, when the pleadings are all in, it appears that these averments are immaterial in the determination of the matter really in dispute between the parties. \* \* \*

Complainants, in their brief, at pages 36 and 37, say:

"So it will be seen that the disclaimer is of exactly the same kind as in the other suit. It does not disclaim. It asserts the ownership of all these waters by virtue of its ownership of the land, as the successor of the pueblo, claiming that under the laws of Spain and Mexico this sweeping and universal right passes to them by virtue of the operation of those laws upon the Mexican grant and the United States patent, and it does not claim that the legislature passed any rights belonging to the defendants or their predecessors; but it does assert that the defendants and their predecessors do not have any right. Now, it is perfectly obvious upon that statement of the case alone that a federal question is involved. Suppose the state court decides that they have no such rights; is that not a decision against a right or title claimed under the United States patent? And also that it proceeds from the Spanish and Mexican governments, and is protected by the treaty?"

The infirmity of this argument lies in the assumption that the fact of a title being derived through a patent or protected by a treaty of the United States is "title claimed under" such patent or treaty; whereas, the courts uniformly hold that this phraseology, as employed in section 709 of the Revised Statutes, as well as the constitutional and legislative grants of original jurisdiction, implies not merely derivation of title through a patent, or protection from a treaty, but a real, substantial controversy over such patent or treaty. Thus the supreme court of the United States has expressly declared:

"When a suit does not really and substantially involve a dispute or controversy as to the effect or construction" of the constitution, "upon the determination of which the result depends, then it is not a suit arising under the constitution. \* \* \* The judicial power extends to all cases in law and equity arising under the constitution, and these are cases actually, and not potentially, arising, and jurisdiction cannot be assumed on mere hypothesis. In this class of cases it is necessary to the exercise of original jurisdiction by the circuit court that the cause of action should depend upon the construction and application of the constitution, and it is readily seen that cases in that predicament must be rare. Ordinarily, the question of the repugnancy of a state statute to the impairment clause of the constitution is to be passed upon by the state courts in the first instance, the presumption being in all cases that they will do what the constitution and the laws of the United States require. *Chicago & A. R. Co. v. Wiggins Ferry Co.*, 108 U. S. 18, 1 Sup. Ct. 614, 617; and, if there be ground for complaint of their decision, the remedy is by writ of error, under section 709 of the Revised Statutes. Congress gave its construction to that part of the constitution by the twenty-fifth section of the judiciary act of 1789, and has adhered to it in subsequent legislation." *City of New Orleans v. Benjamin*, 153 U. S. 424, 14 Sup. Ct. 909.

Complainants further contend that there is no disclaimer as to the act of the legislature of California to incorporate the city of Los Angeles, passed April 4, 1850. The answer of defendant, however, on page 11, lines 27 to 39, disclaims not only as to the acts of the legislature particularly pleaded in the bill, but also as to all other acts of the legislature. Another and complete reply to this contention of complainants is that the bill nowhere alleges that defendant claims through said act of 1850, and, therefore, conceding that the court can take judicial notice of it, the act is not material to the case made by the pleadings.

Complainants further contend that defendant's attorneys were without authority to file the disclaimer. This contention, I think, is not well taken. *Connett v. City of Chicago*, 114 Ill. 233, 29 N. E. 280; *Brooks v. New Durham*, 55 N. H. 559; *City of Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604; *San Francisco Gas Co. v. City of San Francisco*, 9 Cal. 473. After full consideration of the bill and answer, it is clear, to my mind, that the controversy between the parties to this litigation concerns the rights respectively acquired by their predecessors in interest, under Mexican and Spanish laws, prior to the treaty of Guadalupe Hidalgo, and that the decision of the case does not require the construction of the constitution, or any treaty or statute of, or authority exercised under, the United States. Defendant's motion allowed, and suit dismissed, without prejudice, for want of jurisdiction.

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**SIOUX CITY TERMINAL RAILROAD & WAREHOUSE CO. et al. v. TRUST CO. OF NORTH AMERICA.<sup>1</sup>**

(Circuit Court of Appeals, Eighth Circuit. August 2, 1897.)

No. 801.

**1. EQUITY PRACTICE IN FEDERAL COURTS—PARTIES.**

Under the forty-seventh equity rule, the complainant in a federal court need not join any but indispensable parties, when their joinder will oust the jurisdiction; and, if he does join them, the court may permit their dismissal, and thereupon it has the same jurisdiction in the case that it would have had if they had never been made parties. Their subsequent introduction into the suit on their own petition, even if they be citizens of the same state with complainant, will not oust the jurisdiction.

**2. FEDERAL COURTS—FOLLOWING STATE DECISIONS—POWERS OF STATE CORPORATIONS.**

When the highest court of a state has determined the extent of the powers and liabilities of corporations created under its laws, that decision is conclusive in the national courts in all cases involving no question of general or commercial law, and no question of right under the federal constitution.

**3. CORPORATIONS—POWER TO MORTGAGE PROPERTY AND FRANCHISES.**

A terminal and warehouse company organized under the Iowa statutes for the purpose, among others, of constructing and maintaining a railway, has express authority (*McClain's Code*, §§ 1955, 1965, 1966) to mortgage its present and future acquired property and its franchises, and this power is not lost by failure to claim it in the articles of association.

**4. PERPETUITIES—IOWA STATUTE—LEASE AND MORTGAGE.**

Under the statute of Iowa which provides, "Every disposition of property is void which suspends the absolute power of controlling the same for a longer

a Rehearing denied October 18, 1897.

period than the lives of persons then living and for twenty-one years thereafter" (McClain's Code 1888, § 3091), a mortgage in the form of a trust deed, given by a corporation to secure its bonds payable in 10 years, which recites the existence of a lease of the same property for 100 years, and transfers to the trustee all the rights of the mortgagor thereunder, is valid and binding, whether the lease and mortgage are considered separate instruments or a tripartite agreement.

5. CORPORATION—MORTGAGE—EXCESSIVE INDEBTEDNESS.

A mortgage given by a corporation to secure a debt in excess of the amount of indebtedness which it had power under the statute to contract is binding on the corporation and its subsequent creditors, where the corporation has received the full consideration for the debt secured, and the transactions were free from fraud.

6. SAME—ESTOPPEL—MORTGAGE EXECUTED BY OFFICERS.

After a corporation has negotiated and received the proceeds of bonds secured by a mortgage executed by its officers, sealed with its corporate seal, and reciting that it was executed by authority of the corporation, both the corporation and its subsequent creditors are estopped from denying the validity of the mortgage because its execution was not authorized by a proper resolution of its board of directors.

7. SAME—STATUTORY REDEMPTION—SALE IN SOLIDO.

The right of redemption and right of sale in parcels given by the statutes of Iowa (McClain's Code 1888, §§ 4317-4331) do not extend to real estate of a corporation mortgaged with its franchise to take, hold, and use property for public purposes, the chief value of which depends upon its unity and use for such purposes.

Appeal from the Circuit Court of the United States for the Northern District of Iowa.

John C. Coombs and Henry J. Taylor, for appellants.

Asa F. Call, for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This is an appeal by the mortgagor and subsequent lienholders from a decree of foreclosure of a first mortgage for \$1,250,000 upon the property of the Sioux City Terminal Railroad & Warehouse Company of Sioux City, Iowa (hereafter called the "Terminal Company"). The appellants challenge this decree on many grounds. At the threshold of the investigation they meet the complainant with the charge that the court below had no jurisdiction of the case, because some of the defendants were citizens of the same state as the complainant. The complainant was the Trust Company of North America of Philadelphia, Pa. (hereafter called the "Trust Company"), and it was a corporation of the state of Pennsylvania. It was the trustee for the bondholders secured by the first mortgage made by the Terminal Company, and it brought this suit to foreclose that mortgage on April 17, 1894. The Terminal Company was a corporation of the state of Iowa. The Trust Company made the Terminal Company and a large number of individuals and corporations parties defendant. Among the latter were several banks which had liens upon the mortgaged property subsequent to that of the first mortgage, and which were corporations of the state of Pennsylvania. On June 19, 1894, the Terminal Company and several other defendants demurred to the bill on the ground that the circuit court had no jurisdiction because the Pennsylvania banks were



corporations of the same state as the complainant. On the next day the complainant, by leave of the court, dismissed its suit as to the Pennsylvania banks; and the court on the same day overruled the demurrers, and consolidated with this suit another which had been previously brought in that court to foreclose a second mortgage upon the property of the Terminal Company. One of the defendants in the latter suit was a citizen of the same state as one of the complainants therein. On June 24, 1895, the Pennsylvania banks presented a petition in this suit in which they alleged that they had judgment liens upon the property, and asked that they be admitted to the consolidated suit as parties defendant. Their request was granted, and the suit then went to decree.

The general rule in chancery is that all those whose presence is necessary to a determination of the entire controversy must be, and all those who have no interest in the litigation between the immediate parties, but who have an interest in the subject-matter of the litigation, which may be conveniently settled therein, may be, made parties to it. The former are termed the necessary, and the latter the proper, parties to the suit. The limitation of the jurisdiction of the federal courts by the citizenship of the parties, and the inability of those courts to bring in parties beyond their jurisdiction by publication, has resulted in a modification of this rule, and a practical division of the possible parties to suits in equity in those courts into indispensable parties and proper parties. An indispensable party is one who has such an interest in the subject-matter of the controversy that a final decree between the parties before the court cannot be made without affecting his interests, or leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience. Every other party who has any interest in the controversy or the subject-matter which is separable from the interest of the parties before the court, so that it will not be immediately affected by a decree which does complete justice between them, is a proper party. Every indispensable party must be brought into court, or the suit will be dismissed. The complainant may join every proper party, and he must join every proper party who would have been a necessary party under the old chancery rule, unless his joinder would oust the jurisdiction of the court as to the parties before it, or unless he is incapable of being made a party by reason of his absence from the jurisdiction of the court or otherwise. If, however, such a party is incapable of being made a party, or if his joinder would oust the jurisdiction of the court as to the parties before it, the suit may proceed without him, and the decree will not affect his interests. *Rev. St. §§ 737, 738; Equity Rule 47; Chadbourne's Ex'rs v. Coe*, 10 U. S. App. 78, 83, 2 C. C. A. 327, 51 Fed. 479, 480, 481; *Shields v. Barrow*, 17 How. 130, 139; *Ribon v. Railroad Co.*, 16 Wall. 446, 450; *Coiron v. Millaudon*, 19 How. 113; *Williams v. Bankhead*, 19 Wall. 563; *Kendig v. Dean*, 97 U. S. 423; *Alexander v. Horner*, 1 McCrary, 634, Fed. Cas. No. 169; *Cole Silver Min. Co. v. Virginia & Gold Hill Water Co.*, 1 Sawy. 685, Fed. Cas. No. 2,990. The Pennsylvania banks held judgment liens upon the mortgaged property later in date than, and inferior in equity to, the lien of the Trust Company's mortgage.

They were not indispensable parties to the suit, because their interests were separable from those of the other parties to it, and a final decree which would do complete justice between them might be rendered without immediately affecting the interests of these banks. A decree of foreclosure in a suit to which they were not parties would have left their liens upon the equity of redemption unforclosed and unaffected. Moreover, their joinder would oust the jurisdiction of the court as to the other parties to the suit, because they were corporations of the same state as the complainant. When this suit was commenced, therefore, the Trust Company had the option to join or to fail to join these banks as parties defendant; and the court had the right to proceed without making them parties, under the decisions which we have cited, and under the forty-seventh equity rule, which embodies these decisions, and reads:

"In all cases where it shall appear to the court, that persons, who might otherwise be deemed necessary or proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may in their discretion proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties."

If the complainant had not joined these banks, the jurisdiction of the court would have been impregnable. Was it destroyed because the Trust Company made them parties defendant, and then, with the leave of the court, dismissed them from the suit? In *Cameron v. McRoberts*, 3 Wheat. 591, *McRoberts*, a citizen of Kentucky, brought a suit in equity in the district court of the United States for the district of Kentucky, which then had the jurisdiction of a circuit court, and obtained a final decree. There were three defendants to this suit, one of whom (*Cameron*) was stated in the bill to be a citizen of the state of Virginia, but the citizenship of the others did not appear. A motion to set aside the decree was made on the ground that the court had no jurisdiction because the two defendants whose citizenship was not stated were in fact citizens of Kentucky. Two of the questions certified to the supreme court were:

"Had the district court jurisdiction of the cause as to the defendant *Cameron* and the other defendants? If not, had the court jurisdiction as to the defendant *Cameron* alone?"

The answer was:

"If a joint interest vested in *Cameron* and the other defendants, the court had no jurisdiction over the cause. If a distinct interest vested in *Cameron*, so that substantial justice, so far as he was interested, could be done, without affecting the other defendants, the jurisdiction of the court might be exercised as to him alone."

Courts do not require the performance of idle ceremonies. The Trust Company might have prevented this objection to the jurisdiction of the court by neglecting to join the Pennsylvania banks as defendants. The circuit court could have removed it by permitting the complainant to dismiss this suit, and to commence another against all the defendants except the Pennsylvania banks. No reason occurs to us why it might not have obviated it by permitting the com-

plainant to dismiss the banks from this suit. Our conclusion is that the complainant in an equity suit in the federal courts is not required to join any but indispensable parties to the suit, when their joinder will oust the jurisdiction of the court, and, if he does join them, the court may permit their dismissal, and thereupon it has the same jurisdiction and power to proceed to a decree in the case that it would have had if they had never been made parties to it. Nor could the subsequent introduction of these banks and other parties into this suit for the purpose of protecting their own interests affect the jurisdiction of the court. When the banks had been dismissed the circuit court had jurisdiction of the subject-matter and of the parties to the suit. It also had the possession of the mortgaged property, which was then in the hands of its receiver. A suit which had been previously commenced in the same court was consolidated with this suit, and the Pennsylvania banks, on their own petition, were permitted to be made parties defendant to protect their own interests; but all these proceedings were ancillary and subordinate to this suit to foreclose the first mortgage, and all the parties thus brought into this suit were, in effect, interveners for their own benefit. It was immaterial that some of them were citizens of the same state as the complainant. Consolidations and interventions do not oust the jurisdiction of the court in the main suit, whatever the citizenship of the parties thus brought into it may be. *Phelps v. Oaks*, 117 U. S. 236, 240, 6 Sup. Ct. 714; *Stewart v. Dunham*, 115 U. S. 61, 64, 5 Sup. Ct. 1163; *Hardenbergh v. Ray*, 151 U. S. 112, 118, 14 Sup. Ct. 305; *Freeman v. Howe*, 24 How. 450; *Krippendorf v. Hyde*, 110 U. S. 276, 286, 4 Sup. Ct. 27; *Trust Co. v. Bridges*, 16 U. S. App. 115, 6 C. C. A. 539, and 57 Fed. 753; *Society of Shakers v. Watson*, 37 U. S. App. 141, 155, 15 C. C. A. 632, 638, and 68 Fed. 730, 736. The objection to the jurisdiction of the circuit court cannot be sustained.

The mortgage on which this suit is based covers the franchises and all the property of the mortgagor. The appellants insist that the Terminal Company was a quasi public corporation, and that it had no authority to make this mortgage, and they specially urge that it was without power to mortgage its franchises and after-acquired property. The Terminal Company is the creature of the state of Iowa. It was incorporated under the general laws of that state. It has the powers granted to it by those laws, together with those fairly incidental thereto, and it has no others. *Omaha Bridge Cases*, 10 U. S. App. 98, 174, 2 C. C. A. 174, 230, and 51 Fed. 309, 316. The statutes of Iowa, then, measure the powers of this corporation, and the construction of those statutes by the supreme court of that state, and its determination of the extent of the powers and liabilities of corporations formed under them, are authoritative in this court. When the highest judicial tribunal of a state has determined the extent of the powers and liabilities of corporations created under its laws, that decision is conclusive in the national courts in all cases in which no question of general or commercial law and no question of right under the constitution of the United States is involved. *Madden v. County of Lancaster*, 27 U. S. App. 528, 536, 12 C. C. A. 566, 570, and 65 Fed. 188, 192; *Dempsey v. Township of*

Oswego, 4 U. S. App. 416, 2 C. C. A. 110, and 51 Fed. 97; Rugan v. Sabin, 10 U. S. App. 519, 3 C. C. A. 578, and 53 Fed. 415; Travelers' Ins. Co. v. Township of Oswego, 19 U. S. App. 321, 330, 7 C. C. A. 669, 673, and 59 Fed. 58, 61; Claiborne Co. v. Brooks, 111 U. S. 400, 410, 4 Sup. Ct. 489; Bolles v. Brimfield, 120 U. S. 759, 763, 7 Sup. Ct. 736; Detroit v. Osborne, 135 U. S. 492, 499, 10 Sup. Ct. 1012. We turn, then, to the statutes and decisions of Iowa, to learn whether this corporation was endowed with power to make this mortgage. When the Terminal Company was organized, the statutes of Iowa provided that any number of people might become incorporated for the transaction of any lawful business, including the construction, ownership, operation, and maintenance of railways, bridges, or other works of internal improvement; that a corporation so formed should have the power to make contracts, acquire and transfer property, and should possess the same power in such respects as private individuals enjoy, but should have no power not possessed by natural persons, except those expressly granted to it by those statutes (McClain's Code Iowa, § 1608; Id. § 1609, subd. 6); that before commencing business the incorporators should adopt articles of association and publish a notice, which should state, among other things, the general nature of the business to be transacted (Id. §§ 1610, 1611); that any corporation organized under the laws of Iowa for the purpose of constructing and operating a railway should have power to issue its bonds for the construction and equipment of its railway, and to secure their payment by executing mortgages or deeds of trust on the whole or any part of its property and franchises, and that such mortgages or deeds of trust might cover property acquired subsequent to their dates (Id. §§ 1955, 1965, 1966); that any number of persons or of railroad corporations, or of persons and railroad corporations, might form themselves into a body corporate, under the foregoing provisions of the statutes, for the purpose of constructing and maintaining union depots for freight and passengers, and that such a corporation should have the power to acquire by purchase or condemnation such real estate as the railroad commission should deem necessary for their depot and its approaches (Id. §§ 2090, 2091). According to the notice given by the publication of its articles of association under these statutes, the general nature of the business and the powers of the Terminal Company were "to construct, operate and maintain one or more lines of railway within the corporate limits of Sioux City, Iowa, with all needed side tracks, depot yards, warehouses, storage houses, elevators, and all other needed terminal facilities, and shall have power to acquire by purchase or condemnation, all needed grounds for right of way, depot purposes, and side-tracks, wood and water stations, \* \* \* and to mortgage, lease or sell the said grounds and improvements thereon." Under this state of facts, the argument of the appellants is that this mortgage was ultra vires the corporation, because the Terminal Company was a quasi public corporation and had no implied power to mortgage its property, because the power to mortgage its franchises and after-acquired property was not claimed in its articles of incorporation, and because it was organized under

sections 2090 and 2091, *supra*, relating to corporations to construct union depots, and these sections give such corporations no power to mortgage their property. But this was not a corporation organized for the sole purpose of constructing union depots. On the other hand, the description of the general nature of its business in its articles of incorporation makes no reference to any union depot, and expressly states that its business is, among other things, to construct and operate one or more lines of railway. Conceding, but not deciding, that a quasi public corporation has no implied authority to mortgage its property, such a corporation has express authority to do so under the laws of Iowa which we have cited (McClain's Code, §§ 1608, 1609), and that power is not restricted or lost by a failure to claim it in the articles of association. The statutes of Iowa do not require the powers of a corporation organized under them to be enumerated in its articles, and an omission to claim any of these powers would not leave the corporation so organized powerless. Thus, in *Thompson v. Lambert*, 44 Iowa, 239, 243, the incorporators limited the objects of a county agricultural society to "the improvement of agriculture, horticulture, mechanic arts, rural and domestic economy." In answer to the contention that the society had no authority to mortgage its property because that power was not enumerated in its articles, the supreme court of Iowa said:

"The power to borrow money, execute notes and mortgages, was neither assumed nor prohibited. In the absence of any such prohibitory provision the power to borrow money, execute notes and mortgages, as evidences of and security for indebtedness created for the necessary and proper purpose of carrying out the objects of the corporation, impliedly exists. For the purpose of effecting the objects of the corporation, its powers are as broad and comprehensive as those of an individual, unless the exercise of the asserted power is expressly prohibited."

All doubt of the power of the Terminal Company to make this mortgage is, however, dispelled by the provisions of sections 1955, 1965, and 1966 of McClain's Code. They expressly authorize any corporation organized under the laws of Iowa for the purpose of constructing and operating a railway to mortgage its franchises and all its property, whether acquired before or after the execution of the mortgage. The Terminal Company was certainly organized to construct and operate a railway, whatever other objects its incorporators had in view, and under these provisions it had express authority to make the mortgage in suit. *Railroad Co. v. Howard*, 7 Wall. 392, 412.

Another position of counsel for the appellants is that this mortgage is void because it violates the rule against perpetuities, which, in Iowa, is embodied in this provision of its statutes:

"Every disposition of property is void, which suspends the absolute power of controlling the same for a longer period than during the lives of persons then in being and for twenty-one years thereafter." McClain's Code Iowa 1888, § 3091.

The argument in support of this position is founded upon this state of facts: On December 14, 1889, the Terminal Company leased to the Sioux City & Northern Railroad Company of Sioux City, Iowa, all its franchises and property for the term of 100 years, for an annual

rental of \$90,000. The lease recited that the Terminal Company had been authorized by its stockholders and by its board of directors to make a first mortgage on its franchises and property to the Trust Company to secure the repayment of an amount not exceeding \$1,250,000, and that it was about to do so. It contained a permit to the railroad company to sublet the premises, and covenants by the railroad company that it would pay \$75,000 and as much more of its annual rental as should be necessary to pay the expenses of the trusteeship to the Trust Company, to be applied to the payment of the interest on the mortgage bonds and to the payment of the expenses of the trusteeship. It also provided that, if the lessee failed to pay the rent, the lessor might re-enter and take all the rights and remedies of the lessee against the sublessees, and that, if default should be made in the payment of the interest on the mortgage bonds, all those rights and remedies should inure to the benefit of the Trust Company, or of the purchasers under the mortgage. On January 1, 1890, the Terminal Company made to the Trust Company the mortgage in suit, under the form of a trust deed, to secure the payment of bonds due in 10 years, to an amount not exceeding in the aggregate \$1,250,000. This mortgage recited the lease to the railroad company, and its provisions for the benefit of the Trust Company and the bondholders. By its terms the Terminal Company transferred and conveyed to the Trust Company all its franchises and property, including all its rights and privileges under the lease to the railroad company. The third article of the mortgage provided that the Terminal Company transferred to and vested in the Trust Company all the powers, rights, and remedies which it had for the collection annually of the \$75,000 and the expenses of the trusteeship, which the railroad company had promised to pay to the trustee by its covenants in the lease; that, in case of a default of the Terminal Company in the payment of the bonds or the coupons, it would assign to the Trust Company its lease to the railroad company, and the rentals due thereunder, and that the Trust Company and the purchaser under the mortgage should be entitled to all the rentals from the sublessees. The sixth article of the mortgage gave to the Trust Company the option, in case of default to take possession of the mortgaged property, to operate it, and collect the income, rents, and profits from it, until the principal and interest of the bonds were paid, or until the property was sold. The seventh article declared that the provisions of the preceding article were cumulative to the ordinary remedy by foreclosure in the courts, that a majority of the bondholders might require the trustee to avail itself of this remedy, and that, in the absence of their direction, it might do so at its discretion. The ninth and tenth articles provided that the trustee might purchase at the foreclosure sale, and that a majority in interest of the bondholders might control the exercise of every option given to the Trust Company by the terms of the mortgage. The position of counsel for the appellants is that this mortgage violates the rule against perpetuities, (1) because the lease and the mortgage in fact constitute a tripartite agreement, which might suspend the power of the trustee and the bondholders to possess and convey the property mortgaged

upon a condition precedent, to wit, the termination of the lease or the default of the lessee, which might not be fulfilled until 100 years from the date of the lease; (2) because the provisions of the third and sixth articles of the mortgage, for the collection by the trustee of the \$75,000 and the expenses of the trusteeship annually from the lessee, and for the assignment of the lease to the Trust Company by the mortgagor, and the surrender to it of all the rights of the Terminal Company to the rents and income accruing under the lease, in case of the mortgagor's default, tend to prove the suspension of this power, and to render the interest of the trustee too remote; and (3) because the powers given to a majority of the bondholders to control the exercise of the options allowed to the trustee in the mortgage have the same tendency. But there is nothing in these two instruments but a lease for 100 years, and a mortgage by the lessor of its reversion and of the rents accruing to it from the lessee to secure the payment of its bonds due in 10 years. Gray says that the true form of the rule against perpetuities is that "no interest subject to a condition precedent is good unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest." Gray, Perp. § 201. But a vested interest is not subject to the rule against perpetuities, because it is vested, and by its very nature it cannot be subject to a condition precedent. For this reason, reversions and vested remainders are exceptions to the rule; and leases for terms far longer than lives in being and 21 years are valid, both at common law and under the statute of Iowa, notwithstanding the suspension of the power of the lessors to take actual possession, and to convey the property free from the lease. *Id.* §§ 205, 736; *Railway Co. v. Gomm*, 20 Ch. Div. 562, 574; *Toms v. Williams*, 41 Mich. 552, 572, 2 N. W. 814; *Todhunter v. Railroad Co.*, 58 Iowa, 205, 207, 12 N. W. 267. When this is said, all is said. All the remoteness challenged in this case as obnoxious to the rule or the statute is due to the lease, and not to the mortgage. The debt secured by the latter falls due, by the terms of the bonds, in 10 years from the date of the mortgage; and the trustee and the bondholders are then entitled, if the debt is not paid, to take possession of, and to sell and convey, every interest which the lessor reserved under the lease. It is admitted that a mortgage of an unincumbered title to secure a debt due in 10 years would not violate the rule. But this mortgage is not more obnoxious to it. The reversion, the right to the rents under the lease, and the right to re-enter in case of the failure of the lessor to pay them, were all valid in the hands of the lessor, notwithstanding their remoteness. The only effect of the mortgage was to pledge as security remote but valid interests of the mortgagor, and to give the right to the possession and sale of them if the debt and interest secured were not paid within 10 years. If any of those interests were remote, they were made so by the lease, and not by the mortgage, and they were valid because leases are excepted from the rule. The mortgage, therefore, did not offend against either the rule or the statute against perpetuities. Nor is it material whether the lease and the mortgage should be considered as separate instruments, or as a single tripartite agreement. If the par-

ties could have lawfully made the lease and the mortgage as separate instruments, a tripartite agreement between them which contained all the terms of the lease and the mortgage must be equally valid. The position that the mortgage and the lease, or either of them, violate the rule against perpetuities, must be overruled.

But the appellants insist that the mortgage is void because the debt which it secures is in excess of the amount of indebtedness which the Terminal Company had the power to contract. The law of Iowa under which this corporation was organized provided that the incorporators must, before commencing any business except that of their own organization, adopt articles of incorporation, and that "such articles of incorporation must fix the highest amount of indebtedness or liability to which the corporation is at any one time to be subject, which must in no case, except in that of risks of insurance companies, exceed two-thirds of its capital stock," provided that these provisions shall not apply to certain classes of bonds, among which we concede, for the purpose of this discussion and decision, but do not decide, that the bonds of this corporation do not fall. McClain's Code, §§ 1610, 1611. The articles of incorporation of the Terminal Company declare that its authorized capital stock is \$1,000,000, and that "the highest amount of indebtedness to which this company shall at any time subject itself shall not exceed two-thirds of the paid-up capital stock of said company, aside from the indebtedness secured by mortgage upon the real estate of the company." Those articles, however, did not enlarge the powers of the corporation beyond those granted by the statutes under which it was created, and, under the concession we have made, they gave it no authority to incur an indebtedness in excess of \$666,667. A corporation may not enlarge its powers beyond those granted by the laws under which it was organized by claiming greater powers in its articles of incorporation. 5 Thomp. Corp. § 5996. The indebtedness secured by this mortgage was \$1,250,000, and each bond recited that it was one of a series of bonds not exceeding in the aggregate \$1,250,000, and that it was secured by a first mortgage upon the property of the Terminal Company. This debt was therefore in excess of the statutory limitation. The mortgage was duly recorded in the office of the proper register of deeds at Sioux City on February 27, 1890; and from that record and the terms of the bonds it is a fair inference that the Trust Company and the bondholders had full notice that the indebtedness secured by this mortgage was in excess of the limitation prescribed by the law of its being. On the other hand, the bonds were sold on the credit of the mortgage for 90 per cent. and 95 per cent. of their par value, and their proceeds were applied by the mortgagor to the payment of its debts, and to the purchase and improvement of its property. Neither the bondholders nor the Trust Company were guilty of any fraud or bad faith in the transaction. The debt was not created nor was the mortgage made or accepted with any intent to defraud any of the existing or subsequent creditors of the corporation. Can the mortgagor, under these circumstances, avail itself of its violation of the statute to defeat the mortgage upon which it has borrowed this money? If not, have its subse-



quent creditors any better standing to assail it? These are the crucial questions in this case. This is a suit in equity. The Terminal Company has received the full benefit of the proceeds of these bonds, and it obtained this money upon the faith of this mortgage. The creation of the debt and mortgage was not without the general scope of its powers, but it was the result of an excessive exercise of one of those powers. The corporation had, as we have seen, the general power to borrow money, and to secure its repayment by a mortgage. If the aggregate amount of the bonds secured by this mortgage had been \$650,000, instead of \$1,250,000, they would have been valid, in the absence of other indebtedness. The bonds and mortgage did not, like the lease in *Thomas v. Railroad Co.*, 101 U. S. 71; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 290, 309, 6 Sup. Ct. 1094; *Oregon Ry. & Nav. Co. v. Oregonian Ry. Co.*, 130 U. S. 1, 23, 9 Sup. Ct. 409; and *Central Transp. Co. v. Pullman's Palace-Car Co.*, 139 U. S. 24, 50, 11 Sup. Ct. 478,—disable the corporation from performing its obligations to the government and to the public; nor were they, like those leases, beyond the scope of the general powers of the corporation that made them. The statute, whose provisions the bonds and mortgage violate, prescribed no penalty for such a violation. It did not declare that bonds and mortgages issued to secure an indebtedness in excess of the limitation it fixed should be void. Since the legislature imposed no such penalty, it is not the province of the courts to do so. The remedy for the violation of this statute is not the destruction of the contracts which evidence it, but the ouster and dissolution of the corporation at the suit of the state. The state alone can complain of it, and the debtor cannot usurp its functions. *Bank v. Matthews*, 98 U. S. 621, 629; *Fritts v. Palmer*, 132 U. S. 282, 292, 10 Sup. Ct. 93; *Bank v. Townsend*, 139 U. S. 67, 76, 11 Sup. Ct. 496; *Thompson v. Bank*, 146 U. S. 240, 251, 13 Sup. Ct. 66. The creation of this indebtedness and the execution of these bonds and this mortgage involve no moral turpitude. The articles of incorporation and the mortgage were spread upon the proper public records, so that all who subsequently dealt with the corporation could see what it had done. The bonds and mortgage had in them no element of fraud, deceit, or misrepresentation. They were not evil in themselves. The corporation does not offer to return the moneys which it received upon this mortgage, but seeks to retain all its benefits and to repudiate all its burdens. It will be soon enough for the chancellor to stay his hands from the enforcement of these contracts, and soon enough for him to set them aside, when the corporation returns to the complainant the moneys it received upon them. Until then, good faith, justice, and equity demand their enforcement. A man cannot plead his own wrong to relieve himself from the obligations of an executed contract whose benefits he retains; nor is it any defense for a private corporation, against the enforcement of an executed contract whose benefits it holds, that, while its execution was within the general scope of its powers, it involved an excessive exercise of one of them. While it retains the benefits of such a contract, it silently affirms, and may not be permitted to deny, its validity. *Bank v. Matthews*, 98 U. S. 621;

Bank v. Whitney, 103 U. S. 99, 102; Humphrey v. Mercantile Ass'n, 50 Iowa, 607, 610, 612; Garrett v. Plow Co., 70 Iowa, 697, 701, 29 N. W. 395; Warfield v. Canning Co., 72 Iowa, 666, 672, 34 N. W. 467; Manchester & L. R. R. v. Concord R. R. (N. H.) 20 Atl. 383; Poole v. Cheese Ass'n, 30 Fed. 513, 520; Allis v. Jones, 45 Fed. 148, 150; Parish v. Wheeler, 22 N. Y. 494; Hays v. Coal Co., 29 Ohio St. 330, 340; Bissell v. Railroad Co., 22 N. Y. 258; McCluer v. Railroad, 13 Gray, 124; Bradley v. Ballard, 55 Ill. 413, 418; Railroad Co. v. Proctor, 29 Vt. 93. Nor is the innocence or ignorance of the creditor essential to the maintenance of his suit to enforce such a contract. In Bank v. Matthews, supra, a bank had made a loan on the security of a note and a mortgage upon real estate, under the form of a deed of trust, in violation of sections 5136 and 5137 of the Revised Statutes, and was proceeding to enforce collection of its debt by a sale under the trust deed when one of the state courts enjoined the sale at the suit of one of the mortgagors, on the ground that the loan by the bank on real-estate security was forbidden by law, and the trust deed was void. The supreme court reversed that decree, and allowed the bank to enforce its contract. In Humphrey v. Mercantile Ass'n, supra, the supreme court of Iowa compelled a corporation to pay to the guilty agent who had contracted it an indebtedness in excess of the limitation prescribed by the statute; and in Garrett v. Plow Co., supra, that court enforced the collection of a debt in excess of the statutory limitation against a corporation and in favor of its directors by the foreclosure of a mortgage which the latter had caused the corporation to make to secure themselves. These decisions do not rest upon the principle of estoppel, nor depend upon the creditors' ignorance of the excessive indebtedness. They stand upon the rule that he who seeks equity must do equity, and upon the principle that one may not at the same time accept the benefits and repudiate the burdens of his contracts.

But it is said that the creditors of this mortgagor are entitled to a declaration that this mortgage is void, and that they have rights here superior to the corporation. This contention is made with special urgency on behalf of the Credits Commutation Company, a corporation of the state of Iowa, whose standing in this respect is certainly as high as that of any of the creditors who have appealed. A brief statement, however, of the transactions out of which its claim has arisen, will show, we think, that this position of its counsel is untenable. In the latter part of the year 1889 the Terminal Company commenced to issue its promissory notes for \$5,000 each, and to negotiate them through the Union Loan & Trust Company of Sioux City, a corporation which indorsed and sold them to banks located in the Eastern states. The proceeds of these notes were used by the Terminal Company to purchase and improve its property. Early in 1890 the aggregate amount of these notes had reached \$1,250,000. It will be remembered that the Terminal Company made its lease to the Sioux City & Northern Railroad Company on December 14, 1889, and its first mortgage to the Trust Company on January 1, 1890. The bonds secured by this mortgage, with the exception of 250 of them which were disposed of in 1892, were sold early in the year 1890;

and their proceeds were used to pay some of the Terminal Company's notes, and to buy and improve its property. There were, however, some of its outstanding notes that were not paid, and as these fell due the Terminal Company made new notes, and the Union Loan & Trust Company indorsed and sold them, and with their proceeds paid the notes which were falling due. In this way the notes of the Terminal Company which were outstanding on April 25, 1893, were renewals of, or substitutions for, some of the notes issued by that company in 1889 and 1890; but it does not appear that any of the banks which held the notes of the company in April, 1893, ever had any of the notes first issued for the original indebtedness of the corporation. The outstanding notes of the Terminal Company on April 25, 1893, aggregated \$718,000. They were held by banks located in the Eastern states, and none of them were made or dated earlier than January 1, 1892. In April, 1893, the Terminal Company made a trust deed of all its property to the Union Loan & Trust Company to secure the payment of these notes. This deed recited that it was subject to the mortgage in suit. The Union Loan & Trust Company, the trustee in this deed, subsequently made a general assignment of all its property and interests to E. H. Hubbard, as trustee. In December, 1893, the Terminal Company assigned all its property to E. H. Hubbard, in trust, to sell the same and apply the proceeds to the payment of its notes. The Credits Commutation Company subsequently became the owner of these outstanding notes of the Terminal Company to the aggregate amount of \$616,000. It thereupon sued that company upon these notes in one of the state courts of Iowa, obtained a judgment for their amount and interest on July 23, 1895, had an execution returned unsatisfied, and then intervened in this suit, which had been commenced in 1894. E. H. Hubbard, the trustee under the second mortgage and under the assignment of the Terminal Company, is one of the parties to this suit and one of the appellants in this case, so that the rights of the owners of these notes under their second mortgage of April, 1893, under their trust deed of December, 1893, and under their judgment of July 23, 1895, are all here for adjudication. But how can they establish any rights, as against the first mortgage upon this property, superior to those of the mortgagor? The equities of the appellants who own these notes cannot be higher than those of their original holders, and they became creditors of this corporation subsequent to the sale of all but 250 of the bonds, and probably subsequent to the sale of those. Subsequent creditors stand in the shoes of the mortgagor, where the prior mortgage is not obtained and accepted by the mortgagees with intent to defraud them, and this mortgage certainly was not. *Graham v. Railroad Co.*, 102 U. S. 148, 153; *Mattingly v. Nye*, 8 Wall. 370; *Sexton v. Wheaton*, 8 Wheat. 229. Moreover, whether the holders of these notes became creditors before or after the bondholders did, they have established no right to attack this mortgage superior to that of the mortgagor. They could maintain no superior equitable claim to attack it unless they proved that the mortgage was made by the corporation, and was obtained and accepted by the trustee and the bondholders with the intent to deceive and defraud them, and that it did deceive and defraud

them, and there is no such evidence in this case. They have no legal lien upon the mortgaged property prior to that of the mortgage, and the same considerations which have defeated the defense of the mortgagor make this mortgage impregnable to the assaults of these creditors. *Warfield v. Canning Co.*, 72 Iowa, 666, 670, 672, 34 N. W. 467; *Garrett v. Plow Co.*, 70 Iowa, 697, 700-702, 29 N. W. 395; *Bank v. Whitney*, 103 U. S. 99, 103.

Another objection to the validity of this mortgage is that the president and secretary of the Terminal Company who executed it on behalf of that corporation had no authority to do so, because some of the provisions of the mortgage are not identical with those contained in the resolution of the board of directors which authorized its execution. But the Terminal Company delivered this mortgage to the Trust Company, signed by its president and secretary and sealed with its corporate seal. This was prima facie evidence that it was executed on behalf of the corporation by lawful authority. *Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, 10 U. S. App. 98, 189, 2 C. C. A. 174, 240, and 51 Fed. 309, 327; *Burrill v. Bank*, 2 Metc. (Mass.) 163, 166; *Canandarqua Academy v. McKechnie*, 90 N. Y. 618, 629; *Wood v. Whelen*, 93 Ill. 153, 162; *Association v. Bustamente*, 52 Cal. 192. The mortgage recited that it was duly authorized by a proper resolution of the board of directors, and each of the bonds recited that it was secured by a mortgage or deed of trust duly made and delivered to the Trust Company, which was a first lien upon all the property of the Terminal Company. Upon these representations the Terminal Company sold these bonds and obtained their proceeds. It is too late now for this corporation, or for creditors claiming under it through deeds or liens subsequent to the date of the record of this mortgage, to deny the power of its officers to make it. A corporation which induces lenders or purchasers to loan it money or to buy its bonds by delivering a mortgage, formally executed, which purports to secure them, is thereby estopped from denying its validity on the ground that, in giving its officers authority to make it, it failed to comply with some law or rule of action with which it might have complied, but which it willfully or carelessly disregarded. *Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, 10 U. S. App. 98, 188, 191, 2 C. C. A. 174, 239, 241, and 51 Fed. 309, 326, 328; *Zabriskie v. Railroad Co.*, 23 How. 381, 397, 400, 401.

Finally, the appellants assail the decree because it directs the sale of the mortgaged property as a whole, and does not reserve to the mortgagor and to subsequent lienors the right of redemption from the sale, in accordance with the provisions of the statutes of Iowa relative to sales of real property under execution. *McClain's Code Iowa*, §§ 4317, 4331. But this statutory right of redemption and right to a sale in separate parcels does not extend to the real estate of a corporation which is mortgaged with its franchise to acquire, hold, and use property for public purposes, and whose chief value depends upon its unity, and its use for and appropriation to those purposes. *Hammock v. Trust Co.*, 105 U. S. 77, 90. The decree below was right, and it must be affirmed, with costs. It is so ordered.

## BRODRICK v. KILPATRICK et al.

(Circuit Court, S. D. California. July 1, 1897.)

No. 676.

**MORTGAGES—SEPARATE MORTGAGE OF IMPROVEMENTS.**

Under Civ. Code Cal. § 2947, providing that "any interest in real property capable of being transferred may be mortgaged," personal property, which by being attached to land by the owner has become a part of the realty, may still be mortgaged separately from the land itself; and such mortgage, when properly recorded, is enforceable against a subsequent purchaser of the realty.

Suit by William J. Brodrick, receiver of the First National Bank of San Bernardino, against D. Kilpatrick and G. F. Rotsler, to foreclose a mortgage.

Curtis, Oster & Curtis, for complainant.

J. H. Call and John T. Jones, for defendants.

WELLBORN, District Judge. This suit is brought to foreclose a mortgage executed September 24, 1894, by the defendant Kilpatrick to the First National Bank of San Bernardino, Cal., of which bank the complainant is now the receiver. Defendant Kilpatrick makes default. Defendant Rotsler has filed an answer, in which he claims some of the property embraced in said mortgage, deraigning title thereto as follows: On the 24th day of February, 1893, the Mentone Sandstone Company, a California corporation, owned a portion of the property so claimed by defendant Rotsler. On that day, Harper, Reynolds & Co., also a California corporation, at sheriff's sale, under an execution issued on a judgment in favor of said Harper, Reynolds & Co. against said Mentone Sandstone Company, bought in a part of said property, afterwards transferring the same to Rotsler; and another part of said property was purchased by said Rotsler directly, at a subsequent execution sale, had on the 19th day of June, 1895, under the same judgment. The following is a list of the property thus acquired by said Rotsler: One boom derrick, with ropes, blocks, and tools, described in the bill as located at Victor granite quarry, San Bernardino county; 2 boom derricks, 1,000 feet of 8-inch wrought-iron pipe and flume, 1 Pelton water wheel, 1 gang stone saw and counter-shaft, 2 cars and rails, described in the bill as located at Mentone quarry, San Bernardino county; 1 boom derrick and 1 traveling derrick, described in the bill as located at Brownstone spur of Southern Pacific Railroad, Ventura county; 1 wooden oil tank, 1 wrought-iron oil tank, and 1 20-ton stone wagon, described in the bill as located on lot 176 of Filmore's subdivision of the Sespe rancho, Ventura county; 3,800 lineal feet tramway, including rails, ties, steel cable, and pulleys, 2 cars, 1 power house and machinery complete, described in the bill as located at Razzle Dazzle quarry, Boulder Creek and Kentucky oil claims, Ventura county; 5 derricks, with ropes and blocks, 1.16 horse power hoisting engine (Mowery Bros., makers), 1 blacksmith shop and tools, 2 tents, 1 frame office, 1,000 feet of steel rails (20 pounds to the yard), 1 lot of plugs, feathers, drills, crowbars, picks, and shovels, described in the bill as located at the Sespe quar-

ries, Ventura county. Rotsler also claims another portion of the property, described in said mortgage, which did at one time belong to Kilpatrick, and, as the grounds of his ownership, contends that this last-mentioned property was located upon and attached to lot 176 of Filmore's subdivision of the Sespe rancho, in the county of Ventura, Cal., in such a way as to be a part of the realty; that, at the time said property was so placed upon said lot, defendant Kilpatrick held the lot under a contract of purchase; that thereafter he duly assigned said contract to defendant Rotsler; that said Rotsler afterwards, on May 24, 1895, paid the balance due on said contract, and procured a deed to himself. The evidence clearly sustains Rotsler's claim to the property once owned by the Mentone Sandstone Company, and to which he asserts ownership through the execution sales under the Harper, Reynolds & Co. judgment. With reference to the other property claimed by Rotsler, and which at one time belonged to Kilpatrick, I think Rotsler's claim is unfounded. If this last-mentioned property did not become a part of the realty, by virtue of being affixed thereto, then, of course, Rotsler never acquired it through his ownership of lot 176 of Filmore's subdivision of the Sespe rancho. If, however, said property did become a part of the realty, still, when Kilpatrick assigned his contract for the purchase of said lot to Rotsler the assignment was subject to said mortgage, of which Rotsler had at least constructive notice, by reason of its having been previously recorded in said county of Ventura. Kilpatrick, of course, could not assign any other or greater interest in his contract for the purchase of said lot than that which he himself at the time had, and said interest, as just stated, was subject to said mortgage. This mortgage, conceding the property to have been realty, was valid. "Any interest in real property capable of being transferred may be mortgaged." Civ. Code Cal. § 2947. See, also, 15 Am. & Eng. Enc. Law, p. 748. I hold that the mortgage is a valid lien on all the property therein described, except that above listed and mentioned as having once belonged to the Mentone Sandstone Company, and that the property so listed and mentioned is not subject to the lien of said mortgage, but belongs to defendant Rotsler. A decree foreclosing the mortgage, and settling the rights of defendant Rotsler conformably to this opinion, will be entered.

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#### SOWLES v. NATIONAL UNION BANK OF SWANTON.

(Circuit Court, D. Vermont. July 6, 1897.)

##### 1. RECEIVER—SETTLEMENT OF ACCOUNTS—COUNSEL FEES.

When, at the time of the appointment of a receiver of a bank, suits are pending on notes belonging to the bank, with counsel employed and necessary, the reasonable fees of such counsel are chargeable against the assets

##### 2. SAME—COUNSEL FEES NOT ALLOWED.

Counsel fees will not be allowed a receiver for services rendered in conducting the suit in which he was appointed; nor for services on a hearing before a master in behalf of a claim which included a charge for fees paid to the same counsel; nor for services before the master on the hearing

upon the receiver's account, where the principal contest was over the charges of such counsel to the receiver; nor for services in obtaining the appointment of a former receiver, who has been superseded.

Heard on Exceptions to Master's Report.

H. A. Burt and Wilson & Hall, for complainant.

Edward A. Sowles and C. G. Austen, for defendant.

WHEELER, District Judge. This cause has now been heard on exceptions to the report of the master upon accounts of the receiver of the assets of the bank, who was appointed by this court. They relate to charges of counsel and to personal services. The reasonableness of the latter was a fact for the master, and no good cause for disturbing his conclusions in this respect has been made apparent. Question has been made as to the right of the receiver to employ counsel without order of court. Whether a receiver could institute new litigation, and charge the assets with the expense without any order, need not now be decided. Among the assets were notes then in suit for collection, with counsel employed and necessary. The duty of the receiver as such required him to take due care of this litigation, which could not be done without counsel. The only question about paying the charges of such counsel is as to their reasonableness. The master has disallowed some of these on this score, and does not appear to have so disallowed any too much. Term fees in this suit have been disallowed on that score, but the receiver is not a party to this suit, and no counsel for him could have any right, in any view, to charge term fees to him in it. Counsel fees could be chargeable to him only for securing the assets, and not for the conduct of the cause in which he was appointed.

The former president of the bank had claims upon the assets for his services and expenditures, including charges of counsel, to which there were objections. They were referred to a master, and some of the charges here are for counsel interested in sustaining his own charges there. The success of the counsel there, for which these charges are made here, would, wholly or in part not divisible at least, tend to deplete, and not to protect, the assets in the hands of the receiver. These charges, the legality of which is submitted by the master to the court, should be disallowed for this reason.

Charges have also been made for services of counsel before this master at this hearing where the principal contest was in respect to their charges to this receiver. They were directly interested against the receiver in his duty to preserve, and not to dissipate, the assets that he had secured. No allowance should be made for services in this direction, or for charges including such services. The receiver should not pay counsel to work for their own interest against his as receiver, nor to work both ways. The propriety of these charges was left open by the master, and they are here disallowed.

A petition has been presented for an allowance to counsel for services in obtaining the appointment of a former receiver in this cause, who was superseded. These charges had nothing to do with the assets in the hands of this receiver, and have no place in the settle-

ment of his accounts. Exceptions overruled, report accepted and confirmed, and thereupon the charges for counsel before masters are disallowed.

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PERRY v. GODBE et al. (WILLIAMS, Intervener).

(Circuit Court, D. Nevada. April 12, 1897.)

No. 594.

1. EQUITY—OBJECTION TO INTERVENER'S PETITION—WAIVER.

A plaintiff, by filing a replication to a petition in intervention, and proceeding to a hearing, waives the right to object to the sufficiency of the petition, or to the absence of an order granting leave to intervene.

2. SAME—BILL AGAINST CORPORATION—RIGHTS OF RECEIVER.

Where a bill against a corporation seeks to establish a lien on a portion of its property, a receiver of the corporation may properly be granted leave to intervene, and contest plaintiff's right to recover; and it is no ground for the dismissal of his petition that he introduced no evidence, but relied on the insufficiency of the evidence introduced by plaintiff to sustain his bill.

3. SAME—CORPORATION—ADMISSION BY DEFAULT.

Where a defendant corporation suffers default, its receiver, who afterwards intervenes, is bound by the admission of facts alleged in the bill, made by the corporation by such default.

4. LIEN—ESTABLISHING IN EQUITY.

Plaintiff furnished \$20,000 for the purchase of a half interest in a mining claim, under an agreement with one who held the option for such purchase that each should own a fourth interest in the claim, but that plaintiff should have the entire income from the half interest until the \$20,000 should thus be returned to him. Defendant corporation, with knowledge of such agreement, purchased the fourth interest of plaintiff's co-tenant. *Held*, that plaintiff was entitled to a lien on defendant's interest for \$10,000, less one-half the amount he had received in profits, and that his right to such lien was not affected by the fact that he had sold his own interest.

This is a bill in equity for an accounting and for a decree establishing a lien upon the one-quarter interest in the Keystone Mining Company, situate in Lincoln county, Nev., for the amount found due to plaintiff upon a contract entered into by and between S. T. Godbe (defendant) and C. O. Perry (plaintiff), July 8, 1892, and an additional agreement, indorsed on the back thereof, in relation thereto, executed by said parties July 22, 1892. The material part of said contract reads as follows:

"Whereas, the said Godbe holds a certain agreement, dated June 15, 1892, wherein he is given the right to purchase an undivided one-half ( $\frac{1}{2}$ ) of the Keystone Mine from Jones Taylor, of Ivanpah, California, for the sum of twenty thousand (\$20,000) dollars, to be paid on or before September 15, 1892; and whereas, said Godbe desires, to sell one-half ( $\frac{1}{2}$ ) of his interest in said agreement; and whereas, said Perry desires to purchase the same: Now, therefore, it is agreed that in consideration of one (\$1) dollar paid to said Godbe by said Perry, that if said Perry pays the further sum of twenty thousand (\$20,000) dollars to said Jones Taylor as the purchase price of said one-half ( $\frac{1}{2}$ ) of said Keystone Mine on or before the 15th day of August, 1892, then the said Godbe will convey to the said Perry an undivided one-quarter ( $\frac{1}{4}$ ) of the said Keystone Mine, free from incumbrances, by good and sufficient deed."

The additional agreement reads as follows:

"It is further mutually agreed that if said Perry accepts the option hereby given, and pays for said mine as herein provided, that all of the net profits



from the sales of ores from said mine that accrue to the said one-half ( $\frac{1}{2}$ ) interest which will be owned by said Perry and Godbe shall be paid to said Perry until the sum of twenty thousand (\$20,000) dollars, the full amount advanced by him for said purchase, shall have been returned to him. The net profits after said \$20,000 shall have been paid to be divided pro rata according to the respective interests held, but not before."

The following receipt is indorsed upon said contract:

"Received at Fenner, California, August 8, 1892, of C. O. Perry, the sum of twenty thousand dollars (\$20,000) in full satisfaction of and in full compliance with the foregoing contract. Jones Taylor."

The contracts were recorded December 8, 1892, in the county recorder's office of Lincoln county, Nev., in Book D of Miscellaneous Records. The Keystone Mining Company, defendant, was incorporated after the transactions between Godbe and Perry.

It is alleged in the complaint:

"That at the time said corporation defendant took and accepted said deed from said Godbe, and at all times since its organization, said Keystone Mining Company, by and through its officers and agents, had full and complete actual notice and knowledge of said agreement hereinbefore referred to between plaintiff and said defendant Godbe, and the modification thereto, and of all of the terms and conditions of the sale of one-half of said mine by said Taylor to said defendant Godbe, and of the sale of one-fourth thereof by said Godbe to this plaintiff, and of the payment of said \$20,000 to said Taylor by this plaintiff."

It is further alleged:

"That at all times since the conveyance of the one-half interest in said mine to the defendant Godbe by said Jones Taylor said defendant Godbe and said defendant Keystone Mining Company, as his successor in interest, have been in the full possession of said one-fourth interest in said mine conveyed by said defendant Godbe to defendant Keystone Mining Company, working the same, and extracting therefrom valuable ores of gold and silver, and receiving the net profits from said ores."

There are other allegations as to the amount of ore, and its value, taken out of said claim, the net profit thereof, the admission of the receipt by plaintiff of the sum of \$3,267.42, and the averment that there is now due plaintiff on the contract the sum of \$6,732.58, which defendants refuse to pay. S. T. Godbe and the Keystone Mining Company made default; but T. C. Williams, as receiver of the property of the Keystone Mining Company, by leave of the court, filed a complaint in intervention in the nature of a bill of interpleader, traversing the allegations of plaintiff's complaint, and setting up various defenses. The testimony was taken before a special examiner. The defendants and the intervener failed to introduce any testimony. The case was presented on the final hearing upon the pleadings and the testimony taken by the plaintiff.

Trenmor Coffin, for plaintiff.

H. C. Dillon and Torreyson & Summerfield, for intervener.

HAWLEY, District Judge (orally, after stating the facts as above). Is the evidence in this case sufficient to justify a decree in favor of the plaintiff?

1. Has the intervener any such standing in this court as to entitle him to be heard? Upon the hearing the plaintiff moved the

court (1) to dismiss the complaint in intervention upon the ground that the intervenor introduced no evidence in support of his allegations; (2) that no sufficient facts were stated in the petition entitling him to intervene. This motion is denied upon the ground that plaintiff, having filed a replication to the complaint in intervention, has waived the objections to its sufficiency. If any of the original parties to the suit desired to contest the petitioner's right to intervene, it was their duty to make their objections when the petition for intervention was filed. Leave to intervene, when granted, should be by order; but, if the suit is proceeded with without objection, the entry of the order will be waived. *Myers v. Fenn*, 5 Wall. 205; *French v. Gapen*, 105 U. S. 509, 525. As the receiver of the property of the Keystone Mining Company, upon an interest in which plaintiff seeks to obtain a lien, the intervenor had the right by leave of the court to file a bill of complaint *pro interesse suo* in the nature of a bill of interpleader. The intervention may contain a statement of the petitioner's view of the case, and pray, in addition to intervention, for the final relief which he desires. *French v. Gapen*, *supra*. Being entitled to appear, he has the right to rely upon the insufficiency of the evidence to sustain a decree in plaintiff's favor. The fact, therefore, that no testimony was taken by the intervenor in support of his affirmative averments, does not authorize the dismissal of his complaint. *Graves v. Hall*, 27 Tex. 148, 154.

2. The articles of incorporation of the Keystone Mining Company declare that "the name and style of this corporation shall be and is 'The Keystone Mining Company' of Nevada." The intervenor contends that the words "of Nevada" are an essential part of the name of the corporation. The real corporation is before the court, represented by the receiver, and is designated in the evidence as the "Keystone Mining Company." The words "of Nevada" in the articles of incorporation would seem to be only the description of the place where the corporation is engaged in conducting its business of mining. In any event, the objection is technical, and the intervenor is not in a position to raise this question.

3. Did the subsequent purchasers of the mine have knowledge of the contract made between Godbe and the plaintiff? The Keystone Mining Company, having made default, admits the allegations of the complaint that it had notice of the terms and conditions of the contract. The receiver is the superintendent of the corporation. It is not claimed that the default of the corporation is collusive or fraudulent, or that the receiver has any interest in or lien upon the property of the corporation. He is therefore not in a position to assert that he was entitled to any notice of the contract. He is bound by the admissions of the corporation as to its knowledge of the contract. Moreover, the record shows that plaintiff, a few days after the commencement of the suit, filed a *lis pendens* in the recorder's office of Lincoln county, setting up the equitable interest claimed by plaintiff.

4. It is next urged that plaintiff is not entitled to the relief prayed for in his complaint on the half interest in the mine formerly owned by Godbe and the plaintiff, because the testimony shows that plaintiff sold his one-fourth interest in the mine to one Blake on February

25, 1893, and received therefor the sum of \$20,000, which would cover "the full amount advanced by him for said purchase from Jones Taylor," and his lien upon the property would be satisfied when said amount "shall have been returned to him." But the fact is that plaintiff is not asking for any relief against the one-fourth interest in the mine which he conveyed to Blake prior to the formation of the corporation. The \$20,000 which he received from Blake was for his one-fourth interest in the Keystone and his one-fourth interest in the Whatnot mines. The testimony is silent as to what was paid for the interest in the Keystone and what was paid for his interest in the Whatnot. There is nothing in the testimony which disproves any of the allegations of plaintiff's complaint as to the amount due plaintiff upon the contract in so far as it relates to the one-fourth interest of Godbe.

5. The only guaranty of title given by Perry to Blake was in relation to his one-fourth interest in the Keystone Mine. Perry did not convey to Blake his claim upon the one-fourth interest held by Godbe, nor did he guaranty that that interest was free and clear from any incumbrance or lien. Perry says, "I only conveyed him my interest, which had nothing to do with Godbe's interest at all." But all controversy upon this question is set at rest by the bond executed by plaintiff and Godbe, which was introduced by the intervener upon the cross-examination of plaintiff, which recites the facts that whereas, Blake has purchased from Perry "an undivided one-fourth interest in and to the Keystone lode mining claim and an undivided one-fourth interest in and to the Whatnot lode mining claim, there-to adjoining; \* \* \* and whereas, the said Isaac E. Blake has accepted a deed made of said property without any opportunity to examine the title thereof, and relying solely upon the representations of the said Charles O. Perry and Samuel T. Godbe that the said Charles O. Perry was the owner of a clear and unincumbered title to one-fourth ( $\frac{1}{4}$ ) interest in said property, free and clear from all judgments, liens, incumbrances, and charges whatever, including liens of miners and mining partners: Now, therefore," etc. Upon the pleadings and proofs, the plaintiff is entitled to the relief prayed for.

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UNITED WATERWORKS CO., Limited, v. FARMERS' LOAN & TRUST CO.

(Circuit Court of Appeals, Eighth Circuit. August 2, 1897.)

No. 818.

**PAYMENT—EVIDENCE—PAYMENT OR PURCHASE.**

The senior member of a banking firm was the vice president and active officer of a waterworks company, between which and the bank there was a running account. The bank, which was in the habit of advancing money for the company and paying its drafts, took up the maturing coupons from bonds of the company; punching the coupons as paid, and charging the amount, together with a commission for making the payment, to the company. The result being a large debit balance against the company on its books, the bank took the unsecured notes of the company for the amount. *Held*, that such transaction was a payment, and not a purchase of the coupons by the bank.

Appeal from the Circuit Court of the United States for the District of Nebraska.

This is an appeal by the United Waterworks Company, Limited, from an order confirming the report of a master which rejected certain coupons presented by the appellant for allowance under a decree of foreclosure upon the Omaha waterworks.

John L. Webster, for appellant.

James M. Woolworth, for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. Under a decree for the foreclosure of a mortgage upon the Omaha waterworks, this case was referred to a master, with directions to hear any party presenting any bonds or coupons described in the mortgage, in support of his own right, and against the right of any other party to share in the proceeds of the foreclosure sale, and to ascertain and report to the court the amount due to each of the holders of any of the bonds or coupons. The United Waterworks Company, Limited, a corporation, and the appellant here, presented to the master 3,556 coupons, which fell due on July 1, 1891, and which aggregated \$96,850, and the master disallowed them. Exceptions were filed to his report, but the court overruled them and confirmed the report. This appeal challenges that order of confirmation. There is but one issue in this case, and that presents a question of fact. The appellant purchased these coupons, after they were due, and after they had been punched as paid, from the firm of C. H. Venner & Co., who took them between July 1 and December 31, 1891. The question is whether Venner & Co. purchased or paid them. If they purchased them, the master and the court below should have allowed the claim of the appellant; but, if they paid them, that claim was properly rejected. The American Waterworks Company of New Jersey, a corporation, was the owner, subject to the mortgage, and was in possession, of the Omaha waterworks in 1891. C. H. Venner was the vice president and active officer of that corporation, and he was the senior member of the firm of C. H. Venner & Co., who were bankers in active business in New York City. W. H. Hall was the controller of the American Waterworks Company, and the active manager of its works, at Omaha. There was a running account between this corporation and Venner & Co., and the latter were in the habit of advancing money for and of paying drafts of the corporation. From statements of this account which Venner & Co. rendered to the corporation, it appears that the following balances were due from the corporation to the firm at their respective dates:

On May 19, 1891.....	\$23,034 37
On May 29, 1891.....	33,701 17
On June 30, 1891.....	19,982 28
On July 31, 1891.....	72,353 62

On June 3, 1891, Venner & Co. wrote Hall, as controller of the waterworks company at Omaha:

"We note your draft of \$6,000 drawn yesterday. We were hoping there would not be any further drafts at present, so that we might have a chance to prepare

for the July interest. You want to be as sparing of funds as possible, so as to remit us all you can; and we also want you to arrange the hydrant rentals as you did last December, if you can. Our July payments will be very heavy this year."

The aggregate amount of all the outstanding coupons which fell due July 1, 1891, was \$98,000. On that day Venner & Co. charged this amount and one-fourth of 1 per cent. commission thereon to the American Waterworks Company of New Jersey on account of "coupon interest"; and a portion of this charge became a part of the balance of \$72,353.62, which, according to the statement they rendered on July 31, 1891, was then due to them from the corporation. As the coupons were presented, Venner & Co. took them up, punched them as paid, and paid their face value for them. Between June 30 and July 12, 1891, the American Waterworks Company remitted to C. H. Venner & Co. \$50,000; and on July 18, 1891, the total amount due Venner & Co., after crediting them with the payment of all the coupons due July 1, 1891, was \$72,353.62. On that day C. H. Venner & Co. wrote Hall, as controller of the corporation:

"The American Waterworks Company (New Jersey) Omaha account has drawn upon us, including balance of coupon interest, for approximately \$80,000. At the last meeting of the directors the president and controller were authorized to issue notes for the requirements at Omaha. We inclose fifteen notes, of \$5,000 each, which please sign and return to us."

These notes were payable to the order of C. H. Venner & Co., and were signed and delivered to them. On August 6, 1891, the balance due from the American Waterworks Company to Venner & Co., according to the latter's account rendered, was \$73,579.62. On that day C. H. Venner wrote Hall, as controller:

"The company to-day has credit for \$75,000, 15 notes of \$5,000 each."

On August 8th Venner & Co. charged the corporation with \$428.44, interest on its account to August 1st, and on August 11th they credited it on their account with "15 notes, \$5,000 each, to C. H. Venner & Co., dated August 6, 1891, \$75,000."

The burden of proof was upon the appellant to establish by a fair preponderance of evidence the fact that Venner & Co. did not pay, but purchased, these coupons. It produced the testimony of C. H. Venner, and that of the employes of Venner & Co., to the effect that they purchased, and did not pay, these coupons; that they posted a notice in the bank that they were not paying, but were purchasing them; that they notified those who presented them that they were not paying, but purchasing, the coupons; and that they punched them as paid through an error. It also produced the testimony of C. H. Venner that his firm did not intend, by the presentation of their accounts, to treat the coupons as paid; that they made no agreement to, and did not, accept the promissory notes as payment of the account or of the coupons; and that they intended to, and did, hold them as an original claim against the corporation. This record shows that the coupons due on July 1, 1891, were not the only ones secured by this mortgage which Venner & Co. took up. They paid some that were due prior to that date. They purchased some that were due on January 1, 1893, on January 1, 1894, and on July 1, 1894. The witnesses for the appellant may have been mistaken in their date, and it may be

that the notice to which they testified was posted, and the conversations relative to the purchase of coupons which they related were had, at some other time than in the summer of 1891; but it is incredible, in view of the facts which we have recited, in view of the letters which Venner & Co. wrote, and the records which they made, that they could have purchased the coupons here in issue. If they purchased these coupons, it is incredible that they would have charged the American Waterworks Company with the full amount of them, and with a commission for paying them, as they did, when they had not paid them, and did not intend to do so, and when they had not earned this commission, and never intended to earn it. If they bought these coupons, it is beyond belief that they would have written to the controller of the corporation on July 18, 1891,—when the entire balance due to them on account, after crediting them with paying the full amount of these coupons and their commission, was only \$73,579.62, and when, if they had not paid them, the true balance of the account was \$24,420.38 against them,—that the corporation had drawn upon them, including balance of "coupon interest," for approximately \$80,000; and it is incredible, if they purchased these coupons, which, in that event, constituted a secured claim against the corporation for \$96,850, which drew interest under the law, that they would have accepted unsecured promissory notes of a corporation, which was in default, for only \$75,000, as the balance for which the corporation was indebted to them. Every letter written, every entry made, and every account rendered at the time of this transaction is inconsistent with the theory of a purchase. If this transaction was a purchase, the punched coupons, the letters, and the accounts rendered constitute a comedy of errors too marvelous for our credulity. They urge us with compelling force to the opposite conclusion,—to the finding that this was a sale. The punching of the coupons as paid; the charge of the amount of their face value to the American Waterworks Company on July 1, 1891; the charge of the commission for paying them on that day; the letter of July 18th, that the corporation had drawn for approximately \$80,000, including the coupon interest, when that was within \$8,000 of the balance against the corporation after charging up the coupons as paid; the charge of interest on the account in August, and the acceptance and credit of the notes for \$75,000,—together forge a chain of circumstantial evidence about this transaction which has not been overcome to our satisfaction by the explanations of Venner and his employes, or by the testimony of the other witnesses which the appellant has produced. The order confirming the report of the master must be affirmed, with costs. It is so ordered.

**LINCOLN SAV. BANK & SAFE-DEPOSIT CO. v. ALLEN et al.**

(Circuit Court of Appeals, Eighth Circuit. August 2, 1897.)

No. 769.

**1. APPEAL—REVIEW—ASSIGNMENTS OF ERROR.**

Assignments of error relating to the admission of evidence will not be considered where they do not quote the full substance of the evidence admitted, and the brief of plaintiff in error does not point out the pages of the record containing such evidence and the exceptions to its admission.

**2. SAME—INSUFFICIENCY OF PRINTED RECORD.**

Where the parts of the record designated by the plaintiff in error as necessary to a consideration of the errors assigned and printed by the clerk, under rule 23 of the court (21 C. C. A. xcvi., 78 Fed. xcvi.), do not contain all of the evidence, nor a bill of exceptions, the court of appeals cannot review rulings of the trial court on motions or requests to charge, challenging the sufficiency of the evidence, nor errors assigned on the charge of the court.

**3. ASSIGNMENT OF ERRORS—BILL OF EXCEPTIONS.**

A statement by counsel, in their assignment of errors, of occurrences and rulings at a trial, is insufficient to warrant a reversal of a judgment. The evidence, rulings, and instructions upon which reliance is placed for a reversal must be embodied in a bill of exceptions before a federal appellate court can consider them.

**4. CONTRACT—AGREEMENT TO ACCEPT NOTES IN PAYMENT—CONSIDERATION.**

An agreement by a creditor, holding notes as collateral, to accept in payment of the debt a specified sum of money and certain of the collateral notes, and to surrender the remaining collateral, is valid and enforceable, though the face value of the notes agreed to be taken, together with the cash payment, does not equal the debt.

**5. SAME—DIVISIBILITY—AGREEMENT TO SURRENDER COLLATERAL.**

An agreement by a creditor, holding collateral security, to accept a certain payment in full satisfaction, and to surrender the collateral, is divisible, and, though the agreement for composition may be void, that to surrender the collateral may be enforced on performance by the debtor.

**6. CONVERSION — REFUSAL TO SURRENDER PLEDGE — TRANSFER OF TITLE BY PLEDGOR.**

A debtor, having a right to the return of collateral notes held by his creditor, after demand and refusal, may, at his option, maintain replevin for them, or sue for their conversion; and, before he has exercised such option, he may transfer title to another, who after demand has the same option.

In Error to the Circuit Court of the United States for the District of Nebraska.

W. A. Selleck (N. C. Abbott, A. W. Lane, L. C. Burr, and Addison S. Tibbets, on the brief), for plaintiff in error.

Walter J. Lamb, for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. The record in this case is insufficient to warrant a reversal of the judgment below on account of any of the alleged errors assigned. This was an action for the conversion of certain promissory notes, in which the defendants in error alleged that they had a special property. The defense was that the plaintiff in error was the owner of these notes at the time of the alleged conversion, and that the defendants in error had no title or interest in them. There was a verdict and a judgment for the defendants in error. Thirty-six errors were assigned, but counsel for the plaintiff in error

have selected twenty, upon which they say they rely. We shall consider these only.

The first five of these alleged errors are not presented in the brief of the plaintiff in error in the manner prescribed by Rule 24 of this court. 21 C. C. A. xcix., 78 Fed. xcix. They relate to the admission of evidence, and they do not quote the full substance of the evidence admitted. Nor does the brief contain any reference to the pages of the record where any of this evidence, or any exception to its admission, is to be found. Since counsel for the plaintiff in error did not consider their claims relative to these alleged errors of sufficient importance to warrant them in pointing them out in the record, we will not search for them. *City of Lincoln v. Sun Vapor Street-Light Co.*, 19 U. S. App. 431, 8 C. C. A. 253, 59 Fed. 756.

Two of the errors alleged are: (1) That the court overruled the motion of the plaintiff in error, at the close of the testimony of the defendants in error, to dismiss the case because the defendants in error had failed to show that they were the owners of the notes; and (2) that the court refused to instruct the jury, at the close of all the evidence, that the defendants in error could not recover in the action because there was no evidence in the record that they were the owners of the notes. Rule 23 of this court provides:

"The plaintiff in error or appellant may, within twenty days after the allowance of any writ of error or appeal, serve on the adverse party a copy of a statement of the parts of the record which he thinks necessary for the consideration of the errors assigned, and file the same, with proof of service thereof, with the clerk of this court; the adverse party, within twenty days thereafter, may designate in writing and file with the clerk additional parts of the record which he thinks material, and, if he shall not do so, he shall be held to have consented to a hearing on the parts designated by the plaintiff in error or appellant. If the parts of the record shall be so designated by one or both of the parties, the clerk shall print those parts only; and the court will consider nothing but those parts of the record in determining the questions raised by the errors assigned." 21 C. C. A. xcvi., 78 Fed. xcvi.

The plaintiff in error designated the parts of the record which it thought necessary for the consideration of the errors assigned in this case, and they were printed by the clerk under this rule. This court will consider nothing but those parts of the record in determining this case. This printed record does not contain all the evidence that was presented to the court below, nor does it contain any bill of exceptions whatever, if there ever was one. It contains nothing relating to the proceedings at the trial but fragmentary excerpts from the testimony of some witnesses and a few exhibits. After a trial court has submitted a case to the jury, the burden of proof to show that there was no evidence to warrant that course is on him who asserts it. If he would maintain his claim, he must present all the evidence to the appellate court, in order that that court may see for itself what the evidence was. If he fails to do so, he cannot prevail upon that issue. *Railway Co. v. Washington*, 4 U. S. App. 121, 127, 131, 1 C. C. A. 286, 289, 292, 49 Fed. 347, 350, 353; *Railway Co. v. Harris*, 27 U. S. App. 450, 457, 12 C. C. A. 598, 603, 63 Fed. 800, 805; *U. S. v. Patrick*, 36 U. S. App. 645, 20 C. C. A. 11, 18, 73 Fed. 800, 806.

Twelve of the remaining errors are that certain paragraphs of the



charge of the court, which appear to have been wrested from their connection, and quoted in the assignment of errors, and which relate almost entirely to the effect of the evidence which had been produced in the case, are erroneous. But the evidence which was before the trial court has not been presented to us, and the presumption is that there was evidence which warranted the charge. There is no bill of exceptions and no copy of the charge of the court in the printed record. There is nothing in it to show that the paragraphs quoted in the assignment of errors were ever given to the jury by the court, or that any exception was ever taken to any of them by the plaintiff in error. The only information we have upon this subject is contained in the statement which precedes each paragraph in the assignment of errors, and is in these words: "The court erred in giving the following instruction, to the giving of which the defendant duly excepted at the time." But the assertion of the defeated party in his assignment of errors, either that the court erred, or that it gave any instruction, or that the plaintiff in error excepted to that instruction, is insufficient, without more, to warrant an appellate court in reversing a judgment. The facts that portions of the charge challenged were given, and that exceptions were taken to them, must be established by a bill of exceptions, settled and signed in accordance with the act of the congress of the United States, before a federal court can find the errors and reverse the judgment. Rev. St. § 953; *Clune v. U. S.*, 159 U. S. 590, 16 Sup. Ct. 125; *Blake v. U. S.*, 18 C. C. A. 117, 71 Fed. 286; *Mussina v. Cavazos*, 6 Wall. 355, 363; *Origet v. U. S.*, 125 U. S. 240, 8 Sup. Ct. 846. We cannot reverse this judgment on the ground that these alleged errors in the charge of the court exist (1) because there may have been evidence which warranted them, and all the evidence is not presented to us, so that we can see that it was insufficient; (2) because it does not appear from the record that any of the challenged paragraphs were given to the jury by the court; and (3) because it does not appear that any exception was taken to any of them if they were given.

The remaining error assigned is that the court refused to give an instruction which was requested by the defendant. But that instruction relates to the effect of the evidence in the case, and, in the absence of any proof by a bill of exceptions that all the evidence is before us, and that the plaintiff in error excepted to that refusal, there is nothing here for our consideration. The judgment below must accordingly be affirmed.

While the judgment below must be affirmed for the reasons we have stated, we may add that we have carefully read and re-read the briefs of counsel in this case, and we are satisfied that we should not reach a different result if we should assume that the circuit court instructed and refused to instruct the jury as the counsel for the plaintiff in error allege. The facts of the case, which are admitted by counsel for both parties (and we could consider no others, in any event, in the absence of a certificate that all the evidence is before us), were these: F. W. Sears owed the plaintiff in error about \$2,700, and he had pledged the promissory notes for the conversion of which this action was brought and two notes of one Shovelin, upon which there

was from \$320 to \$500 due, to secure his debt. The plaintiff in error was notified that friends of Sears in Wisconsin, the defendants in error, would loan him money to pay a part of this debt, in consideration that the notes on which this action is based should be released by it, and transferred to them as collateral security for their loan. The bank urged Sears to obtain this loan on these terms, and agreed that, if he would get \$1,500 from these friends, and pay it to the bank, and if he would give it in addition the two Shovelin notes, it would release its claim upon the collaterals in suit, and would accept the \$1,500 and the Shovelin notes as full payment of his debt. He obtained the loan of the defendants in error, paid the \$1,500 to the bank, and assigned to it the Shovelin notes, and thereupon the bank refused to release the collaterals, upon the security of which Sears had borrowed the money of the defendants in error, and declined to satisfy the debt of Sears. The money was paid, and the two Shovelin notes were transferred to the bank on February 20, 1895, and on the same day Sears demanded the other collateral notes, and the bank refused to deliver them until the balance of his debt was paid. On the next day the defendants in error demanded them, and, upon the bank's refusal to deliver them, they brought this action for their conversion. The bank took the position that its contract was a mere agreement that a partial payment should be a payment in full, and insisted that it could hold all its collaterals, and collect the balance of Sears' debt, notwithstanding its agreement to surrender the other collaterals. If, as counsel assert, the court below charged the jury that this was a mistake on the part of the bank, and said: "Now, you see the bank got there something that they did not originally contract to get, that is no part of the original contract; they were simply to have the amount of the money due in money; instead of that, now by this new contract they got \$1,500, and got these notes,"—it did no more than to announce a rule of law that has been unquestioned since the foundation of the republic. While an agreement between a creditor and his debtor to accept the payment of less than the full amount due him in satisfaction of an ascertained debt is not legally binding upon the creditor, because it is without consideration (*Pinnel's Case*, 5 Coke, 117; *Cumber v. Wane*, 1 Strange, 426; *Foakes v. Beer*, 9 App. Cas. 605), yet a contract to accept the note of a third person for a greater or less amount than the face of the debt, or to accept any consideration other than current funds in satisfaction of the debt, constitutes a valid and enforceable contract (*Jaffray v. Davis* [N. Y. App.] 26 N. E. 351, 352; *Le Page v. McOrea*, 1 Wend. 164; *Goddard v. O'Brien*, 9 Q. B. Div. 37, 21 Am. Law Reg. [N. S.] 637, and notes; *Boyd v. Hitchcock*, 20 Johns. 76; *Bull v. Bull*, 43 Conn. 455; *Fisher v. May*, 2 Bibb, 448; *Reed v. Bartlett*, 19 Pick. 273; *Bank v. Geary*, 5 Pet. 99, 114; *Brooks v. White*, 2 Metc. [Mass.] 283; *Jones v. Perkins*, 29 Miss. 139, 141; *Hall v. Smith*, 15 Iowa, 584; *Babcock v. Hawkins*, 23 Vt. 561).

If the circuit court refused to instruct the jury that the agreement between Sears and the bank, as shown by the evidence, with reference to the Shovelin notes, amounted in law to a contract that these notes should be taken as cash at their face value, which was \$320, and that in that way the agreement of the bank in fact was to accept

\$1,820 for a debt of \$2,700, we cannot say that its refusal was error, because there is no certificate in the case that all the evidence, or that all the evidence relative to the contract about the Shovelin notes, is before us, and we cannot know what the contract, as shown by that evidence, was. The presumption is, however, in the absence of counter-vailing proof, that the evidence was such that the court's refusal was right. *U. S. v. Patrick*, 36 U. S. App. 645, 20 C. C. A. 11, 18, 73 Fed. 800, 806. If, as counsel for plaintiff in error allege, the court charged the jury that, whatever the effect of the contract between Sears and the bank was upon his debt, the plaintiff in error did agree to surrender the collaterals on which this action was founded for the \$1,500 and the two Shovelin notes, that it received the consideration for this contract, and was bound by it, and that its effect was the real question in the case, it made no mistake. There is no rule of law or of morals which forbids a debtor to make a contract with his creditor for the release of collaterals which he has pledged to secure his debt, and no reason occurs to us why a creditor who has received the full consideration for such a contract should be released from his obligation to perform it. The pledge of collaterals is a contract that the creditor may hold them as security for the debt, and, if the debtor fails to pay it, that then the creditor may sell them, and apply the proceeds, less the expenses of the sale, to the payment of the debt, and return the surplus, if any, to the debtor. An agreement between the creditor and his debtor that the former will surrender one or more of the collateral notes pledged to secure the debt in consideration of a present payment thereon constitutes a valid contract. Such an agreement is not without consideration, even though the principal debt is due, and it is the duty of the debtor to pay it. There is a sufficient consideration to support the contract in the fact that it relieves the creditor of the expense and trouble of a sale of the collaterals under the pledge, and converts them at once into money applicable to the payment of the debt. Nor can a creditor successfully repudiate such a contract, after he has received the consideration for it, on the ground that he also agreed, for the same consideration, and is morally, but not legally, bound, to satisfy the principal debt. It is no defense to a legal obligation that the obligor repudiates his moral obligations whenever they lack the binding force of legal contracts. The bank received the entire consideration for its two covenants,—the covenant to surrender the collaterals and the covenant to satisfy the principal debt. There was nothing immoral or illegal in either of these promises, or in the consideration which it received for them. If the former was valid, and the latter was void, so that it could not be enforced, that was the loss of Sears and the defendants in error. The bank could lose nothing from it. Its only effect on the plaintiff in error was to enable it to obtain the \$1,500 and the Shovelin notes for a less price than it promised to pay for them. Nor was the contract indivisible. The valid covenant was separable from the void one, and could be fully and conveniently enforced without it. It is the settled and the just rule of the law that the valid covenants of a divisible contract which contains both valid and void stipulations may be enforced, if the consideration is tainted with no immorality or illegality.

*Navigation Co. v. Winsor*, 20 Wall. 64, 70; *Illinois Trust & Sav. Bank v. Arkansas City*, 40 U. S. App. 257, 22 C. C. A. 171, 180, 76 Fed. 271, 280; *Western Union Tel. Co. v. Burlington & S. W. Ry. Co.*, 11 Fed. 1, 4, and cases cited in the note at page 12. If Sears demanded these collaterals after he had paid the \$1,500 and transferred the Shovelin notes to the bank, and the latter refused to deliver them, Sears had the option to recover the collateral notes by an action of replevin, or to sue the bank for their conversion. If, before he exercised his option and sued for the conversion, he transferred his title to the defendants in error, they immediately became vested with his right to the possession of the notes, and if on the next day they demanded them, and the bank refused to surrender them, they then had the option to replevy them, or to sue for their conversion, as they have done in this case. The demand made by Sears was no bar to the maintenance of this action by the defendants in error.

If the court charged the jury, as counsel for the bank allege, that the question whether or not the defendants in error were entitled to the collateral notes in suit as between them and Sears was an issue for the jury to determine under the evidence, and that, if the defendants in error were entitled to them, it became the duty of the bank to deliver them over after it received the agreed consideration for their surrender, the presumption is that the evidence before the court below warranted this charge, and we cannot review it, in the absence of a certificate that all the evidence upon these questions is before us. And, finally, if the circuit court told the jury that the verdict in this case would not affect the liability of Sears to the bank, because he was not a party to this action, it told them the truth. The judgment must be affirmed, with costs, and it is so ordered.

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SCHOOLFIELD et al. v. RHODES et al.

(Circuit Court of Appeals, Eighth Circuit. August 2, 1897.)

No. 813.

1. **EJECTMENT—EQUITABLE DEFENSE.**

In the federal courts the distinction between actions at law and suits in equity is not affected by state statutes, under the act of conformity (Rev. St. § 914); and an equitable title cannot be pleaded and proved, against a seasonable objection, to defeat an action of ejectment.

2. **SAME—LEGAL RIGHT OF POSSESSION UNDER EQUITABLE TITLE.**

Where a partner, who, by the articles of agreement, was vested with sole power to make and sign contracts for the firm, made a contract for the sale of land owned by the firm, which provided that the purchaser should have possession so long as he complied with the contract, and the purchaser took and held possession, and has fully complied with the contract, his right of possession is a legal right, and is available as a defense to an action of ejectment, though his title is equitable.

3. **APPEAL AND ERROR—OBJECTION MADE FIRST ON APPEAL.**

In an action at law, where the court has jurisdiction of the parties and subject-matter, an objection that the defense set up was purely equitable comes too late if made for the first time on appeal.

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

This was an action at law, in the nature of ejectment, by W. W. Schoolfield and Henry G. Miller, as surviving partners of Schoolfield, Hanauer & Co., against John F. Rhodes and others. The case was tried to the court without a jury, and judgment was given for defendants. Plaintiffs have brought the case to this court by writ of error.

John J. Hornor and E. C. Hornor, for plaintiffs in error.

R. G. Brown, for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This was an action in the nature of ejectment brought by the plaintiffs in error to recover possession of a tract of land in the state of Arkansas from the defendants in error. The case was tried by the court without a jury, and it found the facts that are material here to be these: In 1887 Emilius Buck and N. E. Campbell were merchants and partners, using the firm name of Buck & Trexler, under a written agreement between them which provided "that the said Emilius Buck shall continue in the exclusive management of the firm's business; \* \* \* he, the said Emilius Buck, to have the exclusive right and power to make and authorize contracts, purchases, debts, and sign the firm's name, or authorize same, to drafts, notes, or other instruments of liabilities, or in liquidation." On March 1, 1887, Buck obtained a deed of the land in dispute from its owners in payment of a debt which was due to his firm. That deed recited that the grantors, in consideration of \$2,300 to them in hand paid by Emilius Buck and Nancy E. Campbell, merchants and partners under the firm name of Buck & Trexler, conveyed the land to Buck & Trexler, their heirs and assigns, in warranty forever. All the parties to this action claim under this deed. The title which the plaintiffs pleaded and proved consisted of a deed which was made on October 12, 1892, by C. L. Campbell, as administrator of the estate of N. E. Campbell, who had died on March 23, 1888, of an undivided half of the premises in question, and a deed to them made by Abner Gaines, as United States marshal, on February 7, 1895, under a judgment against Buck, which was rendered on January 31, 1895, of all the interest of Emilius Buck in the premises. The rights of the defendants arose in this way: On February 21, 1888, Buck & Trexler, through Buck, as their sole manager, sold the land in question to Andy White, and put him in possession of it, in consideration of \$2,500,—\$100 in cash, and White's five promissory notes for the balance. They gave him a written contract that upon the payment of that one of his notes which fell due November 1, 1888, they would convey the land to him; and Buck signed this contract with the name of Buck & Trexler, and duly acknowledged it before the proper officer authorized to take the acknowledgment of deeds. On November 1, 1888, White paid his note, and Buck made a deed of the land to him, which was signed and acknowledged in the same way as the contract was. White's notes were all paid as they fell due, and the proceeds of all of them were received and used as a part of the property of Buck & Trexler. The title and rights of White

passed by the delivery of possession and by mesne conveyances to one of the defendants, and the others were his tenants. White and his immediate and remote grantees have been in possession of the land under his agreement and deed ever since February, 1888. Upon this state of facts the court below held that, under the agreement between Buck & Trexler and himself, White and his grantees acquired an equitable title to the land, which, coupled with the possession, was a good defense in ejectment, and that they had been in possession more than seven years, so that the statute of limitations of the state of Arkansas had run in their favor, and it accordingly rendered judgment against the plaintiffs. This judgment is assailed on two grounds: (1) Because an equitable title is not available as a defense in ejectment in the national courts; and (2) because White did not commence to hold adversely to his vendor until November 1, 1888, when he became entitled to his deed, and this action was commenced within seven years thereafter, so that the statute of limitations was not available to him or his grantees. *Mansf. Dig. Ark. St. § 4471*. It is manifest that it is immaterial whether the statute of limitations constitutes a defense or not, if the equitable title coupled with possession did, since in that event the judgment was right, and must be affirmed, whether the action was barred by the statute or not. We accordingly turn to the consideration of the position that this judgment ought to be reversed because the equitable title under the agreement with White could not be pleaded in an action at law in the United States circuit court, notwithstanding the fact that it constituted a perfect defense to the action when pleaded in a bill in equity to enjoin the prosecution of the suit in ejectment.

There is no doubt that an equitable title may not be pleaded and proved, against a seasonable objection, to defeat an action at law in the federal courts. The distinction between actions at law and suits in equity is not a mere matter of form. It inheres in the nature of judicial proceedings, it is strictly observed in the courts of the United States, and it is not affected by the statutes of the several states, nor by section 914, Rev. St., the act of conformity. The strict legal title prevails in ejectment in the national courts, and a suit in equity is the proper proceeding to establish, protect, and enforce an equitable interest in the land in controversy. *Bagnell v. Broderick*, 13 Pet. 436; *Foster v. Mora*, 98 U. S. 425, 428; *Langdon v. Sherwood*, 124 U. S. 74, 85, 8 Sup. Ct. 429; *Davis v. Hargrave*, 30 U. S. App. 723, 18 C. C. A. 438, 72 Fed. 81. There are, however, two reasons why this proposition is not available to the plaintiffs to overturn this judgment: One of them is that a legal right of a defendant in ejectment to the possession of the premises is as complete a defense as the legal title, and the defendants in this case had that right under the agreement with White. The partnership agreement gave Buck unlimited power to make contracts of sale of and to deliver all the property of the firm of Buck & Trexler on such terms as he prescribed, and this land was the property of that firm. The agreement of sale which he made and signed provided that the vendee, White, should have the possession of the land as long as he complied with its terms, and that if he failed to pay his note which fell due on November 1, 1888, the

\$100 which he had paid, and his improvements, should constitute the rent for the year. He did not fail to pay his notes, but he and his grantees complied literally with all the terms of the agreement; and in that way his legal right and that of his grantees to the possession of the property was, after that contract was made, as complete as it would have been if they had held the land under an ordinary lease. In order to recover in ejectment, the plaintiff must have not only the legal title, but the right to the possession of the property. Indeed, the basis of the action is the right to the possession, and not the title. The plaintiff cannot recover when he has granted the right to the possession to the defendant, and it was a perfect defense at law to the plaintiffs' action here that the defendants held both the possession and the legal right to it under a written agreement with the grantors of the plaintiffs, which was anterior and superior to their title.

The other reason why the objection of the plaintiffs cannot be sustained is that it comes too late. It was not made in the court below. The partnership agreement, the agreement between Buck & Trexler and White, his performance of that agreement, and his possession and that of his grantees under it, upon which the equitable title of the defendants rests, were all pleaded, proved, and submitted to the court below for its decision without an objection or exception to any of them on the ground that that title was inadmissible as a defense in this action. This is a court for the correction of the errors of the court below only. When an action at law is tried by the court without a jury, the questions of the jurisdiction of that court, and of the sufficiency of the pleadings and findings to warrant the judgment, are always open for consideration. No other question will be noticed by the appellate court unless it has first been presented to and considered by the court below. No question arises in this case as to the jurisdiction of the trial court over the parties or the subject-matter in controversy. The pleadings and findings of the court were sufficient to warrant the judgment. The answer denied the ownership of the plaintiffs and their right to the possession of the property, and alleged that the defendants held the title, the possession, and the right to the possession. The findings of the court upheld the undoubted right of the defendants to retain the possession of the property. The objection which plaintiffs now urge, therefore, was one which should have been presented to the trial court, in order to warrant a consideration of it here. That court committed no error in ruling upon this objection, because it was never presented to it and it made no ruling upon it; and there is therefore no ruling before us to review, and no error to correct. *Drexel v. True*, 36 U. S. App. 611, 20 C. C. A. 265, 266, and 74 Fed. 12, 14, and cases cited; *Railway Co. v. Harris*, 27 U. S. App. 450, 454, 12 C. C. A. 598, 601, and 63 Fed. 800, 803, and cases cited.

It is urged that the question presented goes to the jurisdiction of the court below to hear and decide upon the equitable defense. The answer is that, inasmuch as it does not go to the jurisdiction of that court over the parties or the subject-matter of the action, it is waived by a failure to present it at the opening of the trial. Any other practice would cause unreasonable expense, and would result in intoler-

able delay. Take the case in hand. This case has been carefully tried without a jury before the same court which would have heard and sustained the equitable title of the defendants if they had pleaded and proved it, as they might have done, on the equity side of the court. The plaintiffs have not been misled or taken by surprise. The equities of the defendants were pleaded, they were proved, they were considered by the court, and their effect was determined after full notice of all these proceedings to the plaintiffs in a case in which they participated without presenting the objection which they now urge. It is plain that these equities are superior to the claims of the plaintiffs, and that they entitle the defendants to retain the possession and to hold the title to this land. If we should reverse this judgment and send the case back for a new trial, the defendants would immediately exhibit their bill, and pray for an injunction against this action, and the establishment of their title, and the court below must grant their prayer. Such a course would produce nothing but expense and the law's proverbial delay. It would impose useless trouble and expense upon the defendants, which a timely objection from the plaintiffs when the answer was filed, or when the evidence in support of it was introduced in this case, would have avoided. They ought not to be permitted now, after experimenting with the trial court until they obtained its decision upon the merits of this equitable title, to repudiate and defeat the judgment which followed that decision, on the ground that the court below has tried, with their silent acquiescence, either an equitable defense at law, or a legal cause of action in equity. The acts of congress provide that suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law. Rev. St. § 723. Yet it is well settled that an appellate court is not required to listen to an objection to a decree in equity on the ground that the complainant had a complete remedy at law, when that objection is made for the first time in that court. *Tyler v. Savage*, 143 U. S. 79, 12 Sup. Ct. 340; *Reynes v. Dumont*, 130 U. S. 354, 395, 9 Sup. Ct. 486; *Scott v. Armstrong*, 146 U. S. 499, 512, 13 Sup. Ct. 148; *Hollins v. Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127; *Preteca v. Land-Grant Co.*, 4 U. S. App. 326, 1 C. C. A. 607, and 50 Fed. 674. The counter proposition is certainly supported by as much reason, and it is too late for one who has submitted to the trial of an equitable cause of action or defense in an action at law to object to that course for the first time in the appellate court. *Railway Co. v. Harris*, 27 U. S. App. 450, 454, 12 C. C. A. 598, 601, and 63 Fed. 800, 803; *Railway Co. v. Phillips*, 27 U. S. App. 643, 650, 13 C. C. A. 315, 319, and 66 Fed. 35, 40. The judgment below is affirmed, with costs.



**METROPOLITAN ST. RY. CO. v. KENNEDY.**

(Circuit Court of Appeals, Second Circuit. July 21, 1897.)

**1. STREET RAILROADS—COLLISION AT INTERSECTION—NEGLIGENCE.**

In the absence of proof that either of two street-railway companies had any right, by usage or otherwise, of precedence at the intersection of their roads, the law presumes that they stood on a footing of equality, each owing to the other the duty of exercising reasonable care.

**2. SAME.**

The servants in charge of a street car were negligent in attempting to cross the track of another company at the point of their intersection when they saw, or should have seen, that a car of that company, of which plaintiff was in charge, was already in motion, and that a collision would probably result.

**3. SAME.**

Though the plaintiff's view of defendant's car was temporarily obstructed by an intervening object, plaintiff was not negligent in attempting to cross the intersecting track, as he had the right, having first put his car in motion, to rely on the fact that the servants in charge of defendant's car would not attempt to make the crossing until it should be safe to do so.

**4. SAME—DAMAGES—EVIDENCE.**

In an action to recover damages for personal injuries it is competent for plaintiff to prove that he was a sober and industrious man.

**5. SAME—HARMLESS ERROR.**

The error, if any, in permitting plaintiff in an action to recover damages for personal injuries to testify that he was a married man, is harmless where the fact is abundantly proved by evidence to which there was no objection.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Henry A. Robinson, for plaintiff in error.

Wm. H. Regan and James L. Bennett, for defendant in error.

Before PECKHAM, WALLACE, and SHIPMAN, Circuit Judges.

**PER CURIAM.** This is a writ of error by the defendant in the court below to review a judgment for the plaintiff entered upon the verdict of a jury. The action was brought to recover for personal injuries received by the plaintiff in a collision between two street-railway cars, alleged to have been caused by the negligence of the defendant, which took place at the junction of Fourteenth street and Broadway, in the city of New York. The plaintiff was a car driver for the Central Cross Town Railroad. The tracks of that railway run east and west along Fourteenth street, and intersect the double tracks of the railway of the defendant, running north and south upon Broadway. The evidence upon the trial tended to show that as a car driven by plaintiff, bound easterly, approached the point of intersection, it was brought to a stop preparatory to crossing the defendant's railway; that at that time a car of the defendant upon the easterly track of its railway, bound northerly, and approaching the point of intersection, had also been brought to a stop; that the conductor upon the plaintiff's car, observing that the defendant's car had stopped, signaled the plaintiff to go ahead, and the plaintiff thereupon put his car in motion; that about this time a south-bound car of the defendant, upon the westerly track of its railway, passed the point of intersection, thereby momentarily obstructing the view be-

tween the plaintiff's car and the north-bound car of the defendant; that, after the plaintiff's car had thus been put in motion, the defendant's north-bound car was put in motion, and proceeded at such a high rate of speed that it could not be stopped in time to avoid collision with the plaintiff's car as the latter was crossing the tracks of the defendant.

Error is assigned of the refusal of the trial judge to direct a verdict for the defendant upon the ground that the evidence did not show that the defendant was guilty of negligence, and did show that there was contributory negligence on the part of the plaintiff. We think the evidence was sufficient to permit the jury to find that the defendant's car was put in motion after those in charge had observed, or should have seen, that the plaintiff's car was about to cross the tracks of the defendant, and would reach the point of intersection before it could be passed by the defendant's car, and that the defendant's car then proceeded at such rapid speed that it could not be stopped in time to avoid collision. We think the evidence also permitted the jury to find that those in charge of the plaintiff's car, including the plaintiff himself, were not aware that the defendant's car had been put in motion in time to stop their own car before it reached the point of intersection, this being attributable to the fact that, after their car had started, the south-bound car of the defendant intercepted the line of vision between their car and the north-bound car of the defendant. In this view the case could not properly have been withdrawn from the consideration of the jury.

In the absence of proof that either railway company had any right, by usage or otherwise, of precedence at the crossing, the law presumes that they stood on a footing of equality, each lawfully using a public street, and each owing to the other the duty of exercising reasonable care while doing so. When parties occupy such a position towards one another, each has a right to assume that the other will fulfill its duty, until apprised to the contrary. There is no hard and fast rule by which to determine what constitutes reasonable care in such a case. The question is one for the jury, to be determined upon the special facts, testing the acts of the parties by that measure of circumspection which would ordinarily be exercised by prudent men under similar circumstances. We entertain no doubt that the jury were authorized to indulge the conclusion that the defendant was guilty of negligence, either because those in charge of its car failed to observe that the plaintiff's car had started to cross the intersecting tracks, or, having observed this, in attempting to cross with their own car when there was not sufficient time to do so before plaintiff's car would reach the place, or at such a rate of speed that it could not be stopped in time to avoid collision; and that the plaintiff, having the right to rely upon the exercise of reasonable care by the defendant, was not himself negligent in failing to stop his car when the south-bound car of the defendant temporarily obstructed his view of the north-bound car.

Error is also assigned of the rulings of the trial judge in admitting evidence contrary to the objections of the defendant. A witness for the plaintiff was permitted to state that the plaintiff was a sober and

industrious man. The testimony was competent upon the issue of damages. The earning power of the plaintiff was an element in estimating the loss which he had sustained, and was likely to sustain in the future, by being incapacitated for labor in consequence of the injuries received. The plaintiff was allowed to testify that he was a married man. While this testimony may not have been strictly competent (*Pennsylvania Co. v. Roy*, 102 U. S. 459), it was innocuous, the fact having been abundantly proved by evidence which was not objected to. His wife was one of the principal witnesses upon the trial. The other rulings complained of do not merit notice. We find no error in the record, and the judgment is therefore affirmed.

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ILLINOIS STEEL CO. v. BUDZISZ et al.

(Circuit Court, E. D. Wisconsin. July 30, 1897.)

PUBLIC LANDS—PATENTS—PRE-EXISTING EQUITIES.

The validity of patents issued in 1838 for surveyed lands offered for sale by president's proclamation in 1835 cannot now be questioned, either by the United States or by any person in its right, under equities pre-existing or otherwise.

Action at law by the Illinois Steel Company against John Budzisz and others. On motion to strike out special matter alleged in the answer.

This action is in ejectment, and the plaintiff moves to strike out, as irrelevant, incompetent, etc., special matter alleged in the answer by way of defense and counterclaim. The matter referred to is voluminous, and sets forth facts and inferences by way of impeachment of the title of the plaintiff, which title the answer asserts is "derived from a purported entry as a float or floating right," by one Daniel Darnell, at the Green Bay land office, on July 30, 1835, and a purported "patent of the United States, dated the 1st day of September, 1838, to Alexander J. Irwin, assignee," etc., for one tract, and a purported "patent of the United States, dated the 16th day of April, 1838, to Albert G. Ellis, assignee," etc., for the other tract. The allegations to that end are substantially as follows: (1) That the title to the lands still remains in the United States; (2) that an entry by Clafin and Darnell on July 30, 1835, was void because it "lacked the essential ingredients, both in law and fact, both in the matter of residence and occupation," under the laws applicable thereto; (3) that the tract was not of the description to authorize a float or floating right upon a joint entry by two persons under the act of congress; (4) that the residence of Clafin and Darnell, respectively, as set forth, did not extend to the years 1829 and 1830, and was inconsistent with such right of entry; (5) that the "Indian title to" said tract "was not extinguished" until the ratification of certain treaties referred to, in the years 1831, 1832, 1833, and 1848, and, as to the treaty of 1831, retained the "liberty to hunt and fish on the lands ceded" until surveyed and offered for sale by the president; (6) that the lands were surveyed in 1834, and were first offered for sale by the president by his proclamation of May 6, 1835. The answer prays adjudication of invalidity against both entries and patents.

Van Dyke, Van Dyke & Carter, for plaintiff.  
Ruble A. Cole, for defendants.

SEAMAN, District Judge. The general rule is undoubted that the defendant in ejectment may avail himself of any defect in the

plaintiff's chain of title to defeat recovery, when the complaint founds the right of possession solely upon the assertion of title. But a patent of the United States is the highest evidence of title, where the grant originates out of the public domain. The pleader is mistaken in the inference that the ownership of these lands was at any time, in the view of the law, vested in the Indians, or derived through the treaties referred to. There is no recognition by any of the authorities of a fee vested in the Indians. *Spalding v. Chandler*, 160 U. S. 394, 402, 16 Sup. Ct. 360. As to the lands in Wisconsin, the treaty with Great Britain and the cessions of Massachusetts and Virginia are the legal sources of title in the general government. The treaties with the Indians are regarded only for rights of occupancy and for reservations from sale. Therefore the doctrine is established that the patent issued by the government is "an invaluable muniment of title and a source of quiet and peace to its possessor." *Wright v. Roseberry*, 121 U. S. 488, 501, 7 Sup. Ct. 989. As held under a constant line of decisions, it cannot be impeached, if the lands are patentable, unless there is entire want of jurisdiction in the land department to effect the grant, or conditions are presented to cancel or avoid for fraud or mistake affecting the issue of the patents; and, for the latter grounds, relief can be extended only in favor of the United States, or of the party defrauded or deprived of his rights. *Ehrhardt v. Hogaboom*, 115 U. S. 67, 5 Sup. Ct. 1157; *Vance v. Burbank*, 101 U. S. 514; *Deeweese v. Reinhard*, 165 U. S. 386, 17 Sup. Ct. 340.

The industry of counsel for the defendants has brought to light reports in the land department of proceedings in other cases, presenting a state of facts similar to that set forth in this answer, wherein the ruling was against the entries, and patents were denied. Assuming, for the purposes of this motion, that there was no right of entry at the time of original entry alleged, the answer concedes that these lands were offered for sale by the president's proclamation of May 6, 1835, upon survey of 1834, and that the patents were issued, respectively, April 16, 1838, and September 1, 1838. It is not asserted that their validity has ever been questioned since, either by the United States, or by any person in its right, under equities pre-existing or otherwise. The lands became patentable after the survey and proclamation, and were clearly within the jurisdiction of the land department when the patents issued in 1838. All questions as to entry and right to patent were then determinable by that tribunal, and the patents were not void, although they may have been voidable at the proper instance. The doctrine for which the defendants contend would overturn the well-settled rules by which the patent from the government is fortified, and finds no sanction in any of the numerous authorities cited by counsel. Independently of the act of congress of March 3, 1891 (26 Stat. 1093), I am clearly of the opinion that the special matter alleged in the answer and included in the motion states no grounds which are available to these defendants by way of defense. Under the act of limitations referred to, any action by the United States to annul the patent is now barred; and if the defendants were possessed of paramount equities, or were in any manner entitled to avail themselves of rights existing in the United States, they are equally barred

by the limitation. The motion is granted, and the matter therein specified will be stricken from the amended answer and second amended answer.

### VANY v. PEIRCE.

(Circuit Court of Appeals, Sixth Circuit. July 6, 1897.)

No. 356.

**1. TRIAL—DIRECTING VERDICT FOR DEFENDANT.**

A court should not direct a verdict for defendant where plaintiff's evidence, if standing alone, would sustain a verdict in his favor, although on the whole case the evidence for defendant greatly preponderates.

**2. MASTER AND SERVANT—PERSONAL INJURY—CONTRIBUTORY NEGLIGENCE.**

A brakeman cannot recover for injuries received, while coupling two Pennsylvania freight cars, by being caught between the projecting deadwoods with which such cars are constructed, on the alleged ground that it was dark, and the oil furnished him for his lantern was of such poor quality that he was unable to see that the car he was approaching was a Pennsylvania car, when it appears from his own testimony that he must have known that the moving car was a Pennsylvania car, and that he could see the drawhead of the standing car as he approached, and that the coupling pin was in proper position, but that he did not notice the kind of car it was.

**In Error to the Circuit Court of the United States for the Western Division of the Northern District of Ohio.**

This is a writ of error to review a judgment of the circuit court of the United States for the Western division of the Northern district of Ohio. The plaintiff on the 9th of October, and prior thereto, was employed as a brakeman by Samuel R. Calloway, receiver of the Toledo, St. Louis & Kansas City Railway Company, appointed by the circuit court of the United States for the Northern district of Ohio. The plaintiff was injured while in such employment, and brought suit in the common pleas court of Lucas county against Calloway as receiver. The suit was removed to the circuit court of the United States on the ground that the cause arose under the laws of the United States. After the removal, Calloway was succeeded by R. B. F. Peirce as receiver of the railroad company, the defendant in error here. Peirce answered the petition of the plaintiff. The case of the plaintiff, as stated in the petition, was as follows:

"For a long time prior to the 9th day of October, 1893, plaintiff says he was employed by the said Samuel R. Calloway, receiver as aforesaid, in the capacity of brakeman upon a local freight train on the said road running between the city of Toledo and the village of Delphos, Ohio, a station on the line of said road. As such brakeman, it was his duty, among other things, to go between the freight cars in said train for the purpose of coupling and uncoupling the same. It was the further duty of said receiver to furnish plaintiff with a lantern, and supply the same with oil of a good quality to be burned in said lantern. Said lantern and the light furnished thereby were necessary in the night season to enable plaintiff to perform his work in a good and proper manner, and to afford him the means of guarding against injuries to his life and limbs while in the performance of his duties. At about the hour of 7:30 o'clock, standard time, in the evening of said day, and while it was dark, the plaintiff was ordered by the conductor in charge of said train to couple several freight cars attached to the engine which drew said train to the balance of said train consisting of about 40 cars, which last-named cars were standing on the track of the said railroad, a short distance east of said engine, at or near a place known as 'Cloverdale,' a station upon the line of said railroad in Putnam county, Ohio. Plaintiff further says that in compliance with said order he gave a signal to the engineer of said engine to back the said first-named cars for the purpose of being coupled to the balance of the freight train as aforesaid; that said engineer did thereupon cause said cars to be backed, while the plaintiff swung a lantern for the purpose of giving

signals to said engineer, which said lantern had been furnished to him by the said receiver, and said cars so being backed approached said cars so standing upon said track. Plaintiff, on account of the darkness which then prevailed, held up said lantern immediately after swinging the same to signal said engineer, in order to see the condition of the cars he was about to couple. But said lantern failed to emit sufficient light to enable him to see the kind of car, and appliances thereon, that was standing still, attached to the main part of said train. Plaintiff further says that the immediate cause of the light being poor and insufficient to afford the necessary light for plaintiff to see while in the performance of his said work was because the said receiver had wrongfully, carelessly, and negligently failed to furnish him with a lantern containing oil of good quality, but did furnish him with a lantern which contained oil of a poor, cheap, and inferior quality, by reason of which the light in said lantern became nearly extinguished just after the swinging of said lantern, and failed to give sufficient light, as it should have done, for plaintiff to see the condition of the cars which were to be coupled together, and the distance between them. By reason of the failure of said lantern to furnish light as aforesaid, and while plaintiff was performing his duty, the said cars which were being backed were run against the said cars standing upon such track in such manner as to catch plaintiff's body between the framework of the cars being coupled, which said cars were of the kind known as 'Pennsylvania cars,' having sills projecting at each end beyond the car's main body; and, by reason of being caught in said projecting frames of said Pennsylvania cars, the plaintiff was squeezed between said cars, and fell upon said track in such manner that his right leg remained upon one of the rails of said track, and the wheels of the said car which was furthest from the engine, and being backed as aforesaid, ran upon and over the plaintiff's said right leg at a point near the knee, crushing, mashing, and mangling the same."

The answer of Peirce denied that Calloway, the receiver, was guilty of any negligence which caused the injuries received by plaintiff, and averred that the plaintiff was injured through his own fault and negligence.

The plaintiff adduced much evidence to show that the oil furnished by the receiver to his employees at the time of the accident was defective, and that complaints concerning it had been made known to the superior officers working under the receiver. The receiver's evidence tended to show that the oil was as good as any signal oil used by the railroad companies of the country. The learned judge at the circuit court at the close of the evidence examined the question of what his power was with reference to granting a motion to direct a verdict for the defendant on the ground that the evidence with respect to the defective quality of the oil was not sufficient to support a verdict. After referring to a decision by the supreme court, he stated his conclusions as follows: "Now, I have very fully stated the evidence in that case, to show that the trial judge must not only have determined where the preponderance of the evidence was, but must have considered the evidence tending to show negligence, and that he must have determined that the evidence was of such a character that, if a verdict had been returned for the plaintiff, it would have been his duty to set it aside. In reaching that conclusion, he must necessarily have weighed the evidence, and considered all the testimony given on the trial, the credibility of the witnesses, and all the circumstances, and from them all determined whether there was such a sufficiency of testimony as would have supported a verdict, if rendered. So that I understand the rule to be in the federal courts that at the close of the evidence it is a right which the defendant has to challenge the array of facts by having the trial judge determine whether or not there is sufficient evidence to authorize the case to be submitted to the jury, and that is a legal right, which the defendant is entitled to, and that it is the duty of the judge of the court to pass upon that question, and determine whether or not there is such a sufficiency of testimony to sustain a verdict for the plaintiff, and, if not, to direct a verdict for the defendant. Now, I am aware that there are some decisions of the courts of appeals in some circuits where there is an attempt made to modify this rule. But these two decisions I have cited stand. They never have been modified, never been reversed, never been qualified in any way. So there can be no mistake about the rule. It therefore remains my duty to determine whether or not in this case there is sufficient evidence to support a verdict, so that if this case was submitted to this jury upon

this evidence, and they returned a verdict, it would not be the duty of the court to set that verdict aside."

The judge then proceeded to consider the evidence, and finding by the great weight of the testimony that good oil was furnished, and that it had not been impaired after it came into the possession of the company, and that, if a verdict were to be rendered for plaintiff, the court would set aside the verdict as against the weight of the evidence, he directed a verdict for the defendant.

It was admitted in the case that, on the freight cars of the Pennsylvania Company, sills extended from the end of the car outward just over the drawbar where the coupling is made, and that, in making a coupling between such cars, it was necessary for the brakeman to stoop down and put his hand up from below under the sills, and above the coupling, to avoid being squeezed by the sills. The evidence of the plaintiff as to how the accident happened may be seen from the following quotations of his evidence:

"Q. Now tell the jury how it happened that you received your injury at Cloverdale. Just go on, and, in your own words, detail the circumstances to the jury. A. Well, I got caught between those end sills, making the coupling,—caught there and mashed when the slack run up at the hind end. Then I dropped— \* \* \* Q. Now tell the jury what the circumstances were connected with your coupling,—how you went at it. A. I was walking along the track, fixing the link, and I walked along until I got close up to the other car, had my link fixed, swung my lantern— Q. Did you go in on the track to fix the link? A. Yes, sir. Q. In which car? A. In the car that was backing up. \* \* \* Q. Tell how the light was. I mean, was it daylight or darkness at that time? A. It was dark at that time. Q. How dark was it? A. Well, it was so dark that you could not see, without a light, to do any work. Q. Did you have any lantern? A. Yes, sir; I had a lantern. \* \* \* Q. Tell the jury what you did when you were at the work of making the coupling in the use of the lantern,—what use, if any, you made of the lantern. A. I swung it out for them to slow up. Q. You was between the cars. How did you swing it? A. I swung it out by the corner, past the corner, and I went to make the coupling,—held my lantern up. I lifted it up to make the coupling. Q. Lifted it up in front of you? A. Yes, sir; when I raised my lantern up the light went down, so you could see nothing by it. Q. What took place then? A. I got caught between these two dead-woods or sills. Q. What was the cause of your being caught? A. Well, on account of I did not have any light to see what kind of cars they were. Q. What kind of cars were those between which you were caught? A. They were Pennsylvania cars, both of them. Q. Describe them. A. Well, one of them was a refrigerator car. The other was just a common box car. Q. How are those cars constructed? A. They have a sill—oh, perhaps, a foot thick—that runs out past the end of the car. Each one of them had this sill. Q. These sills extend out beyond the end of the car? A. Yes, sir. Q. Did they extend a foot wide clear across the end? A. They are not quite so wide. They kind of narrow off a little at the end. Q. Is this construction peculiar to Pennsylvania cars? A. Yes, sir; they are all that way, I think. Q. That construction—this wide projection the whole width of the end of the car—is made for what purpose? A. For end brakes. Q. To allow a man to stand between the cars and twist the brakes? A. Yes, sir. Q. And those cars the brake is on the end instead of on top? A. On the end of the car. Q. Now, what is the fact with reference to the space between these projecting sills on these Pennsylvania cars? A. Well, I should think, up towards the middle, they would not be more than four or five inches. Q. The space gradually widens out from the center? A. Yes, sir. Q. How are the couplings made on these cars,—this kind of cars,—ordinarily? A. Well, they are mostly made by stooping down and making them from the bottom. \* \* \* Q. You were standing sideways towards the car? A. Yes, sir. Q. Your arms and body crosswise on the track? A. Yes, sir. Q. Your back was towards the car that was backing up? A. Yes, sir. Q. Was you walking along with it? A. I had been in the center of the track, fixing the link. \* \* \* Q. What took place after you was caught by the car and squeezed? A. Well, the slack run out and let me drop down. My body and all fell out, but one leg that was across the track. Q. What took place then? A. They run over it. Two trucks, two wheels, run over it. Q. How much light did the lantern give after you had swung it in there making the coupling? A. It did not give any. I could hardly see it. Q.

Did it go clear out, or not? A. I do not know whether it went clear out, or not. I could not tell. Q. Were you able to see the kind of cars that were coming together? A. No, sir. Q. You swung the lantern out how long before you was caught and squeezed? A. Yes, sir. Q. How long before you was caught and squeezed,—immediately? A. Just a little bit before. They were backing up. I swung the lantern across the track for them to stop.”

On cross-examination the plaintiff testified that he had given the signal to the engineer to back down to make the coupling after having kicked a flat car onto the side track. The counsel then put the question:

“Q. There was nothing the matter with the lantern, so far as you could see, at that time? A. Nothing, only it burned a little dim once in a while. Q. How soon after you got the lantern did you notice it burned dim? A. I did not use it only about ten minutes. Q. How soon after you got it did you notice it burned dim? A. Just about the time I was making the coupling. Q. Then the lantern burned all right when you got it? A. Yes, sir. Q. It burned all right when you gave the signal to the engineer to back down? A. It would kind of die out when you would swing it. Q. How soon did you notice that it would die down when you would swing it? A. I did not notice it until I swung it out for them to stop. Q. Then it worked all right when you gave them the signal to back up, didn't it? A. Well, I would not say for that, because I hardly ever looked at my lamp. Q. From the fact that you did not notice anything wrong, does not that satisfy you that it worked all right? A. I think the conductor gave the signal to back down. Q. Didn't you give the signal? A. I do not think I did. \* \* \* Q. You could see up on the switch, couldn't you? A. I could see enough to throw the switch. Q. You could see to uncouple the flat car? A. Didn't have to see much to do that. Q. You could see enough to do that,—is it not a fact you could see enough to do that? A. Well, it was not so awful dark. A man could see to do that without a lantern,—to pull a pin. Q. How long was it between the time you uncoupled the flat car on the switch to the time you attempted to make the coupling on the side track to couple up the train? A. About fifteen minutes. Q. It took you fifteen minutes from the time you went down there to go down and make this coupling, did it? A. Yes, sir; it was all of fifteen minutes. Q. And you could see, couldn't you, to throw the switch and lock the switch? A. A man could see that without any light. Q. You could see to arrange the pin on that refrigerator car you were walking in front of? A. I could see the link and pin. It was fast in the drawbar head. I had to loosen it. Q. You could see that drawbar head? A. Yes, sir. Q. And the link and pin? A. Yes, sir. Q. Your lantern gave light enough for that, did it? A. You could almost do that in the dark, without any light. Q. You could do that with your eyes shut? A. Almost; yes, sir. Q. Well, now the truth is, Mr. Vany, you did not look at that very carefully,—you did not think it very necessary,—did you? A. I fixed it. I loosened it. Q. You did that without paying much attention, didn't you? A. Sure, it had to be done, or you could not make the coupling. Q. You did that without looking at it very carefully? A. I seen it was all right. Q. Your lantern gave light enough to enable you to see that? A. You could tell that without looking much. \* \* \* I done it without looking. I just walked along there, and looked where I was walking, and stopped and took the pin and loosened it. \* \* \* Q. Well, now, as you went in between the cars there, where were you when you went behind the refrigerator car, that was backing down to arrange the link and pin,—how far up the track? A. I was four or five car lengths from the hind cut, standing still. Q. Was you walking all of that distance on the track in front of that car? A. Most all the way. Could not fix it either when it was backing up. Q. How far were you from the hind cut of that train that was standing still when you gave the signal to stop? A. I was just about to the cut. I walked on ahead of the car backing up after I fixed the link. Q. That is, you walked faster than the engine moved? A. Yes, sir; they were going slow. Q. You walked faster than the engine moved, went up, and stood at the stationary car, and waited for them to back down? A. I walked up to about four or five feet of it. Q. You walked up to within four or five feet of the stationary cars, and waited for the moving train to come down? A. Yes, sir; the train was not very far back of me. It was moving right along. Q. But you moved faster than the train behind you did,—you moved faster than the train did,—and went up to the stationary cars? A. No, sir; I did not go up to



them. Q. I mean within four or five feet of them? A. They were only three or four feet from me when I stopped. Q. You went up to within three or four feet of the stationary cars, stopped, and waited for the moving train to come down, did you? A. I stepped on between the track. Q. That is, outside of the rail? A. Yes, sir. Q. Did you examine this car to see what the condition of the coupler was? A. No, sir. Q. You did not look at that at all? A. No, sir. Q. Did you stand with your back towards the stationary cars, or towards the moving train? A. Towards the moving train. Q. With your back towards the moving train? A. Yes, sir. Q. Then as you stood there, waiting for that train to come down, you stood with your face towards these stationary cars,—you did not look to see what condition the coupler was in? A. I was outside. Q. You did not look to see, did you? A. Well, I seen the link and pin was set in the drawbar head. Q. You could see that, could you? A. Yes, sir. Q. You mean, by 'the pin was set,' that the pin was set up in the top hole in the coupler, ready to receive the link? A. Yes, sir. Q. You could see that, could you? A. Yes, sir. Q. So there was nothing else for you to do? A. To make the coupling. Q. Until the train come up to that stationary car, you did no work; it was all right? A. There was no work to do. Q. Could you see that this was a Pennsylvania car? A. You could not tell well. Q. Could you see these bumpers—deadwoods, as they are called—on that car? A. You could if you would walk up and notice. Standing in front, I do not suppose you could tell. Q. You were outside? A. Yes, sir; off on one side. Q. Do you mean you could see this coupling pin? A. I could see that walking along. Q. It was light enough for you to see that as you walked along the track? A. My lantern gave light enough to walk by. Q. Your lantern gave light enough to enable you to see that as you walked along the track, did it? A. I do not know whether I seen it, or whether I walked up to the car. I think, though, that— I think I walked up to the car,—up to the drawbar. Q. You walked up to the drawbar of the stationary car? A. I am not sure. It has been so long I have almost forgotten. Q. What is your best recollection now as to whether you did walk up to that stationary car? A. Well, I could not say. Q. Well, did you see the coupling pin standing in the head of the drawbar, ready to make the coupling? You did see that, didn't you? A. I said I seen it, but I could not say whether I did or not. It has been so long ago I have forgotten the most of it. Q. You saw it, didn't you? A. I said I saw it. Q. You are telling the truth, are you not? A. I am supposed to. A man can't remember so long as that. Q. Will you tell the jury why, if you could see that coupling pin, that you could not see these deadwoods you spoke of, which are perhaps eight or ten times as large? A. Those kind of cars are something we had not been in the habit of using or hauling many of them,—would not pay any attention to it, would not notice them. Q. Because they were unusual, you would not pay any attention to them? A. You would not just think of it. Q. Don't you know, Mr. Vany, that is just the contrary? When you get an unusual car, you do pay attention to it. That is a thing that attracts your attention. A. Not so far as making couplings. Q. If you had a strange car, the like of which you had never seen before, you would not pay any attention to that? A. I suppose a man would pay attention to it. Q. Now, this deadwood as it is called, on the Pennsylvania cars, is a large timber structure out above the drawbar? A. I think it is right over the top of the drawbar. Q. It is a large timber? A. Yes, sir. Q. How long is it on each side of the drawbar? A. The full length of the car. Q. How thick is it? A. I could not say. Q. About how thick? A. I could not say. Q. Six, eight, or ten inches? A. Which way do you mean? Q. How deep? A. I do not know just how wide it is. Q. It is a large timber? A. Yes, sir; it is a square piece of timber. Q. It is at least as large as the drawbar, is it not? A. It is as large as the drawbar if it was doubled up. \* \* \*

Again on cross-examination the plaintiff was asked:

"Q. You swore that the lantern gave so little light you could not see what kind of a car it was? A. I did not notice what kind of a car it was. Q. Then it was not that the lantern gave so little light you could not see, but that you did not notice? You could not see what kind of a car it was, but that you did not notice? A. You could not see what kind of a car it was from the end, I suppose, unless you took a little time to notice it. \* \* \* Q. Did the lantern give you sufficient light to enable you to see the appliances on this car if you had gone up to it and looked? A. Might have took time to raise it up, without raising it

up— Q. That is, if you had taken time you could have seen it? A. Yes, sir. Q. You did not look to see what kind of appliances were there? A. I did not have time. Q. You did not look, did you? A. I could not have seen if I had looked after I got up there. Q. Answer my question. A. That is as near as I can answer it. \* \* \*

On re-examination he said:

"Q. How far were the two cars apart at the time you stepped in? A. About four or five car lengths. Q. You walked along with the moving car, shaking the link and testing it? A. The link was fast in the drawbar. Q. Did you loosen it? A. I took the pin, and drove it, and pounded it up, and loosened it. Q. Was the car coming back while you were doing this? A. Yes, sir. Q. When did you give the signal to the engineer, now, where you swung your lantern out? A. From between the cars. Q. At what place,—after you had loosened the link, or before? A. After I had loosened the link. Q. Were the cars close together, or far apart, after you gave this signal to the engineer? A. Right close together. Q. How far apart were the cars at the time you swung the lantern out to give the signal to the engineer,—about, if you know or are able to state? A. About four feet, I should judge,—four or five feet. Q. Immediately after swinging the lantern is when you raised it up, I understand you to say, to look? A. Yes, sir. \* \* \* Q. They were moving so slow you did not think it necessary to give any signal to stop until they were within four or five feet of the stationary car? A. They were not. Q. You did not run ahead and make any examination of the stationary car? A. No, sir. Q. Before you gave the signal to stop? A. No, sir; I did not think I had time to run ahead."

On re-examination he said:

"Q. When you say you did not have time to examine the cars, I will ask you whether you refer to having time before you commenced to make the coupling, or that you did not have time to observe after you held your light up? A. I did not have time when I held my light up, or before, either. Q. If your light had been burning, would you have had time to have seen? A. Yes, sir; I could have stepped right in there before they would have caught me, if I had had the light to see. They come out towards the end. They won't pinch a man up towards the ends. They are kind of round on the ends, on the corner. A man can stand way out and make a coupling, and they won't get hurt; but, if he stands right up straight, they will pinch him."

The main exception and the chief assignment of error were to the court's instruction to the jury to return a verdict for the defendant.

Hurd, Brumback & Thatcher, for plaintiff.

Clarence Brown, for defendant.

Before TAFT and LURTON, Circuit Judges, and HAMMOND, J.

TAFT, Circuit Judge (after stating the facts as above). Upon the issue as to whether the oil was defective, the court found that there was not sufficient evidence to go to the jury, and therefore directed a verdict for the defendant. In this we think the court erred. In the remarks with which the court prefaced its charge to the jury to bring in a verdict for the defendant, the court proceeded on the theory that in the federal courts, in every case in which the evidence, taken as a whole, is such that, if a verdict should be rendered in favor of one party, the court would feel obliged to set it aside on the ground that it is against the weight of the evidence, it is the duty of the court to direct a verdict in favor of the party adducing the stronger proof. We have examined this question at great length in the well-considered case of *Railway Co. v. Lowery*, 43 U. S. App. 408, 20 C. C. A. 596, and 74 Fed. 463. In that case the opinion of the court, delivered by Judge Lurton, shows the clear distinction between the function which the court has to discharge after a verdict has been rendered, in de-

termining whether it is so much against the weight of the evidence as to require it to be set aside, and the function which it discharges in deciding, upon a motion to direct a verdict, whether the evidence supporting the issue upon one side is of such an inconsequential character that in law it cannot support a verdict. In the case at bar the court proceeded to weigh the evidence on both sides, and, finding that the evidence tending to show that the oil was of good character so far outweighed the evidence to the contrary that he would be obliged to set aside a verdict based on the view that the oil was defective, he directed a verdict for the defendant. This was beyond the power of the court. If no evidence as to the character of the oil had been introduced by the defendant company, the evidence for the plaintiff was certainly strong enough to support a verdict based on the theory that the oil was defective.

But, though the court reached the conclusion to direct the verdict on an erroneous ground, we are of opinion that the conclusion can be supported on another ground, and that the direction to find a verdict for the defendant was right. It seems to us clear, from the testimony of the plaintiff himself as to how the accident occurred, that he was guilty of negligence causing the accident, and this without respect to the character of the oil. It is perfectly evident from what he states that he knew that the moving car to be coupled was a Pennsylvania car. If he did not know it, he ought to have known it, because he fixed the pin in the drawhead some time before the two cars came together, and the sill at the end of the car, the presence of which required peculiar care in coupling, was just above the drawhead, and so near to it that it was impossible that he did not see the sill if he saw the drawhead as he said he did. Indeed, he does not deny that he knew that the moving car was a Pennsylvania car with a sill. He also states that he could see and did see the drawhead of the stationary car, and could see that the link and pin were properly adjusted in it to make the coupling. If he could see that, as he testifies that he did, it is impossible to explain, except on the theory of negligence and inattention, why he did not see the sill upon that car, for the one was so near the other that with the slightest attention it could not have escaped him. His real explanation of the fact that he did not see the sills was that he did not notice them. Failure to notice a fact so important in determining his proper course, when he had full opportunity to do so, was gross negligence. In view of his admissions his statement that he did not have time to see the sills before the coming together of the cars is certainly not more than a scintilla of evidence to support his case, which, in a federal court, need not be submitted to a jury. The action of the court in directing a verdict was right, and the judgment is affirmed.

## DUN et al. v. MAIER et al.

(Circuit Court of Appeals, Fifth Circuit. June 16, 1897.)

No. 571.

## 1. LIBEL—PLEADING—WHEN SPECIAL DAMAGES MUST BE ALLEGED.

Where words published are not libelous per se, special damages must be alleged.

## 2. SAME—WORDS NOT ACTIONABLE.

A mercantile agency, under the head of "Record Items," in the Weekly Change Sheet furnished to its subscribers, published the following words: "Atlanta: Maier & Berkele: M. Berkele gives R. E. deeds, \$4,100. Jewelry;" meaning thereby that said firm was in the jewelry business, and that the Berkele thereof had conveyed to others real estate to the value of \$4,100. Held, that the words were not susceptible of the construction placed on them by an innuendo charging their meaning to be that the conveyance had diminished to that extent the property accessible to creditors of said firm, and were not actionable per se.

## In Error to the Circuit Court of the United States for the Northern District of Georgia.

This suit was brought by Maier & Berkele, a mercantile firm composed of Herman A. Maier and John Berkele, who are defendants in error, against R. G. Dun & Co., a firm composed of Robert G. Dun, Arthur J. King, and Robert D. Douglass, who are plaintiffs in error, to recover damages for alleged libelous matter published by the latter firm concerning the said John Berkele. The declaration filed by the defendants in error set forth the cause of action in the following language: "(2) Your petitioners were on January 31, 1894, and for a considerable period theretofore had been, and now are, merchants engaged in conducting a wholesale and retail jewelry business in the city of Atlanta and said state, and doing an extensive trade in that line. (3) Your petitioners were then and are now using in the purchase of goods for their business, and raising money for its need, a large mercantile credit, to which they were and are entitled by virtue of their solvency and prompt and honest dealing with their creditors. (4) The defendants were on the day and year aforesaid, and had been continuously for many years before, conducting what is commonly known as a 'commercial agency,' the design and actual use of which is to collect and disseminate among merchants, bankers, and others interested in the matter, throughout the United States, information respecting the commercial standing and credit of those engaged in any department of trade requiring the use of credit. This information is communicated to those only who contract for the same with said defendants, and is sent out, among other means, in the form of written or printed reports, and a publication issued weekly, and entitled, 'The Mercantile Agency Weekly Change Sheet.' The defendants had then a great number of subscribers for their reports and publications in all the markets of this country. (5) On the day and year aforesaid the defendants had a branch office in the city of Atlanta and said state, and were engaged in sending out from said office such reports as are in the preceding paragraph described, and the publication therein mentioned for the purposes therein specified. (6) The defendants on the day and year aforesaid, and in the city aforesaid, issued and circulated among its subscribers a copy of the said publication, wherein they, for the purpose of injuring the commercial credit of your petitioners, and being moved thereto by malice against them, inserted, under the head of 'Record Items,' in one column of said publication, the following false statement as to your petitioners, to wit: 'Atlanta: Maier & Berkele: M. Berkele gives R. E. deeds, \$4,100. Jewelry;' meaning thereby that said firm was in the jewelry business, and that the Berkele thereof had conveyed to others real estate belonging to him of the value of \$4,100, and thus diminished to such an extent the property accessible to creditors of said firm for the payment of debts due them. (7) During the year 1893 your petitioners, with others in

like business in said city, had formed and had in operation a voluntary association known as the 'Jewelry Association,' the object of which was the promotion of their interest in the line of trade carried on by them. On the — day of December in said year, at a meeting of said association, the matter under discussion being whether the association should subscribe for the reports of the commercial agencies represented in said city, one of your petitioners, the said Berkele, in some remarks made by him, questioned the expediency of such subscription. On the day thereafter, in said city, one Elmer R. Kirk, the canvasser of defendants therein, having heard of such remarks, said to a member of said association, and while speaking of them and the subject to which they related, that if he ever had an opportunity to do up your petitioners, he would do so, because of such remarks. Your petitioners allege that the false and malicious statement concerning them published as aforesaid was in pursuance of such threat. (8) Your petitioners allege that the false and malicious statement as to them set out in the sixth paragraph above is of such a nature as to impair their credit in the commercial world, and therefore they say that they have been injured and damaged as aforesaid."

The plaintiffs in error demurred to the declaration on several grounds, which are hereinafter fully noted in the opinion of the court. The demurrers were overruled, and thereupon the plaintiffs in error filed their plea, in which they set up their several defenses to the suit. Subsequently the defendants in error filed three amendments of their declaration, as follows:

First amendment: "And now come the plaintiffs in the above-stated case, and amend the declaration therein, and say that in addition to the general damages suffered by them because of said libel, as already set forth, they sustained special damages in the sum of one thousand dollars, because of the following state of facts: That, at the date of said publication, plaintiffs were conducting business at two stores on Whitehall street, in the city of Atlanta; that they had determined to close one of the stores, and for this purpose to dispose of the goods there at auction; that they had fixed upon February 15, 1894, as the time when such auction should begin, but that because of the apprehension excited in their minds by such publication that such a sale would be understood as evidence of failing condition, and impair their standing with their creditors and with the commercial world, they delayed such sale for six weeks; and that by reason of such delay they were subjected to an expense of one thousand dollars because of the rent of the store which they desired to close, the hire of clerks for the same, and the bills for gaslight and other incidentals connected with the carrying on of said store."

Second amendment: "And now come the plaintiffs, and amend the amendment heretofore made, wherein they claim of defendants special damages, as follows:

"(1) By striking out after the words 'but that,' in the eleventh line of such amendment, the clause, 'because of the apprehension excited in their minds by such publication,' and inserting in place thereof the following: 'because such publication was of a character to excite in the mind of a man of ordinary prudence, and did excite in the minds of plaintiffs, an apprehension,'—so that the sentence as amended shall read as follows: 'That, at the date of the publication, plaintiffs were conducting business at two stores on Whitehall street, in the city of Atlanta; that they had determined to close one of the stores, and for this purpose to dispose of the goods there at auction; that they had fixed upon February 15, 1894, as the time when such auction should begin, but that because such publication was of a character to excite in the mind of a man of ordinary prudence, and did excite in the minds of plaintiffs, an apprehension that such sale would be understood as evidence of failing condition, and impair their standing with their creditors and with the commercial world, they delayed such sale for six weeks; and that, by reason of such delay, they were subjected to an expense of one thousand dollars because of the rent of the store which they desired to close, the hire of clerks for the same, and the bills for gaslight and other incidentals connected with the carrying on of said store.'

"(2) By appending to said amendment the following bill of the items constituting the expense alleged to be one thousand dollars, to wit:

Rent of store proposed to be closed.....	\$300 00
Gas and electric light.....	25 00
Salary of J. C. Mellichamp as bookkeeper.....	85 00
Salary of Walter Ballard as salesman.....	100 00
Salary of J. W. French as salesman.....	50 00
Salary of Miss May Archer as saleslady.....	35 00
Salary of J. C. Rivers as collector.....	50 00
Salary of Flewellyn Fluker as porter.....	22 00
	<hr/>
	\$667 00

Third amendment: "Now come the plaintiffs in the above-stated case, and amend the second amendment filed by them under date of May 28, 1896, by striking therefrom the clause, 'and for this purpose to dispose of the goods there at auction' (this clause beginning in the thirteenth line), and to insert in lieu thereof the following: 'and concentrate their entire business in the other store: that this other store was entirely sufficient for the business done in both, and in it such two businesses could be conducted with the same facility and success as in the two stores; that, for the purpose of so closing the one store, they had decided to dispose of the goods there at auction'; and by adding at the end of the twenty-fifth line the following: 'and this expense was a loss to petitioners, in that it was made necessary solely because of such delay,'—so that the paragraph thus amended shall read as follows: 'That, at the date of the publication, plaintiffs were conducting business at two stores on Whitehall street, in the city of Atlanta; that they had determined to close one of the stores, and concentrate their entire business in the other store; that this other store was entirely sufficient for the business done in both, and in it such two businesses could be conducted with the same facility and success as in the two stores; that, for the purpose of so closing the one store, they had decided to dispose of the goods there at auction; that they had fixed upon February 15, 1894, as the time when such auction should begin, but that because such publication was of a character to excite in the mind of a man of ordinary prudence, and did excite in the minds of plaintiffs, an apprehension that such sale would be understood as evidence of falling condition, and impair their standing with their creditors and with the commercial world, they delayed such sale for six weeks; and that by reason of such delay they were subjected to an expense of one thousand dollars because of the rent of store which they desired to close, the hire of clerks for the same, and the bills for gaslight and other incidentals connected with the carrying on of said store, and this expense was a loss to petitioners, in that it was made necessary solely because of such delay.'

And for further amendment the plaintiffs strike from the second line of the first amendment, under date of May 28, 1896, these words, "in addition to the general," and substitute these words as a part thereof, so that the first sentence will read: "And now come the plaintiffs in the above-stated case, and amend the declaration therein, and say that as a part of the damages suffered by them because of said libel, as already set forth," etc.

Demurrers interposed by the plaintiffs in error to the amendments were overruled by the court, and on the issues joined the cause was submitted to the jury, who returned a verdict in favor of the defendants in error, and judgment was duly entered thereon. To reverse the judgment this writ of error is prosecuted.

Walter R. Brown, John L. Hopkins, and T. M. Miller, for plaintiffs.  
in error.

Marshall J. Clarke, for defendants in error.

Before PARDEE and McCORMICK, Circuit Judges, and MAXEY, District Judge.

MAXEY, District Judge, after stating the case, delivered the opinion of the court.

The ninth specification of error challenges the correctness of the action of the circuit court in overruling the demurrers of the plain-

tiffs in error to the original declaration and to the three amendments thereof. The demurrer to the original declaration contains several grounds of objection; inter alia, the two following:

(1) "The language of the alleged libel as stated is not libelous per se, and there is no averment in the petition of special damage to the petitioners by reason of the alleged publication of it." (2) "The innuendo is null and void, inasmuch as it undertakes to enlarge and wholly change the meaning of the words of the alleged libel as set out in the petition."

The question presented for consideration is whether the words used in the publication are libelous per se. If they are, the uniform current of authority authorizes the recovery of general damages, and no special damage need be averred. If, however, the words published are not actionable per se, it was incumbent on the defendants in error to make the necessary averments of special damage to warrant a recovery. *Stone v. Cooper*, 2 Denio, 293; *Woodruff v. Bradstreet Co.*, 116 N. Y. 217, 22 N. E. 357; *Newbold v. The J. M. Bradstreet & Son*, 57 Md. 38; *Hirshfield v. Bank*, 83 Tex. 452, 18 S. W. 743; *Goldberger v. Grocer Pub. Co.*, 42 Fed. 42; *Walker v. Tribune Co.*, 29 Fed. 827; *Townsh. Sland. & L.* § 289; *Odgers, Sland. & L.* 290, 291; 13 Am. & Eng. Enc. Law, 434, 435. It is alleged in the declaration that the plaintiffs in error published in the *Mercantile Agency Weekly Change Sheet*, and circulated among their subscribers, the following false statement as to the defendants in error: "Atlanta: Maier & Berkele: M. Berkele gives R. E. deeds, \$4,100. Jewelry;" "meaning thereby," the declaration further alleges "that said firm was in the jewelry business, and that the Berkele thereof had conveyed to others real estate belonging to him of the value of \$4,100, and thus diminished to such an extent the property accessible to creditors of said firm for the payment of debts due them." The publication of the words set out in the declaration is admitted by the demurrer, and it is conceded by counsel for the plaintiffs in error that, by the use of the words appearing in the *Weekly Change Sheet*, the plaintiffs in error intended, as the innuendo charges, to convey the meaning that M. Berkele was a member of the mercantile firm of the defendants in error, and that he had conveyed real estate of the value of \$4,100. But the effect attributed to the words in the concluding part of the innuendo is denied by the plaintiffs in error, who insist that the words are innocent in themselves, and do not imply that Berkele, by the sale of real estate, had diminished to any extent the property accessible to his creditors. And they further contend that the court cannot presume that the words, as ordinarily and properly understood, would injure Berkele or the defendants in error in their business, or reflect upon their character as merchants. "It is the office of an innuendo to define the defamatory meaning which the plaintiff sets on the words, to show how they came to have that defamatory meaning, and also to show how they relate to the plaintiff, whenever that is not clear on the face of them. But an innuendo may not introduce new matter, or enlarge the natural meaning of words. It must not put upon the defendant's words a construction which they will not bear. If the words are incapable of the meaning ascribed to them by the innuendo, and are prima facie not actionable, the declaration will be held bad

on demurrer, or if there be no demurrer, the judge at the trial will stop the case." *Odgers, Sland. & L.* 100, 101; *13 Am. & Eng. Enc. Law*, 463, 464; *Townsh. Sland. & L.* § 335. See, also, *Railway Co. v. McCurdy*, 114 Pa. St. 554, 8 Atl. 230; *Stitzell v. Reynolds*, 59 Pa. St. 488. The question is, do the published words, giving them their natural and ordinary meaning, bear the construction ascribed to them by the innuendo? To publish of a merchant anything which imputes insolvency, a fraudulent disposition of his property, or a want of integrity in his business, is libelous per se, because the publication, in legal contemplation, tends to injure his business credit and standing. *Newbold v. The J. M. Bradstreet & Son*, supra. But, as properly said by Chancellor Walworth in *Stone v. Cooper*, supra:

"It is not every false charge against an individual, even when the same is deliberately reduced to writing and published to the world, which is sufficient to sustain a private action to recover a compensation in damages as for a libel. \* \* \* To sustain a private action for the recovery of a compensation in damages for a false and unauthorized publication, the plaintiff in such action must either aver and prove that he has sustained some special damage from the publication of the matter charged against him, or the nature of the charge itself must be such that the court can legally presume he has been degraded in the estimation of his acquaintances or of the public, or has suffered some other loss, either in his property, character, or business, or in his domestic or social relations, in consequence of the publication of such charge."

In the present case the words published are harmless in themselves, and have a plain and unambiguous meaning. They certainly do not directly impute to Berkele any fraud, dishonesty, or misconduct in the management of his business, or in any matter connected therewith; and it would require a strained and unnatural construction of the words for the court to presume that their tendency was to injure Berkele, much less the firm of the defendants in error, in his business as a merchant. The legal presumption is in favor of honesty and uprightness in business transactions, and the adoption of the construction placed by the defendants in error upon the words in question would require a reversal of that salutary rule, and stamp as dishonest and fraudulent a sale of real estate, simply because it was made by a person engaged in mercantile pursuits. We refrain from going to that extent, as we appreciate too highly the value of commercial character, and the necessity of preserving it untarnished. Upon this branch of the case our conclusion is that the matter set out in the declaration as defamatory is not libelous per se, and that special damage should have been averred, to authorize a recovery. This conclusion is clearly supported by the cases of *Newbold v. The J. M. Bradstreet & Son*, 57 Md. 38, and *Woodruff v. Bradstreet Co.*, 116 N. Y. 217, 22 N. E. 354, to which we refer.

In reference to the action of the circuit court in overruling the demurrers to the three amendments of the declaration, little need be said. While the demurrers were formally overruled, the court stated, during the progress of the trial, that the question of special damages would be withdrawn from the jury, and the charge of the court instructed them to award general damages only. Although the action of the court in overruling the demurrers to the amendments was erroneous, because the damages therein claimed were too remote to



be considered, and it was so conceded by counsel for defendants in error on the argument, it was harmless error, resulting in no injury to the plaintiffs in error. As a matter of correct practice, however, the demurrers should have been sustained.

In view of the disposition which we have made of the demurrers to the original declaration, we deem it unnecessary to discuss other questions argued by counsel. For the error of the circuit court in overruling the demurrers of the plaintiffs in error to the declaration and amendments thereof, the judgment is reversed and the cause remanded. Reversed and remanded.

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CENTRAL R. R. OF NEW JERSEY v. KEEGAN.

(Circuit Court of Appeals, Second Circuit. July 21, 1897.)

MASTER AND SERVANT—ACTION FOR PERSONAL INJURIES—INCOMPETENCY OF FELLOW SERVANT.

In an action by an employé for personal injuries, the incompetency of the foreman in charge of the work and crew affords no ground of recovery, if it appears that the injuries were caused by the carelessness of another member of the crew in executing the foreman's orders to uncouple cars, but in a manner not directed by the foreman.

In Error to the Circuit Court of the United States for the Eastern District of New York.

This case comes here upon writ of error to review a judgment of the circuit court, Eastern district of New York, entered upon the verdict of a jury in favor of defendant in error, who was plaintiff below. The action was brought to recover damages for personal injuries sustained by plaintiff while in defendant's employ.

George H. Holmes, for plaintiff in error.

A. G. Vanderpoel, for defendant in error.

Before LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. At the time of the accident, plaintiff, with four other men, was engaged in drilling cars in the Jersey City yard of defendant. These men were O'Brien, conductor, or foreman driller; Keegan, the plaintiff, coupler; Lalley, signal man; Gooley, pin puller; and Ward, the engineer. All these men were fellow servants. *Railroad Co. v. Keegan*, 160 U. S. 259, 16 Sup. Ct. 269. The course of business was as follows: Dent, the yard master, gave to O'Brien drill slips; that is, slips of paper containing the numbers of the cars, and the particular tracks leading to the floats on which these cars were to be placed. The carrying out of these directions required frequent switching of cars from one set of tracks to another, in order to sort out from arriving trains the particular car or cars to be placed on a particular float track. It also required the making up of trains of cars, sometimes longer sometimes shorter; their movement, by the engine attached to them, forward or backward, and at varying rates of speed; the braking, coupling, and uncoupling of the cars composing them. The general management of the opera-

tion was with O'Brien, and he had control over the persons employed therein. The plaintiff had worked in this yard before, and had some previous experience in working on other railroads and yards, although this was the first time he had worked with this particular crew. He went to work at about half past 7 in the evening. About 2 a. m., having relighted his lantern at the engine, which was then standing still, attached to several cars, plaintiff walked to the rear end of the train. O'Brien and Gooley were standing there, looking over the drill slip. There were some other cars standing on the same track below the switch, and about 40 feet beyond the end of the cars to which the engine was attached. Plaintiff's own story is that, when he came up to O'Brien and Gooley, they were reading this list of their work; that O'Brien said to him, "You make that coupling, and back them all down clear." The coupling indicated was between the rear end of the last car of the train and the forward end of the first car of those above referred to as being below the switch. Gooley, who was present and heard this order, confirms plaintiff's statement, and adds that O'Brien told him (Gooley) at the same time what cars to cut off. Keegan took the coupling link of the rear car in his right hand, and, having signaled for the train to back slowly, walked towards the detached cars, with the rear end of the last car at his back. Before he reached them he caught his right foot in the guard rail of a switch, and at once called out to hold up the train. His call was heard, and the engine stopped immediately. Gooley, however, had already drawn the pin, and thus uncoupled the cars indicated to be cut off, so that when the engine pulled up it did not stop the backward movement. Neither Gooley nor O'Brien was on the cars thus moving backward, so there was no one to check their motion by applying the brakes; and as a consequence the rear wheel passed over Keegan's leg, producing the injuries complained of. It appears from the evidence that it is not customary to back cars, when they are to be coupled to others still further behind, unless the moving cars are coupled to the engine, and that, when cars are "kicked back" (i. e. uncoupled and then pushed back), some one is stationed on the rear car to operate the brake. The plaintiff's evidence is most positive that, during the six hours the crew were engaged in this same work, invariably, "when a coupling was to be made, the engine kept right fast to the cars till the coupling was made," and the cars to be cut off were uncoupled afterwards. There is sufficient in the evidence to sustain a finding that Keegan's injuries resulted as plaintiff contends, because on this occasion the cars to be cut off were uncoupled from the moving train before it had backed up and been coupled to the cars below the switch, and a further finding that such uncoupling was negligent should not be disturbed. The theory upon which it is contended that the defendant is liable is that O'Brien was an incompetent man, of whose incompetency the defendant had notice, wherefore defendant should be held negligent, and should respond in damages for the results of O'Brien's incompetency, even to a fellow servant. The greater part of the testimony, and nearly the whole argument, are addressed to this proposition that O'Brien was incompetent. It overshadows the whole case. Before defendant can be held liable,

however, for damages resulting from an accident, on the theory that one of defendant's employes was notoriously incompetent, it must appear that his incompetency caused the injury; and this must be shown either by direct proof, or by evidence fairly warranting such inference. A jury should not be allowed to guess at it, without proof. The cause of the injury in this case was the uncoupling of the cars while in motion, and it seems to have been assumed by the trial judge that O'Brien directed this to be done. Thus, in the charge, we find:

"Now, was the cutting off of those cars, or, rather, the directing them to be cut off, by O'Brien, an improper act, a negligent act, such an act as a competent and suitable conductor would not have done? \* \* \* If so, the plaintiff is entitled to recover," etc.

When we turn to the record, however, which contains all the testimony, we find nothing to sustain a finding that O'Brien gave any such order. Only three men were present when the order was given,—the plaintiff, Gooley, and O'Brien himself. O'Brien died before the trial, and the plaintiff says he did not hear the instructions to Gooley; that he left immediately after receiving his own order. Gooley, therefore, who is called for the plaintiff, is the sole witness to what was said, and this is his whole testimony on the subject:

"I remember well enough when he gave me the orders that we were almost together,—the three of us. O'Brien had his drill slip in his hand." "As near as I can remember, we were coming up after we coupled up to those cars. We pulled up, and Mr. O'Brien told me what cars to cut off, and how to cut them; and I went up above the switch, and I cut those cars off. I don't remember how many it was. I think it was two or three, but probably there might have been more. \* \* \* Q. By whose orders did you pull the pins? A. Mr. O'Brien told me while we were pulling up how many cars to cut off, and, as soon as we got over the switch, then I cut the cars off, or while we were backing down, rather. Q. While the cars were being backed down you pulled the pin and cut the cars? A. Yes, sir. Q. So that the cars were moving when you cut them, weren't they? A. Yes, sir; they were moving. Q. And that was at O'Brien's order,—the conductor? A. O'Brien didn't tell me at that time to cut the cars off, but he told me while we were pulling up out of the track how many cars to cut off. Probably we had hold of ten cars, and probably we cut two off, and one, and three, and then he told me what cuts to make; and as soon as we got above the switch I cut them off, while we were backing down." While they were at work that evening, before the accident, "O'Brien's orders were issued in the same way as on this occasion; simply telling you what to do,—what to cut off and what to couple."

Gooley was the "pin puller" of this gang. He had switched cars for a good many years. There is no suggestion that he was not a competent man, quite capable of executing such orders as might be given to him in a proper manner, without specific supervision. For six hours this same night he had been receiving orders to cut off cars issued in this same way, and there is nothing to show that in obeying any of those earlier orders he cut off cars while the train was backing down to couple. Having coupled up some cars, and while they are being hauled forward [up], O'Brien consults his drill list, and tells Gooley what cars to cut off next, but gives no instructions to cut them off otherwise than in the usual way at the usual time. Under these circumstances, we are not satisfied that O'Brien is to be held responsible because Gooley drew the pin while the cars are moving

backward, instead of waiting till they stopped. Since it was through no fault of O'Brien that the pin was drawn too soon, and since it was such a premature drawing of the pin which caused the accident, the question whether or not he was generally competent to discharge his duties is immaterial. Assuming that plaintiff was not himself negligent, the accident seems to have been caused by the carelessness of Gooley, a fellow servant, for whose negligence defendant would not be liable.

At the close of the whole case, defendant moved for the direction of a verdict on the ground that—

"There is not sufficient proof in law to sustain a verdict for the plaintiff; that the accident resulted from a danger incident to the nature of the employment in which the plaintiff was engaged; that the plaintiff assumed all the risk of the dangers he alleges caused the accident; that, if there was any negligence, it was the negligence of a fellow servant or servants, for which defendant is not liable; that there is no negligence proven against the defendant; that, if there is any evidence in the case that O'Brien was incompetent, the evidence in the case which is claimed to show that he was incompetent is not sufficient to prove that the accident was caused by reason of any of the defects which it is claimed existed in O'Brien; that it was not the approximate cause of the accident."

The exception to the court's refusal to make such direction sufficiently presents the point above discussed. The judgment appealed from is reversed.

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#### ATLANTIC TRANSPORT CO. v. CONEYS.

(Circuit Court of Appeals, Second Circuit. July 26, 1897.)

##### MASTER AND SERVANT—INDEPENDENT CONTRACTOR.

A firm of jobbing carpenters employed by a steamship company to make necessary repairs and alterations in their vessels when in port, and who charged for work by the hour, and lumber by the foot, sent men in charge of a foreman to do the work. Superintendents and captains of the vessels had the right to direct the manner and extent of repairs and alterations to be made. *Held*, that the men, while so engaged, were the servants of the steamship company, and not of an independent contractor.

Wallace, J., dissenting.

##### In Error to the Circuit Court of the United States for the Southern District of New York.

This writ of error was brought to reverse a judgment for \$2,034.85 rendered upon a verdict of the jury in favor of Michael Coneys, the plaintiff below, in an action to recover damages for personal injuries caused by the negligence of persons alleged to be the servants of the defendant, a steamship company having a line of steamers running to and from New York, and engaged in the transportation from New York to London of cattle, horses, grain, and general merchandise. The plaintiff was an employé of an elevator company, and at the time of the accident was at work upon a canal boat alongside of the defendant's steamer Mississippi, and between it and a grain elevator from which the steamer was loading. He was injured by the fall upon him of a wooden shutter which was used for closing a gangway at the side of the top deck of the steamer, and was a part of the fittings of the vessel for the carriage of cattle, and which was being handled by carpenters in the employment of H. P. Kirkham & Son, a firm of carpenters, who were repairing the cattle stalls. The accident happened through the negligence of the carpenters. The defendant relied upon the position that the workmen were in the employment of independent contractors, and were not its servants, and, in various forms, requested the trial court to thus instruct the jury. The court charged the jury that the evidence showed they were not the servants

of an independent contractor, but that they were doing the ship's work at the request of, and under the direction of, the ship's officers. To this charge the defendant excepted, and the assignments of error relate to this exception, and to the various refusals of the trial judge to direct otherwise. The facts in regard to the course of business of the defendant with the firm of H. P. Kirkham & Son are given in the opinion.

William P. Burr and H. K. Coddington, for plaintiff in error.  
J. Parker Kirlin, for defendant in error.

Before PECKHAM, Circuit Justice, and WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge (after stating the facts as above). The fact of a distinction between the liability of an employer for an injury caused by the negligence of his employé or his servant, and the liability of an owner for an injury caused by the negligence of an independent contractor who undertakes to execute specified work upon the owner's property, was formerly not well recognized (*Bush v. Steinman*, 1 Bos. & P. 404), but is now distinctly understood (*Hilliard v. Richardson*, 3 Gray, 349). If any confusion now exists, it is in regard to the controlling tests that determine the character of the particular contract which is under examination. The two kinds of employment are frequently close to each other, and, while it is often not difficult to appreciate and understand the difference between the two classes of contracts, it is sometimes difficult to express the distinctions with exactness of language. The cases of *Casement v. Brown*, 148 U. S. 615, 13 Sup. Ct. 672, and *Railroad Co. v. Hanning*, 15 Wall. 649, illustrate that, while two contracts may apparently be similar in phraseology, yet their nature and subject-matter may place the respective contracting parties in different relations to each other. The tendency of modern decisions is not to regard as essential or controlling the mere incidentals of the contract, such as the mode and manner of payment (*Corbin v. American Mills*, 27 Conn. 274), or whether the owner can discharge the subordinate workmen, and not to regard as essential, or an absolute test, so much what the owner actually did when the work was being done, as what he had a right to do. Many circumstances may combine, as in *Butler v. Townsend*, 126 N. Y. 105, 26 N. E. 1017, which show that the relation of an independent contractor exists, but the significant test, which courts regard as of an absolute character, has been variously expressed by them as follows:

"The test, I think, always is, had the superior control or power over the acting or mode of acting of the subordinates? \* \* \* Was there a control or direction of the person, in opposition to a mere right to object to the quality or the description of the work done? \* \* \* On the other hand, if an employer has no such personal control, but has merely the right to reject work that is ill done, or to stop work that is not being rightly done, but has no power over the person or time of the workman or artisan employed, then he will not be their superior, in the sense of the maxim, and not answerable for their fault or negligence." Lord Gifford in *Stephen v. Commissioners*, 3 Sess. Cas. (4th Series Scot.) 535, 542.

In *Linnehan v. Rollins*, 137 Mass. 123, 125, the instruction of the trial judge, which was adopted by the appellate court, was:

"The absolute test is not the exercise of the power of control, but the right to exercise power of control."

In *Hexamer v. Webb*, 101 N. Y. 377, 4 N. E. 755, the court said:

"The test to determine whether one who renders service to another does so as a contractor or not is to ascertain whether he renders the service in the course of an independent occupation, representing the will of his employer only as the result of his work, and not as to the means by which it is accomplished."

In *Casement v. Brown*, *supra*, the court, by Mr. Justice Brewer, said:

"The will of the companies [the owners] was represented only in the result of the work, and not in the means by which it was accomplished. This gave to the defendants the status of independent contractors, and that status was not affected by the fact that, instead of waiting until the close of the work for acceptance by the engineers of the companies, the contract provided for their daily supervision and approval of both material and work."

—Whereas, in *Railroad Co. v. Hanning*, *supra*, the court found that the essence of the contract to rebuild an old wharf, and "make it as good as new," was a reservation of the power, "not only to direct what shall be done, but how it shall be done."

In the case now under consideration the contract was not in writing, but was manifested by the course of business between the parties, and the witnesses are not at variance as to its terms. There was no question before the jury as to the evidence, but the plaintiff in error insists that it was entitled to a ruling that the legal conclusions from the evidence must be that the firm of carpenters stood in the position of independent contractors, or at least that the question of the character of the contract was one for the jury. The members of the court concur in the opinion that the facts did not entitle the plaintiff to the absolute ruling which was asked for, and the majority are of opinion that the only just inferences from the testimony are that the relation between the shipowners and the carpenter was that of master and servant. The dissenting judge thinks that the inferences might be twofold, and that the question should have been submitted to the jury.

The steamship company had for four years before the accident been operating a line of steamers carrying horses, cattle, and general cargo from New York. Whenever a steamer arrived in port, its fittings for cattle and other equipments for the carriage of freight required repairs, which were uniformly made by Kirkham & Son, who charged for work by the hour, and for material by the foot. The dock superintendent of the steamship company, in reply to the question, "Describe to us how the work is done; who gives the directions?" said:

"There are hardly any directions to be given. Mr. Kirkham has a foreman there, and he goes to work,—being used to this work, he knows just what is to be done; and he goes ahead and does this work regularly each week, excepting possibly when we have horses. When we have horses, then I counsel him how many horses."

In reply to the question, "What kind of work do they do on the ship, and how long are they there generally each trip?" he said:

"Some of them are there most all the time while the ship is in port. There is so many things to be done—fitting up the boat for grain, and tinkering around, one thing and another; fixing up the cattle fittings; fixing up for the horses—that it takes a larger or smaller gang, according to the amount of work, most of the time the ship is in port."

The carpenters' foreman testified that he goes over every vessel of the steamship company as it arrives, and reports the result of his inspection to the superintendent, who tells him to go ahead with the work; that when the Mississippi came in, the superintendent being absent, the assistant gave orders to go ahead and see to the repairing the same as usual; that in practice the witness got instructions from the captains once in a while, "in the nature of alterations, or any thing that way"; and that it was a part of his general duty to do any repairing that he sees is needed, and asked for by the captain or by the dock superintendent. Kirkham & Son are the jobbing carpenters customarily employed by this steamship line. Their experience has been such that their ascertainment of the necessary amount of repairs is relied upon. They are told to do the work, and, as a rule, need no other directions. But both the captains and the superintendent have the right to direct the extent and the manner of the alterations and repairs. It is a right not often exercised, for the carpenters apparently had the confidence of the superintendent, but the right existed. But it may be said that, while it is true that the officers of the defendant had some general power to direct how alterations and repairs should be made, they had no particular power "to direct and control the manner of performing the very work in which the carelessness occurred," and that the existence or nonexistence of such kind of power is the real question in the case, which is true. *Charlock v. Freel*, 125 N. Y. 357, 26 N. E. 262; *Vogel v. Mayor*, 92 N. Y. 18. The subject-matter to which the course of business related—that of a series of minor jobbing repairs—tells with a good deal of clearness what the rights of the respective parties were. The contract of the superintendent was not analogous to that of a household-er's occasional contract with a tinman to tin a roof, or with a painter to paint a house. It was analogous to that of the owner of a house who customarily calls in the jobbing carpenter whom he is in the habit of employing, and starts him in the work of "tinkering around, one thing after another," and doing the various jobs of repairs which time has shown to be necessary. The manner in which the work shall be done, and the dangers to be avoided, as well as the extent to which the work shall be carried on, are under the control and guidance of the owner. In this case separate bills were made out for the separate kinds of work upon each vessel, and for the materials furnished for each job; and, while the mode of payment is not essential, it was not in harmony with the usual incidents of the contract of an independent contractor. Inasmuch as, in our opinion, the only inference that can fairly be drawn from the testimony is that the steamship company and the carpenters were in the usual relation of master and servant, the judgment of the circuit court is affirmed.

WALLACE, Circuit Judge (dissenting). I think that the evidence upon the trial presented a question of fact for the determination of the jury,—whether Kirkham & Son were contractors, exercising an independent calling, and delegated with the responsibility of deciding how the carpenter work which they were to do for the defendant should be done, subject to the right of the defendant to object to the

quality of the work, or whether the relation between their subordinates and the defendant was that of master and servant. Unless the defendant, pursuant to the understanding or course of business between it and Kirkham & Son, had the right to direct and control the manner of performing the very work in which the carelessness occurred by which the plaintiff was injured, the employés of Kirkham & Son were not its servants. In my opinion, the trial judge erred in taking this question from the jury, and deciding as matter of law that these employés were the servants of the defendant. I therefore dissent from the opinion of the court.

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WARNER v. PENOYER et al.

(Circuit Court, N. D. New York. August 17, 1897.)

No. 6,392.

**NATIONAL BANKS—LIABILITY OF DIRECTORS FOR NEGLIGENCE.**

Where the affairs of a national bank were managed entirely by its cashier, who was reputed and universally believed to be honest and capable, but whose dishonesty and reckless management resulted in wrecking the bank, the president and directors, who knew little of the business of banking, and most of whom were farmers, were not guilty of negligence rendering them liable for the losses to creditors because they failed to examine the books; the statements prepared and furnished them by the cashier, and which purported to be made from the books, showing the bank to be in a prosperous condition, and there being no grounds of suspicion known to them. *Briggs v. Spaulding*, 11 Sup. Ct. 924, 141 U. S. 132, followed.

This was a suit in equity by John W. Warner, as receiver of the First National Bank of Watkins, N. Y., against William J. Penoyer and others, directors of said bank, for losses of the bank alleged to have been caused by defendants' negligence as such directors.

Martin S. Lynch and Edward Winslow Paige, for complainant.

Frank C. Avery, Charles M. Woodward, and Frederic Collin, for defendants.

COXE, District Judge. The complainant, as receiver of the First National Bank of Watkins, N. Y., seeks to recover of the defendants, who were directors of the bank, for losses alleged to be due to their negligence. Watkins is a village of about 3,000 inhabitants in Schuyler county, N. Y., situated in the midst of an agricultural community. The First National Bank of Watkins, succeeding the Schuyler County Bank, was organized in 1883 with a capital of \$50,000. It closed its doors, hopelessly insolvent, on the 8th of February, 1894. William N. Love was president of the bank from 1885 until August, 1892, when he died. The defendant Adrian Tuttle, who was a director from the organization of the bank, became its president upon the death of William N. Love. John W. Love, a son of William N. Love, entered the bank as an errand boy, and rose to the position of cashier before his father's presidency. He was continued in that position until the failure of the bank, being its chief executive officer and having the entire charge of its affairs for at least 18 months prior to



the failure. At the time of his father's death he was about 32 years of age, reputed to be worth two or three thousand dollars. The directors never required a bond from him and he gave none. The reports to the comptroller show that the deposits and discounts of the bank averaged not to exceed about \$200,000. When the bank suspended, February 8, 1894, it had lost mainly through the negligence, incompetency and rascality of the cashier, John W. Love, nearly \$150,000. Of this sum about \$100,000 was lost during the 18 months subsequent to his father's death and while Tuttle was president. John W. Love is now serving a term in the state's prison for his crimes in wrecking this bank. It is not necessary to enter into the details of his fall. It is the old familiar story. The first false step, the rapidly downward course, the hopeless struggle to avert disclosure by perjury, forgery and theft; discovery, disgrace and then—the penitentiary. The defendants do not deny his incompetency or attempt to palliate his crimes. All agree that the bank was ruined by him. The largest item of loss was through the Western Improvement Company, a speculative concern of which the cashier was vice president, and for which he discounted notes and permitted overdrafts to the amount of \$72,000. This account began in October, 1891, gradually growing larger until the failure of the company involved the bank in ruin. It may be conceded that this was reckless, if not dishonest, banking, and that Love's action in permitting it rendered him liable for the loss and renders the defendants equally liable if they connived at or permitted it. The directors were all men of good character and had the confidence of the community. With two exceptions they were farmers. All were unacquainted with the details of banking and had little knowledge of bookkeeping. During the entire period of his cashiership John W. Love had the confidence of the citizens of Watkins. To all outward appearances his character was above reproach; his life blameless. We have then, upon undisputed facts, the following situation: A village bank managed exclusively by its cashier, who is believed to be honest, but whose dishonesty and incompetency result in wrecking the bank. A set of books, for the most part correctly kept, which, if examined, would have disclosed the reckless financiering of the cashier. This examination, depending upon the time it was made, would, probably, have saved the bank from failure or greatly reduced its losses. A board of directors composed of men knowing little of banking, but honest and respected, who intrust the administration of the bank to the cashier relying upon his representations and never examining the books except as statements, purporting to be taken from them, are submitted to the board from time to time. The question of liability can be narrowed to the single inquiry, should the directors have examined the discount register and general ledger? Are they liable for not doing this? The law which rules this controversy must be taken from *Briggs v. Spaulding*, 141 U. S. 132, 11 Sup. Ct. 924. This is true, even though the court may be convinced that the rule contended for by the dissenting justices is conducive to greater stability, conservatism and honesty in all branches of commerce and finance. A somewhat extended experience in the trial of indictments under section 5209 of

the Revised Statutes has led to the conclusion that in fully half these cases an examination of the books of the bank by the directors, or an examiner, would prevent failure, or, at least, would save large sums for the creditors. Furthermore, the knowledge that such an examination is liable to be made at any time would have a most salutary effect in restraining dishonest officers from entering upon a career of crime. The rule laid down by the supreme court does not, however, require such an examination unless the directors become acquainted with some fact calculated to arouse suspicion. The liability of the directors, says the court, in the Briggs-Spaulding Case, "depends upon whether they should have made an examination of the books and assets of the bank," etc. The court holds that they were not required to do this, quoting, with approval, the language of Sir George Jessel in *Hallmark's Case*, 9 Ch. Div. 332, as follows:

"I know no case, except *Ex parte Brown*, 19 Beav. 97, which shows that it is the duty of a director to look at the entries in any of the books; and it would be extending the doctrine of constructive notice far beyond that of any other case to impute to this director the knowledge which it is sought to impute to him in this case."

I cannot resist the conclusion that the conduct which the supreme court excused approached much nearer the verge of culpable negligence than that of the defendants in the case at bar. The status of the three directors, whose negligence was in question, is thus characterized in the minority opinion:

"In fact, these gentlemen, while they were directors, had no knowledge whatever of what was being done by Lee in the conduct of the bank. They took his word that all was right, and gave no attention whatever to the management of its business. \* \* \* They signed and certified to their correctness [reports to the comptroller] entirely upon their faith in Lee. They acted as if confidence in him discharged them from all responsibility touching the management of the bank. \* \* \* In the case of Mr. Spaulding, there are absolutely no circumstances of a mitigating character. \* \* \* He performed no duty while director, except 'to examine reports'; but he made no examination to ascertain their correctness. \* \* \* When asked in reference to the enormous overdrafts, made while he was director, and whether he did anything to prevent them, he replied, 'I didn't go to the bank to ascertain. I left the officers in charge as I found them.' \* \* \* 'I never examined its books or affairs, and I only examined the reports which it made to the comptroller, whose duty it was to see that these reports were correct.' \* \* \* It is plain from the evidence that if, with his long experience in banking business, he had given one hour, or at the utmost a few hours' time in any week while he was director, to ascertain how this bank was being managed, he would have discovered enough that was wrong and reckless to have saved the association \* \* \* many if not all the losses thereafter occurring. Upon his theory of duty, the only need for directors of a national bank is to meet, take the required oath to administer its business diligently and honestly, turn over all its affairs to the control of some one or more of its officers, and never go near the bank again unless they are notified to come there, or until they are informed that there is something wrong. \* \* \* The case is one of supine, continuous negligence, upon the part of the three directors named, in the discharge of duties they owed to the bank and to those interested in it."

And yet these men were exculpated.

The question arises, how can this court, in justice, hold these defendants when the only act of negligence is failure to do that, which, on the highest authority in the land, they were not required to do? I have read with interest the able opinion in the case of *Gibbons v.*

Anderson, 80 Fed. 345. With the views there expressed I am in hearty accord and should be inclined to enter a similar decree if there were here the necessary suspicious circumstances to put the directors upon inquiry. In the Gibbons Case it appeared that the usual dividend was passed in January, 1892, and again in July, 1892, and the court says:

"It would seem to me that at the last-mentioned date the fact that a year had now gone by without any declaration of dividend, and no sufficient explanation thereof being shown, the attention of the board of directors, to the bank's condition, was challenged, and that, in the interest of those concerned, an examination into the causes should have been instituted."

There was also in that case a letter from the comptroller making disclosures and giving warning which was brought directly to the attention of the board; and even this failed to arouse them from their lethargy. In *Robinson v. Hall*, 25 U. S. App. 48, 12 C. C. A. 674, and 63 Fed. 222, the frauds and irregularities which resulted in the ruin of the bank were of such a character that they must have been known to the directors. In the case at bar, on the contrary, dividends were regularly paid and every one in the community believed the bank to be in a most flourishing condition until the news of Love's flight was made known. Some of Love's frauds were carried on so clandestinely, by false entries and juggling with the books, that it is not pretended that they could have been discovered except by an expert. Others, like his larceny of the cash, it would have been impossible to prevent. The chief accusation against the directors is that they permitted the account of the Western Improvement Company to grow to such large proportions; but they all testify that they were absolutely ignorant of the existence of such an account, and there was no way they could have discovered it short of an actual inspection of the books, for statements purporting to be drawn from the books were from time to time submitted to them. There was nothing to direct suspicion in that direction. At the time they trusted Love no young man in the community stood higher. They had absolutely no reason for thinking that statements presented by him were false and that notes submitted by him were forged or fictitious. These men were none of them bankers or bookkeepers, and the examination by them of statements which, they were informed by a trusted employé, were taken from the books, was surely the next thing to an examination of the books themselves.

The argument for the complainant proceeds upon the theory that the defendant Tuttle, being the president of the bank, was guilty of greater negligence than the other defendants. In other words, if any defendant is liable it is Tuttle. A brief résumé of the testimony as to him will, therefore, suffice for all. Adrian Tuttle is a farmer, 60 years of age, residing in the town of Reading, 2½ miles from the bank building. He had been a director since its organization and was elected president of the bank in the autumn of 1892. He and his family owned \$6,000 of the shares of the bank, purchasing \$4,000 of this amount in 1892 and 1893 while he was president. John W. Love was employed during Tuttle's connection with the bank, and for some time prior to his presidency Love had been cashier. Nothing

had ever occurred to mar Tuttle's confidence in Love until the morning the bank closed. During his presidency he attended every meeting of the directors. His visits to the bank were frequent, sometimes every day, sometimes every other day, and during haying or harvesting he would come down in the evening and talk with the cashier. When in the bank he frequently did the work of the cashier and the clerks while they were absent making collections or for other purposes. He had numerous conversations with the cashier regarding the condition of the bank and was always informed that it was solvent and prosperous. Weekly statements drawn up by the clerk or cashier were examined by him every Tuesday morning. The last statement of this kind was submitted to him two days before the bank failed. It showed that the bank was solvent and prosperous. That Tuttle had the utmost confidence in the bank up to the last moment of its existence as a going concern, is demonstrated by the fact that he had a deposit there of \$420 when the collapse came and made a deposit of \$100 on Wednesday—the bank failing on Friday. Shortly before the bank failed he signed a tax collector's bond for the purpose of securing the deposit for the bank and subsequently paid the amount of the loss. At the directors' meetings in response to a request to produce all the notes of the bank the cashier would bring in a bundle of notes and the directors would proceed to examine them. Tuttle swears that he did not know of the overdraft of the Western Improvement Company, or of the discount of its paper. After the cashier absconded Tuttle did what he could to secure his arrest and paid one-third of the reward offered for his apprehension. He has also paid the assessment on his stock. These are the salient features of Tuttle's connection with the bank. It will hardly be controverted that, when compared with Spaulding's directorship in the Buffalo bank, it is a record of activity and prudence. The testimony as to the other directors is substantially the same. Unquestionably they trusted too implicitly to Love, but it would be manifestly unfair to judge them in the light of what now is known of Love's character. At the time they trusted him every one trusted him. Nothing had occurred to shake their confidence in him, or put them upon inquiry. It is true that at the meeting held on the 11th of July, 1893, a list of notes was submitted showing eight \$5,000 discounts, but it did not show who were the makers and indorsers. There was nothing to show that these discounts were all for the same party. With the burden upon the complainant it can hardly be said that this proof sufficiently establishes negligence in the teeth of the defendants' oaths that they never knew of the Western Improvement Company's discounts. Assuming that they could be held liable had they known of this transaction, the court must find that they did not know of it, and that the facts were so concealed by Love that nothing occurred to turn their attention in that direction.

After giving this cause the most careful consideration it is thought that under the law of Briggs and Spaulding, which, of course, is controlling upon this court, the liability of these defendants has not been established. The bill is dismissed.

## PRIDDIE v. THOMPSON, United States Marshal.

(Circuit Court, D. West Virginia. July 28, 1897.)

## 1. UNITED STATES MARSHAL — REMOVAL OF OFFICE DEPUTY — CIVIL SERVICE LAW.

An office deputy marshal appointed by the joint action of the attorney general and the marshal under the provisions of the act of May 28, 1896 (29 Stat. 182, § 10), is protected in his position by the civil service laws and rules, and is not subject to removal by the marshal.

## 2. INJUNCTION—REMOVAL FROM OFFICE—CIVIL SERVICE LAW.

One who holds a position under the protection of the civil service laws and rules is entitled to the remedy by injunction to prevent his unauthorized removal therefrom.

J. T. McGraw, J. H. Holt, and Z. T. Vinson, for complainant.  
Joseph H. Gaines, for defendant.

JACKSON, District Judge. This cause is now heard upon a motion for an injunction upon a bill filed by the complainant, an office deputy marshal of the United States for the district of West Virginia, against the defendant, the marshal of the United States for the district of West Virginia. The defendant files a demurrer to the bill, and insists—First, upon the right of the marshal to remove the complainant in this cause from the position he holds; second, that there exists no legal remedy to prevent the marshal from removing the complainant from office, and appointing another in his place. Congress passed an act "to regulate and improve the civil service of the United States," which was approved by the president on the 16th day of January, 1883. 22 Stat. 403. I infer that the purpose of congress was to promote efficiency in the public service, and the exercise of such a power was clearly within its legislative scope. Under and by virtue of the provisions of this act the commission was authorized "to make regulations for their guidance" in the execution of the powers conferred upon it, subject to the rules that may "be made by the president." Upon the 28th day of May, 1896, congress passed an act "allowing the marshals of the United States to employ necessary office deputies and clerical assistants, if in the opinion of the attorney general the public interest requires it." 29 Stat. 182, § 10. The bill alleges that the complainant was appointed, under written authority from the attorney general, by C. E. Wells, then marshal of this district, "chief office deputy marshal," with the approval of the attorney general, and that he qualified as such officer on the 1st day of July, 1896. The form of the appointment was prepared and sent to the marshal from the department of justice, as provided for in the act of May 28, 1896, designating and authorizing the complainant to act as chief office deputy of the United States marshal, and to hold said position subject to the conditions prescribed by the tenth section of said act. Prior to the act of 1896, deputy marshals were all on the same footing, and held their positions at the pleasure of the marshal, unless removed by the district court. By the tenth section of the act of 1896 there was a provision made for a new grade of deputy marshals, to be known as "office deputies," "when,

in the opinion of the attorney general, the public service requires it"; salaries to be fixed by the attorney general, and to be paid out of the treasury of the United States. Section 11 of the same act provides for the appointment of deputy marshals "who shall be known as field deputies, and, unless sooner removed by the district court, shall hold office during the pleasure of the marshal, and shall receive as compensation for their services three-fourths of their gross fees, including mileage, as provided by law." By the terms of section 10 of the act, no limitation is imposed upon the tenure of the position of the office deputy, nor is there any provision found in the act that places the position at the pleasure of the marshal. He is paid directly from the treasury; but in the case of the field deputy the tenure of the office is at the pleasure of the marshal, and, as before stated, he is paid out of the gross fees of his office. It is claimed by the complainant in this action that he is protected in his position by the express terms of the civil service law, and the regulations made to execute its provisions; that he has been assigned by the order of the attorney general to the position of chief office deputy at a salary of \$1,800 per annum. It is apparent that there is a striking difference between the two sections referred to, and that congress did not intend that office deputies should be removed except for good cause, "other than for political or religious opinions or affiliations," but intended to keep the office in the hands of trained men, leaving the field deputies alone subject to removal. It would seem that congress intended that office deputies should not be removed from their positions by a marshal who happens to entertain different political opinions, so long as such deputy was an efficient and faithful officer. There is no provision in the act to remove an office deputy once installed in his position, not even for cause.

The second section, par. 1, of the civil service act provides that the civil service commission shall "aid the president as he may request in preparing suitable rules for carrying the act into effect," and makes it the duty of "all officers of the United States in the various departments and offices to which any such rules may relate to aid in carrying such rules into effect." Under the provisions of this act the president promulgated, on the 6th day of May, 1896, certain rules prepared by him in connection with the civil service commission. The additions under the revision of the rules as promulgated May 6, 1896, brought into the classified service "office deputy marshals." 13 Civ. Serv. Rep. pp. 101, 102. The records of the civil service commission show that this complainant was, by the joint action of the commission and the attorney general, recognized as belonging to the classified service, and he is so reported in the register of the department of justice for 1897. The marshal of this district, by letter bearing date June 15, 1896, addressed to the attorney general, recommended to him the complainant as his chief office deputy, which the attorney general approved in a letter bearing date June 29, 1896, the appointment to take effect on the 1st day of July, 1896, and which position he has held, unmolested, up to the time of the filing of this bill. It does not appear that he ever passed the civil service examination, but, being in office at the time he was

placed in the classified service, as provided for by section 7, rule 2, he was exempt from such examination.

I have referred to such portions of the act of congress creating the civil service commission, and the rules promulgated under it, as I think apply to the case under consideration. It is to be presumed that congress intended, when it passed the act, that it should be observed in good faith by all the officers of the government who came within its provisions. It will be observed that the civil service commission, as well as the attorney general, in construing section 10 of the act of 1896, must have reached the conclusion that the office deputies come within the provisions of the act, and by their joint action they have placed them in the classified service. So far as the attorney general took action in regard to the classification of these deputies, he must have concluded that by the terms of section 10 the appointment was vested in him upon the recommendation of the marshal. The marshal could not appoint without his approval, and it was a condition precedent that the marshal should recommend a person for the position before the attorney general could approve it. Certainly congress never intended that the marshal should recommend a person to himself for appointment. To my mind, there can be no question that the real source of power in making this appointment was with the attorney general, upon the recommendation of the marshal. If this conclusion is wrong, why should the marshal be vested with the power of recommendation? If the marshal is the appointing power, there would be no occasion for him to recommend a person for appointment. It is absurd to suppose that the law intended that the appointing power should be invested with the power of recommendation to itself. When we look to the provision which fixes the salary of the office deputies, we find that their salaries are fixed by the attorney general, and paid monthly out of the treasury of the United States, and not out of the fees earned by them as provided for field deputies in section 11. I have concluded, therefore, that the office deputy or clerical assistant is an appointee of the attorney general, upon the recommendation of the marshal, for the reason that no person recommended by the marshal could be appointed unless approved by the attorney general. It would seem that when an appointment is made by the joint action of the attorney general and the marshal, and a party appointed has been placed in the classified service, that he would hold the position during good behavior. Not so with what is known as a "field deputy," who holds his position at the pleasure of the marshal, unless removed by order of the district court. He is appointed by the marshal upon his own responsibility, and paid by fees as he earns them. It is apparent that there are two classes of deputies. One is the office deputy, the other is the field deputy. Section 10 authorizes the attorney general, when the public interest requires it, to allow the marshal to employ the necessary office deputies. This section provides for joint action by both the attorney general and the marshal, while section 11 confers upon the marshal the absolute power to appoint whomsoever he desires as his field deputies, without regard to the rules of the civil service.

The next question presented is, can a person in the classified serv-

ice be removed, without cause, for political or religious reasons alone? It is manifest that the act was passed to promote the efficiency of the civil service of the government, and was intended to prevent the removal of all officers, for political reasons, who were within the classified service. If such was not the object of the act, its purpose is not apparent. The act requires rules to be "formulated and promulgated" for the guidance of the commission, which the president, in connection with the members of the commission, prepare and announce, and, when so prepared and announced, become a part of the law itself. Rule 2 of section 3 forbids the dismissal from the executive civil service of any one for political or religious opinions or affiliations. 13 Civ. Serv. Rep. p. 53. It is obvious that congress has undertaken, by the civil service act, to restrain the exercise of the power to remove by the appointing power. It evidently hoped to improve the service by limiting the power of removal, leaving an incumbent to retain the position held until removed for cause other than political or religious belief. If this was not the intention of congress, then this civil service act is mere "brutum fulmen," and the attempt of congress to improve the civil service futile and abortive. I conclude that when congress passed the act known as the "Civil Service Act" it had in view the improvement and efficiency of the public service, and that this was its sole purpose.

One other question remains to be considered, and that is whether there is a remedy by injunction to restrain the marshal from removing the plaintiff from the position he holds as chief deputy marshal. It cannot be questioned that the plaintiff has an interest of some kind in the office. If it is a vested interest, he must and should be protected from ouster in some way. It has been wisely said that there is hardly to be found in jurisprudence a wrong without a remedy. The plaintiff, under the civil service rules, claims the right to hold and enjoy the office, and that he is not liable to removal except for cause which does not arise out of "his political or religious opinions or affiliations"; that as long as the statute law creating the office remains as it is on the statute book he is entitled to hold the office during good behavior. If his contention is true that he is protected by the civil service act in the enjoyment of the office, it necessarily follows that there should be some remedy by which he could protect his rights in the enjoyment of it. I know of no remedy at law that would furnish the protection he desires, or would adequately compensate him in the case of an eviction; but it is said that there never was a wrong that the law did not furnish a remedy, though sometimes an inadequate one. Clearly, neither mandamus, prohibition, nor quo warranto could be resorted to in this case, and I doubt if certiorari would be effective. Mandamus is never resorted to as a remedy to prevent an ouster from office. Prohibition is a prerogative writ issued from a superior tribunal to an inferior one to prevent usurpation of power by the latter. Nor could quo warranto be resorted to except against the incumbent who is in possession of the office in question, and who is required by the writ to appear and show by what warrant of authority he exercises the functions of the office. The plaintiff here is in possession, and wants



to be let alone to enjoy what he claims is rightfully his until lawfully removed. As we have seen that mandamus, prohibition, and quo warranto do not lie in the case under consideration, the only remedy left for consideration is the one furnished by injunction. The office in question has, in past times, been regarded as an office which belongs to the victorious political party, and was always held to be a portion of party spoils. I do not now so understand it, nor do I so regard it. If there is anything in the act of congress known as the "Civil Service Act," and the amendments to it, the office is one fully protected by it, and the occupant is withdrawn from the spoils of party. In my judgment, the civil service act is a law founded in wisdom, and if it is executed in the same wisdom in which it was conceived and enacted it will not only prove to be one of the wisest statutes that has been enacted in the latter part of this century, but one of the safeguards of our republican institutions. I reach the conclusion that the incumbent in the position is protected in the enjoyment of it by the civil service act and the amendments thereto. But it is insisted by the defense that there is no remedy to prevent his removal from the office. Since the act known as the "Civil Service Act" became the law of the land, it, like all other statutes, must be referred to the courts for construction when any question arises under it. If, therefore, it was the object and purpose of the act to create a new office or position under its protection, there should be, if there is not, some remedy when it is sought to remove an incumbent under it. The fifteenth section of the act approved January 16, 1883, provides for the punishment of any person who shall be guilty of a violation of any of its provisions, but it does not provide a statutory remedy against the removal of an incumbent from office. Congress may have wisely left this matter to the rights of parties as they existed before the passage of the act. In the case under consideration the question to be determined is not the title to the position or office held by the incumbent. The title is not in dispute, as the incumbent legally holds the office or position, as the case may be. It is, therefore, only a question of removal. Being a question of removal, if there is any remedy to stay the hand that causes the removal, it must be by injunction. It is a preventive proceeding, and always furnishes a remedy to prevent a wrong being inflicted when there is no other adequate remedy. What is the wrong now complained of? Stripped of all the surplusage that generally surrounds questions of this character, the incumbent holds his position by regular appointment, and is unquestionably, if not the "de jure" the "de facto" incumbent of it. The right to hold the position may be inquired into by writ of quo warranto. I am not called upon to determine any question that might arise under that writ. I am asked to determine whether or not the incumbent, an office deputy marshal, who has been classified under the civil service act, shall be entitled to the protection of the act which expressly declares "that no person in the executive civil service shall dismiss or cause to be dismissed any person for political or religious affiliation." As I have heretofore said, no remedy exists, unless the restraining power of the court is interposed. I reach the conclusion that when the title

to the office is not in dispute, but when the question of removal is involved, as in this case, for political reasons, there is a remedy by injunction. In this case it is an effort to oust the party from his position, not only without the sanction of law, but, as I hold, in violation of law. In the case of *Ex parte Sawyer*, 124 U. S. 223, 8 Sup. Ct. 494, Chief Justice Waite, referring to the remedy by injunction, uses the following language, which seems to support me in the view I have taken of the question under consideration. He says:

"I can easily conceive of circumstances under which a removal, even for a short period, would be productive of irremediable mischief. Such cases may rarely occur, and the propriety of such an application may not often be seen, but, if one arises, and if the exercise of the jurisdiction can ever be proper, the proceedings of the court in due course upon the bill filed for such relief will not be void, even though the grounds upon which it is asked may be insufficient."

The law as laid down by the learned chief justice in the case cited seems to cover the case of this plaintiff, whom it is proposed to remove. High on Injunctions (section 1315) says:

"While courts of equity refuse to interfere by the exercise of their preventive jurisdiction to determine questions relating to title to office, they frequently recognize and protect the position of officers de facto by protecting such position against the interference of adverse claimants."

In this case, as we have seen, the plaintiff is the incumbent, and it is proposed to remove him against his consent. He claims the position by reason of a legal and rightful appointment, and that he is liable to removal only for causes other than political or religious. It would seem that he should be protected, and, if so, it can only be done by the restraining order of the court, in due course, upon a bill filed for relief. In support of the view I have taken in this case I cite High, *Inj.* (2d Ed.) § 1315; also, *Guillotte v. Poincy* (La.) 6 South. 507, and the cases there cited. High, speaking for the plaintiff, says for him:

"I am the actual incumbent in possession of the office, to which I claim to be legally entitled. Defendant, claiming under a title the validity of which I dispute, is seeking to oust me extrajudicially, in which effort he will have the aid of my fellow members on the board, and I ask judicial aid to protect my incumbency and possession until defendant shall in due course of judicial proceeding establish his right and title."

Such an action falls within a well-recognized branch of relief by injunction. The doctrine is announced by Mr. High as follows:

"While courts of equity uniformly refuse to interfere by exercise of their preventive jurisdiction to determine questions relating to the title to office, they frequently recognize and protect the possession of officers de facto by refusing to interfere with their possession in behalf of adverse claimants, or, if necessary, by protecting such possession against the interference of such claimants. \* \* \* And the granting of an injunction in such case in no manner determines the question of title involved, but merely goes to the protection of the present incumbents against the interference of claimants out of possession, and whose title is not yet established. This doctrine is in the interest of social peace and order, and conforms to the object and policy of the law in all remedial provisions for the settlement of disputed rights, which always respect and maintain the status quo until the controversy shall be settled in orderly course of judicial procedure. Plaintiff is undoubtedly the de facto officer, because he 'claims the office, and is in possession of it, performing the duties un-

der color of an appointment.' 5 Wait, Act. & Def. p. 7, § 9; *Buckman v. Rugles*, 15 Mass. 180; *Com. v. McCombs*, 56 Pa. St. 436; *State v. Howe*, 25 Ohio St. 588; *Braid v. Theritt*, 17 Kan. 468."

It follows from what I have announced as the opinion of the court that an injunction will be allowed to restrain the marshal and all others claiming the position now held by the plaintiff from any interference or molestation with him in the possession of the office or position now held by him until the further order of the court.

INTERSTATE COMMERCE COMMISSION v. WESTERN NEW YORK & P.  
R. CO. et al.

(Circuit Court, W. D. Pennsylvania. July 3, 1897.)

No. 24.

1. COMMERCE—PETITION OF INTERSTATE COMMERCE COMMISSION—JURISDICTION OF PARTIES.

In an action by the commissioners, under the sixteenth section of the interstate commerce act, where the petition and the attached exhibits show the substance of the complaint against the defendants to be a charge of a common arrangement for a continuous carriage by railroad from points within the district to points in other states, and that it is by combined action and joint agreement among the defendants the unlawful discriminations complained of are committed, an allegation of the violation or disobedience of an order of the commission by one of the defendants within the district sufficiently charges its violation or disobedience by all who are parties to, and acting under, the common arrangement, and the jurisdiction of the court over all the defendants clearly appears.

2. SAME—SUCCEEDING RAILROAD COMPANY.

When an order against unjust discrimination made by the interstate commerce commission is binding on a railroad company, it is binding on the successor of such company.

3. JURISDICTION OF COURT OF EQUITY—ENFORCEMENT OF CLAIMS.

In an action by the commissioners, under the sixteenth section of the interstate commerce act, in the circuit court sitting as a court of equity, to restrain the defendant railroad companies from further continuing the violation and disobedience of an order of the commission, and to enjoin obedience to the same, where the order, besides requiring the several defendant companies to cease and desist from certain acts found by the commission to constitute unlawful discrimination between shippers, also required them to make reparation to the complaining shippers, the commissioners afterwards determining the amount to which each claimant was entitled, so far as the petition seeks the enforcement of these claims, the court, sitting as a court of equity, has no jurisdiction of the subject-matter, but as to the other matters charged it has jurisdiction.

Sur Demurrers to the Petition of the Interstate Commerce Commission, and Motion to Dismiss Petition.

Lee & Chapman, W. J. Heywang, and S. S. Mehard, for complainants.

T. B. Jennings, for New York, L. E. & W. R. Co. and Receivers.

Frank Rumsey, for Western New York & P. R. Co. and Receivers.

David Wilcox, for Delaware & H. Canal Co.

F. J. Gowen, for Lehigh Valley R. Co.

Geo. B. Gordon, for Pennsylvania Co.

Before ACHESON, Circuit Judge, and BUFFINGTON, District Judge.

ACHESON, Circuit Judge. At the hearing of the demurrers to the petition, and the motion to dismiss the petition, the arguments of counsel took a wide range, embracing some questions which we think are not properly determinable at this stage of the case. In disposing of the demurrers and the pending motion we will confine our discussion to three points only:

1. The sixteenth section of the interstate commerce act provides that in cases of the violation of, or disobedience to, the order or requirement of the commission, application by petition for relief may be made to the circuit court of the United States sitting "in the judicial district in which the common carrier complained of has its principal office or in which the violation or disobedience of such order or requirement shall happen." By the primary order of the commission here sought to be enforced, made on November 14, 1892, the railroad companies complained of were required to cease and desist from certain specified acts found by the commission to constitute unjust and unlawful discrimination between shippers of petroleum oil transported over their respective roads or lines of railway from the oil regions of Western Pennsylvania to New York and New York Harbor points, and to Boston and Boston points. The petition of the interstate commerce commission, after reciting the said order, and setting forth that each of the defendants is a common carrier engaged in the transportation of property by railroad, alone or together with some one or more of the other defendants, from Titusville and Oil City, in the state of Pennsylvania, to New York City, and other points, known as "New York Harbor Points," and to Boston, in the state of Massachusetts, charges that all of the defendants "have willfully continued to fail and neglect, and they still refuse, to obey and conform to said requirements as set forth in said order," and that "by so failing, neglecting, and refusing said defendants have violated, and do continue to violate, provisions of said act to regulate commerce, at, to wit, Titusville and Oil City, in the state of Pennsylvania." Upon the face of the petition, therefore, our rightful jurisdiction of all the defendants appears, for each of them is therein charged with the violation or disobedience within this judicial district of the order or requirement of the commission. But if we look beyond the terms of the petition itself, and examine the attached exhibits, our jurisdiction seems to be equally clear. The substance of the complaint against the defendants is that they are engaged in the transportation of petroleum oil by railroad under common arrangements for continuous carriage thereof from Titusville and Oil City, and other points in the Western district of Pennsylvania, to points at the seaboard in other states, and that by joint agreement and combined action among the defendants the alleged unlawful discriminations complained of are committed. If the allegations are true, it may well be said that the violation or disobedience within this judicial district of the order of the commission by any one of the defendants is the violation or disobedience of all the defendants who are parties to, and acting under, the common

arrangement. *Interstate Commerce Commission v. Southern Pac. Co.*, 74 Fed. 42; *Texas & P. Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 16 Sup. Ct. 666.

2. The petition sets forth that the railroad formerly owned by the Western New York & Pennsylvania Railroad Company, one of the defendants in the proceeding before the commission, now is, and since about March 31, 1895, has been, owned, controlled, and operated by the Western New York & Pennsylvania Railway Company, and that the railroad formerly owned by the New York, Lake Erie & Western Railroad Company, one of the defendants in the proceeding before the commission, now is, and since about November 20, 1895, has been, owned, controlled, and operated by the Erie Railroad Company. Both of these new companies—the Western New York & Pennsylvania Railway Company and the Erie Railroad Company—are joined as parties defendant in this suit, and the petition distinctly avers that these two companies have willfully failed and neglected and refuse to obey and conform to the requirements of the order of the commission made on November 14, 1892. Each of these two new companies sets up as ground of demurrer to the petition that it was not a party to the proceeding before the interstate commerce commission, and that no order or requirement against or of it has been made by the commission. The order, however, here sought to be enforced, was made against the old railroad companies, to which the Western New York & Pennsylvania Railway Company and the Erie Railroad Company, respectively, have since become successors. The question then is, are these succeeding companies to be regarded as strangers to that order? We cannot think so. It would indeed be lamentable if a lawful order against unjust discrimination by a railroad company, made by the interstate commerce commission after a protracted investigation, could be nullified by the subsequent reorganization of the company, or transfer of its railroad and franchises to another corporation. It is a settled principle that the purchaser of property in litigation, *pendente lite*, is bound by the judgment or decree in the suit. 1 Story, Eq. Jur. § 405. And the rule is said to be founded upon great public policy, for otherwise alienations made during a suit might defeat its whole purpose, and there would be no end to litigation. *Id.* § 406. This principle is applicable here. This case is very different from those of *Sullivan v. Railroad Co.*, 94 U. S. 806, and *Hoard v. Railway Co.*, 123 U. S. 222, 8 Sup. Ct. 74, wherein it was attempted to enforce against a succeeding owner a contractual liability which did not run with the property, but simply bound the former owner personally. Here the new railroad companies have succeeded to the enjoyment of public franchises, and they have voluntarily taken upon themselves the performance of reciprocal public duties. This proceeding is for the enforcement of a public duty which is inseparable from the ownership of the railroad. No injustice is done to these new companies by joining them as defendants here, for they are entitled to be heard against the enforcement of the order of the commission, and the court is to proceed and determine “in such manner as to do justice in the premises.” These views are not at variance with the decision in *Behlmer v. Railroad Co.*, 71 Fed.

835, as we understand that case. There the question as to the enforcement of the order of the commission against the succeeding company arose at final hearing, when it appeared that the jurisdictional averments of the petition were not sustained by the proofs. The court there said:

"The only ground of jurisdiction against the South Carolina & Georgia Railroad Company is that, having been served with a copy of the order of the commission, it refused or neglected to obey it. The record discloses no such service, refusal, or neglect."

3. The order of the commission of November 14, 1892, in general terms directed and required the railroad companies complained of to make reparation to the complaining shippers. Afterwards, upon further investigation to ascertain the amounts wrongfully taken from the complainants, respectively, the commission, in the case of each complaining shipper, made a finding and order, dated October 22, 1895, determining the amount which such complainant was entitled to recover as reparation for damages resulting to such complainant from excessive and unlawful transportation charges exacted upon oil shipments, and directing payment thereof by the offending railroad companies to such complainant. There are a number of these special findings and orders. One of the grounds of demurrer to the petition of the commission is "that, in so far as the petition seeks the enforcement of orders for refunding or reparation or payment of damages to the several claimants named in the orders, this court, sitting as a court of equity, has no jurisdiction of the subject-matter of the action; such orders being enforceable, if at all, only in the circuit court of the United States, sitting as a court of law." The sixteenth section of the interstate commerce act, which authorizes summary application for relief to the circuit court of the United States, provides for two classes of cases. The first class embraces cases of refusal or neglect to obey and perform any lawful order or requirement of the commission "not founded upon a controversy requiring a trial by jury, as provided in the seventh amendment to the constitution of the United States"; and it is enacted that in such instances "it shall be lawful for the commission, or for any company or person interested in such order or requirement, to apply in a summary way, by petition, to the circuit court of the United States sitting in equity," alleging such violation or disobedience. It is further here enacted that if, upon the hearing, it is made to appear to the court "that the lawful order or requirement of said commission drawn in question has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience of such order or requirement of said commission, and enjoining obedience to the same," with provisions for enforcing compliance by attachment and otherwise. The second class of cases embraces those where "the matters involved in any such order or requirement of said commission are founded upon a controversy requiring a trial by jury, as provided by the seventh amendment to the constitution of the United States"; and it is enacted that in case of a violation thereof, or refusal or neglect to obey and perform the same, "it

shall be lawful for any company or person interested in such order or requirement to apply in a summary way, by petition, to the circuit court of the United States sitting as a court of law," alleging such violation or disobedience, whereupon the court shall make an order fixing the time and place for the trial of the cause by jury. It is very plain, upon the face of this legislation, that it was the intention of congress to preserve to common carriers their constitutional right to trial by jury unimpaired. Throughout the whole act the distinction between legal and equitable rights and remedies is sharply defined and most carefully maintained. Now, it is clear to us that the orders of the commission fixing the amounts recoverable by the several claimants "for damage resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil," and directing reparation to be made by the railroad companies, involve matters not within the province of a court of equity, but matters determinable at law. These claims are for damages for alleged wrongs already committed. To each claimant a suit at law affords a plain, adequate, and complete remedy. Undeniably, under the ninth section of the interstate commerce act, these several claimants might originally have brought suits at law for the recovery of their damages in any district or circuit court of the United States of competent jurisdiction. Can it then be that the railroad companies are to be deprived of the right of trial by jury with respect to these claims because the claimants saw fit to exercise the option, given to them by the act, to proceed in the first instance by complaint to the commission? No such result, it seems to us, is contemplated by the act. The counsel for the interstate commerce commission, however, invoke, and ask us to apply to this case, the recognized doctrine that, where the jurisdiction of equity has once attached because of a wrong requiring its peculiar aid, the court will take cognizance of the whole matter in controversy, and administer full relief. But to this suggestion it is, we think, a decisive answer that in this case the court is not exercising its general equity powers. The jurisdiction of the court here is auxiliary and limited. *Detroit, G. H. & M. Ry. Co. v. Interstate Commerce Commission*, 21 C. C. A. 103, 74 Fed. 803, 841. In exercising this special statutory jurisdiction in aid of the interstate commerce commission, the court must be guided by the provisions of the interstate commerce act. Now, we search the act in vain to discover any warrant for administering equitable relief to these claimants of damages under the orders of the commission made in their behalf. Moreover, these reparation orders are separable from, and independent of, the order regulating the future conduct of the defendants in the transportation of petroleum oil. Again we find in the act no authority to the commission to file a petition to enforce such orders. We are clearly of opinion that these orders severally involve matters founded upon a controversy requiring a trial by jury, within the meaning of the interstate commerce act; and therefore, if they are lawful orders, the several claimants must themselves proceed for the enforcement thereof by petition to the court sitting as a court of law. And now, July 3, 1897, the demurrers to so much of the petition as seeks the enforcement of orders for

refunding or reparation or payment of damages to the several claimants named in the orders are sustained, but in all other respects the demurrers are overruled, and the motion to dismiss the petition is denied, with leave to such of the defendants as have not already filed answers to answer the petition within 30 days.

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ANIMARIUM CO. v. BRIGHT.

(Circuit Court, D. New Jersey. July 10, 1897.)

**CONTEMPT—INTERFERENCE WITH PROPERTY IN CUSTODY OF COURT—DELIVERY OF GOODS UNDER WRIT OF REPLEVIN**

Where a marshal, who had taken goods on a writ of replevin directing him to deliver them to the plaintiff, permitted plaintiff's agents to pack the goods, load them into a car, and procure a shipping receipt and bill of lading therefor, such acts constituted a delivery to the plaintiff, and the goods thereby passed out of the custody of the court, and a sheriff who thereafter levied on them under a writ of attachment issued by a state court was not guilty of contempt of the federal court.

Rule against a sheriff to show cause why he should not be adjudged guilty of contempt.

Charles Howard Williams, for plaintiff.

John Whitehead, for the rule.

Albridge C. Smith, opposed.

KIRKPATRICK, District Judge. On the 18th day of May, 1897, a writ of replevin was sued out of the United States circuit court for the district of New Jersey at the suit of the Animarium Company, a nonresident corporation, against Thomas Bright, directing the marshal, if the plaintiff should make him secure, to replevy and deliver to the plaintiff the goods and chattels named in the schedule annexed to said writ. Robert A. Haggerty, a deputy marshal of said district, on the 22d day of May last executed the said writ, and returned that he had "levied and attached the goods and chattels named in said return." On the — day of May, C. H. Williams, the attorney of record of the plaintiff in replevin, requested the marshal to permit certain persons whom he would send to prepare the goods for shipment. Accordingly, a Mr. McElligott went to Woodford, Morris county, N. J., where the goods were, and proceeded, with the consent of the marshal, to pack the goods. When they were packed, McElligott ordered from the agent of the railroad company a car to be placed on the near-by switch to receive the packages, and on the 2d day of June the car was loaded with the same. On June 3d McElligott procured from the railroad agent a shipping receipt for the goods and a bill of lading for the same. They were directed: "A. McGlincey. Notify Animarium Company, Detroit, Michigan." As soon as this was done, French, who had been placed in charge by the deputy marshal, left Woodford, and went to Dover. On the 27th day of May a writ of attachment was issued out of the circuit court of the county of Morris, in the state of New Jersey, in favor of Thomas Bright, against the Animarium Company. Durling, the sheriff of



said county, attempted to execute the same by attaching the goods and chattels which had been replevied by the marshal in this suit; but learning, as he says, that the property was in the possession of the marshal, he returned his writ unsatisfied, because he was "unable to find any goods and chattels in his county whereon to levy." On June 1st another writ of attachment was sued out of the said Morris county circuit court against the Animarium Company by the said Thomas Bright, and placed in the hands of Durling, sheriff, for execution. On June 3d, after the issuance of the shipping receipt and bill of lading for said goods as above set forth, the sheriff levied upon them as the property of the Animarium Company. The car containing the property was detained by the railroad company, and French, the marshal's keeper, finding that it did not go forward as he expected, notified the deputy marshal, who proceeded to Morris county, and demanded that the car and the goods should be dispatched as directed by McElligott. The sheriff of Morris county still retains the possession of the property under his writ, and the motion now is for this court to adjudge him guilty of a contempt for interfering with its process. When the federal court has acquired possession of property by a writ of replevin, and the same remains in the hands of its officer, it is in the care of the court, free from interference by the process of any other tribunal. To hold otherwise would, in the language of Judge Grier in *Peck v. Jenness*, 7 How. 624, "produce a conflict extremely embarrassing to the administration of justice." So long as the property is in the custody of the officer for the purpose of enabling him to deliver it according to the exigency of the writ, it cannot be taken from him by any one, even though acting under a valid writ issuing out of a court of competent concurrent jurisdiction, but when the court's officer parts with the possession of the property, and according to the directions of his writ makes delivery to the plaintiff in replevin, the property is no longer under the care of the court, and any third person may claim it to make service of his writ upon it. *Crane v. McCoy*, Fed. Cas. No. 3,354.

The question, then, in this case, is one of fact: Had the marshal, on June 3, 1897, made delivery to the plaintiff in replevin of the goods and chattels described in the schedule annexed to the writ? The writ was returnable and returned June 3, 1897, but in making his return the marshal only states that he "executed said writ on the 22d day of May, 1897, by levying upon and attaching the following named articles." The writ fails to show whether, as directed therein, he had delivered the said goods to the plaintiff. The object of the writ being to enable the plaintiff to obtain possession of his property, which has been unjustly detained, and the statute of New Jersey, which was binding upon the marshal, requiring that he should "proceed to make deliverance thereof to the plaintiff in said writ named" unless the said defendant should, within 24 hours after service of the writ of replevin upon him, deliver a written claim of property specifying the goods and chattels so claimed, and give bond with one or more sureties in double the value of the goods, with condition to deliver the said goods and chattels to the plaintiff if the same shall be adjudged to the plaintiff, and no such claim having

been made by the defendant, and no such bond having been given by him, the presumption is that the officer obeyed the directions of the writ. It appears by the testimony of witnesses that the goods replevied were of such character that they could not be removed to the domicile of the plaintiff company without being first packed in crates or boxes; that several persons were sent from New York by or on behalf of the plaintiff, under the direction of a man named McElligott, to prepare the goods for shipment, and that they, with the assent of the marshal and Mr. French, the person whom he had left in charge of the property, packed the same in cases; that said McElligott ordered a car to be placed on the railroad switch to receive the goods when packed, and that with the knowledge of the marshal and Mr. French they were removed from the premises where they had been seized by the marshal, and placed in said railroad car; that with the like knowledge of the marshal and Mr. French said McElligott obtained from the agent of the railroad company a shipping receipt for said goods, and a bill of lading for the same; that the goods were shipped to Detroit, Mich., "A McGlincey. Notify Animarium Company"; that French, the keeper, had knowledge of such shipment, and acquiesced therein; that after it was made the said French left the locality where the goods were, and went to Dover, expecting, as he himself says, that he would meet the car at Port Oram, en route for its destination. When he learned that the car was detained by the sheriff's attachment, he notified the marshal, and both he and the marshal demanded of the agent of the railroad company that it should be forwarded in accordance with the orders of McElligott, thereby ratifying his act. It is in evidence that McElligott said to more than one person that he was the agent of the Animarium Company for the packing and shipping of the property. McElligott, though present at the time of the taking of plaintiff's testimony, was not called as a witness to deny this statement. We know that it is true that he was sent to pack them, and that with the permission of the marshal he did ship them. The statements of the marshal and Mr. French that they made no delivery to the plaintiff, in view of the facts set forth, have but little weight. I am of opinion that at the time the sheriff of Morris county levied his attachment on June 3d the possession of the property had passed from the marshal with his consent, and the goods and chattels were no longer in the custody of the court. It therefore follows that the sheriff was not guilty of any contempt of the authority of this court in the execution of his writ. The rule to show cause will be discharged.

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In re CHRISTIAN.

(Circuit Court, W. D. Arkansas. June 15, 1897.)

1. CRIMINAL LAW—INVALIDITY OF SENTENCE—OMISSION OF "HARD LABOR.

In the courts of the United States the rule is that a judgment in a criminal case must conform strictly to the statute, and that any variation from its provisions, either in the character or extent of the punishment inflicted, renders the judgment void.

**1. SAME—HABEAS CORPUS—EXTENT OF RELIEF GRANTED.**

Petitioner was indicted and convicted under section 5392 of the Revised Statutes of the United States, which imposed as a penalty fine and imprisonment at hard labor. He was sentenced to pay a fine and be imprisoned in the House of Correction at Detroit, Mich. (a penitentiary), but "hard labor" was omitted in the sentence and judgment. On habeas corpus the defendant was released, but without prejudice to the right of the United States to take lawful measures to have him resented on the verdict against him.

Winchester & Martin and John Neal, for petitioner.  
W. J. Horton, for the United States.

**ROGERS, District Judge.** W. S. Christian filed his petition in the Ft. Smith division of the circuit court of the United States for the Western district of Arkansas for a writ of habeas corpus. He alleges that at the May term, 1897, of the United States court for the Central district of the Indian Territory, sitting at Antlers, he was indicted and convicted of the crime of perjury, and was sentenced by the court "to be imprisoned in the Detroit House of Correction, at Detroit, Michigan, and to pay a fine of one dollar and costs of this action." He alleges that his term of imprisonment began on the 29th day of May, 1897, and that he has ever since been confined in the United States jail at Antlers, Ind. T., and that he is now in custody of J. P. Grady, United States marshal for said district, under a commitment, and is within the jurisdiction of the United States court for the Western district of Arkansas. The writ issued and was served on Grady in said last-named district. Grady responded, and filed his answer, in which he alleges that he holds the said Christian in his custody as United States marshal for the Central district of the Indian Territory under and by virtue of a mittimus issued out of and from said court at the May term, 1897, thereof, and makes a copy of the mittimus an exhibit to his answer, and alleges that he does not hold him otherwise. No question is made as to the regularity of the mittimus, except that part of it which recites the judgment of the court which sentenced the said Christian "to be imprisoned in the House of Correction situated at Detroit, Michigan, for the term and period of three years, and that he pay the United States of America a fine of one dollar, together with all costs in and about this prosecution laid out and expended, and that they have execution thereupon." It further appears from the mittimus that the said Christian was committed to the custody of the said marshal, who was commanded to receive and safely keep and convey the body of the said Christian to said House of Correction without delay, and deliver him to the custody of the keeper of the said jail, who shall receive and safely keep him in execution of the sentence. On the trial it was shown that petitioner had paid the fine of one dollar which was imposed by the judgment. Grady, the marshal, was served with the writ of habeas corpus issued by this court in the Western district of Arkansas, while en route to Detroit, Mich., with the petitioner.

It is contended—First, that the judgment and sentence under which the petitioner is held is illegal and void; second, that the commitment under which petitioner is held is illegal and void; third, that the court was without jurisdiction to impose the particular sentence

under which petitioner is held; and, fourth, that the petitioner's imprisonment and detention under said sentence is contrary to the laws of the state of Arkansas and contrary to the laws and constitution of the United States. All of these contentions may be summarized in one, which is that the court was without power to pronounce a judgment sentencing the petitioner to the House of Correction in Detroit, Mich., unless that sentence imposed upon the petitioner hard labor. The indictment was found under section 5392, Rev. St. U. S., which in substance provides that every person found guilty of perjury "shall be punished by fine of not more than two thousand dollars, and by imprisonment at hard labor not more than five years." It will be seen that there is no provision in the statute referred to for sentencing the petitioner to imprisonment in a penitentiary unless that sentence imposes as a part of the judgment hard labor. Section 5541, Rev. St., provides that in every case where any person convicted of any offense against the United States is sentenced to imprisonment for a period longer than one year, the court by which the sentence is passed may order the same to be executed in any state jail or penitentiary within the district or state where such court is held, the use of which jail or penitentiary is allowed by the legislature of the state for that purpose; and section 5542 provides for similar imprisonment in the state jail or penitentiary where the person has been convicted of any offense against the United States and sentenced to imprisonment and confinement at hard labor. Section 5546 provides where such persons may be imprisoned in the event there may be no penitentiary or jail suitable for the confinement of convicts, or available therefor, in the territory or district where the party is convicted, and it provides that the attorney general of the United States may designate a jail or penitentiary in some other state or territory for that purpose. In the case at bar it seems that the attorney general had designated the House of Correction at Detroit, Mich., as a suitable place for prisoners to be confined who were convicted in the courts of the Central district of the Indian Territory. The simple question, therefore, arises whether or not a defendant convicted under a statute which imposes fine, and imprisonment at hard labor, may be imprisoned in a state penitentiary where the judgment pronounced against him does not impose hard labor. The negative of this proposition has been repeatedly held. In *re Johnson*, 46 Fed. 477; In *re Mills*, 135 U. S. 263, 10 Sup. Ct. 762; *Harman v. U. S.*, 50 Fed. 922; *Ex parte Karstendick*, 93 U. S. 396, and cases there cited. See, also, *Nielsen, Petitioner*, 131 U. S. 176, 9 Sup. Ct. 672; In *re Graham*, 138 U. S. 461, 11 Sup. Ct. 363.

In *re Johnson*, 46 Fed. 477, is a case in which Johnson was convicted under precisely the same statute that the petitioner in this case was convicted under. Nelson, J., in that case said:

"It was held by the supreme court in *Ex parte Karstendick*, 93 U. S. 396, that in cases where the statute makes hard labor a part of the punishment, it is imperative upon the court to include that in the sentence."

In that case Johnson was sentenced to pay a fine of \$10 and to be imprisoned for the term of six months in the Reformatory Prison for Women at Sherborn, and to stand committed until said sentence be performed. Sherborn was a state prison for the reformation and

punishment of female prisoners sentenced to hard labor by the courts of the state and the United States, and was held to be a state penitentiary within the meaning of sections 5541 and 5542. It will be seen that the judgment of the court in Johnson's case was directly in the teeth of section 5541 of the Revised Statutes of the United States, which by implication prohibits the sentencing of a defendant to a penitentiary unless the term of imprisonment exceeds one year.

In *re Mills*, 135 U. S. 263, 10 Sup. Ct. 762, is in principle exactly the same as the Johnson Case, ante. Mills was convicted under section 3242, Rev. St., the punishment for which was a fine not less than \$1,000 nor more than \$5,000, and imprisonment not less than six months nor more than two years. Upon a plea of guilty the court sentenced him to one year's imprisonment in the Ohio Penitentiary, and to pay a fine of \$100 and costs. On a plea of guilty upon an indictment based on section 2139, Rev. St., Mills was also sentenced to six months' imprisonment in the same penitentiary, and to pay a fine of \$50, with costs, the second sentence to begin when the first expired. As stated above, the court had no power to sentence Mills to a state penitentiary unless the imprisonment exceeded one year. The supreme court of the United States in that case said:

"A sentence simply of 'imprisonment,' in the case of a person convicted of an offense against the United States, where the statute prescribing the punishment does not require that the accused shall be confined in a penitentiary, cannot be executed by confinement in a penitentiary, except in cases in which the sentence is 'for a period longer than one year.' In neither of the cases against the accused was he sentenced to imprisonment for a period longer than one year. In one case, the imprisonment was 'for the term and period of one year'; in the other, 'for the term and period of six months.' There is, consequently, no escape from the conclusion that the judgment of the court sentencing the petitioner to imprisonment in a penitentiary, in one case for a year, and in the other for six months, was in violation of the statutes of the United States. The court below was without jurisdiction to pass any such sentences, and the orders directing the sentences of imprisonment to be executed in a penitentiary are void. This is not a case of mere error, but one in which the court below transcended its powers. *Ex parte Lange*, 18 Wall. 163, 176; *Ex parte Parks*, 93 U. S. 18, 23; *Ex parte Virginia*, 100 U. S. 339, 343; *Ex parte Rowland*, 104 U. S. 604, 612; *In re Coy*, 127 U. S. 731, 8 Sup. Ct. 1263; *Nielsen, Petitioner*, 131 U. S. 176, 182, 9 Sup. Ct. 672."

The case of *Harman v. U. S.*, 50 Fed. 922, is precisely in point in every particular except one, viz. Harman did not pay the fine imposed by the judgment. He pleaded guilty to an indictment under section 3893, Rev. St., and was sentenced to imprisonment in the Kansas State Penitentiary for five years, and to pay a fine of \$300. The section of the statute under which he was convicted authorized the court to impose a fine of not less than \$100 nor more than \$5,000, or imprisonment at hard labor not less than one year nor more than ten years, or both, at the discretion of the court. This, however, was not a habeas corpus case, but a case on error to the district court of Kansas. Caldwell, J., in deciding the case said:

"The plaintiff in error (*Harman*) was sentenced to 'be imprisoned in the Kansas State Penitentiary for five years,' and hard labor is not made a part of the punishment, as the statute requires shall be done, where imprisonment forms any part of the sentence. When the statute makes hard labor a part of the punishment, it is imperative upon the court to include that in its sentence. *Ex parte Karstendick*, 93 U. S. 396. In the courts of the United States the rule is that a judgment in a criminal case must conform strictly to the statute,

and that any variation from its provisions, either in the character or extent of the punishment inflicted, renders the judgment absolutely void. \* \* \* It seems probable that if the plaintiff in error had sought relief from the void sentence, after suffering a part of the punishment, by habeas corpus, his discharge would have been absolute and final, and he could not have been again sentenced or tried for the offense. *Ex parte Lange*, 18 Wall. 163; *In re Johnson*, 46 Fed. 477. Assuming, but not deciding, that his discharge on habeas corpus, after suffering a part of the punishment under the void sentence, would have precluded the imposition of a legal sentence upon a verdict of guilty, or another trial for the same offense, it does not follow that a reversal of such a sentence on a writ sued out by the defendant himself is attended with any such consequences."

It is not necessary to refer to the other cases cited. They differ from the above cases in certain particulars, but have less relevancy to the case at bar. No case has been found precisely like the one at bar. In this case petitioner was convicted under a statute which authorized the court to impose a fine, and also to imprison the petitioner at hard labor for a longer time than that for which he was sentenced. The gist of the cause of complaint by the petitioner, therefore, is that the court failed to impose hard labor, and not because the court sentenced him to the penitentiary. In other words, it is conceded that the court had the power to sentence the petitioner to the penitentiary, but it did not have that right unless hard labor was added to the imprisonment. This is precisely the complaint made in *Harman v. U. S.*, supra, which, as stated, was a case on error to the district court of Kansas, and in which case Caldwell, J., held that the judgment was absolutely void, and reversed the case, to be proceeded with in conformity to law. However, in the case of *Harman v. U. S.*, the fine imposed had not been paid. Harman declined to submit to the judgment, and sued out his writ of error. In the case at bar Christian has paid the fine before suing out his writ of habeas corpus, so that he has already suffered a part of the penalty inflicted by the court, and a part, too, which the court had the power to inflict. The question, therefore, arises, inasmuch as Christian has discharged that part of the judgment of the court which the court had the power to inflict, should he be held, or remanded to the United States court for the Central district of the Indian Territory to be resentenced upon the verdict rendered against him? Caldwell, J., in *Harman v. U. S.*, supra, says:

"It seems probable that if the plaintiff in error had sought relief from the void sentence, after suffering a part of the punishment, by habeas corpus, his discharge would have been absolute and final, and he could not have been again sentenced or tried for that offense,"—citing *Ex parte Lange*, 18 Wall. 163, and *In re Johnson*, 46 Fed. 477.

He, however, expressly declined to decide that question, saying that "the same has not been argued, and no opinion is expressed upon it." He adds:

"If the defendant conceives that a legal sentence cannot now be imposed upon him on the existing verdict of guilty, and that he cannot again be tried for the same offense, he can raise these questions in the trial court."

Assuming, therefore, that Christian is entitled to the benefit of the writ of habeas corpus, the additional question arises as to whether or not he should be discharged peremptorily, without giving the United States an opportunity to take any lawful measures to have him sen-

tenced in accordance with the law upon the verdict against him. That question was before the supreme court of the United States in the case of *In re Bonner*, 151 U. S. 243, 14 Sup. Ct. 323. In that case Bonner had been convicted under a statute the penalty for which was a fine of not more than \$1,000, or by imprisonment not more than one year, or by both such fine and imprisonment. The court sentenced him to imprisonment in the penitentiary at Anamosa, in the state of Iowa, for the term of one year, and to the payment of a fine of \$1,000. In that case Bonner was delivered to the keeper of the state penitentiary and had served a large portion of the sentence of imprisonment. The sentence in that case was directly in violation of section 5541 of the Revised Statutes, which by implication prohibits the imprisonment in a penitentiary of any person who is not sentenced to imprisonment for a longer period than one year. That case, therefore, is a much stronger case than the one at bar, because in the case at bar the court had the power to sentence Christian to the penitentiary, and also to sentence him to hard labor. In the Bonner Case the court had no power to sentence Bonner to the penitentiary at all. But the court, in discharging Bonner from the custody of the keeper of the penitentiary, did so without prejudice to the right of the United States to take any lawful measures to have him resented on the verdict against him, and, I think, thereby established a sound and salutary practice, which should be followed, to the end that justice may not be thwarted by mere inadvertent errors of the court or clerical misprisions of the clerks, which do not prejudice the substantial rights of the defendant. Moreover, there is ground for belief that the court, in sentencing Christian, sentenced him to imprisonment at hard labor, and that it was an inadvertence or misprision of the clerk that the judgment did not contain the sentence of hard labor.

Without reference, however, to this feature of the case, which is not raised by the answer, but was briefly referred to in argument on the trial, on the authority of *In re Bonner*, *supra*, the order will be that the petitioner be discharged from the custody of J. P. Grady, marshal of the Central district of the Indian Territory, but without prejudice to the right of the United States to take any lawful measures to have the petitioner sentenced in accordance with law upon the verdict of guilty against him, or to correct the judgment if the same was by misprision of the clerk erroneously entered.

See, also, *Medlev*, Petitioner, 134 U. S. 175, 10 Sup. Ct. 384; *Savage*, Petitioner, 134 U. S. 176, 10 Sup. Ct. 389. An interesting case is that of *Ex parte Friday*, 43 Fed. 916.

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UNITED STATES v. 164<sup>8</sup>/<sub>100</sub> PROOF GALLONS DISTILLED SPIRITS.

(District Court, S. D. Ohio, W. D. June 30, 1897.)

No. 1,762.

INTERNAL REVENUE — PROCEEDING FOR FORFEITURE OF SPIRITS—MOTION TO PRODUCE EVIDENCE.

In a proceeding for the forfeiture of distilled spirits on the ground of a fraudulent violation of the internal revenue laws, the government will not be required, on motion of an intervening claimant, to furnish such claimant

before trial with the report of the gauger showing the measurements of the packages containing such spirits, such report being on file in the proper district, and the claimant being entitled, on application there, to an inspection or a certified copy of the same.

Proceeding by the United States for the forfeiture of distilled spirits. Heard on motion to require the government to produce evidence before trial.

Sidney G. Stricker, for claimant.

Horlan Cleveland, for the United States.

SAGE, District Judge. This case is before the court on motion to require the government, before trial, to produce to the attorney for the intervening petitioner any and all books or writings in its possession or power which contain—First, evidence pertinent to the issues; that is to say, any and all reports or returns of the gaugers who gauged and inspected the brandy in question; second, any and all reports or returns made by the distillers or wholesale liquor dealers in whose possession or control said brandy has ever been; third, any and all writings or correspondence or copies thereof between any of the parties who may have had any connection with the removal or shipment of said brandy. The demand is as sweeping and comprehensive as it could be made, and, if sanctioned by the order of the court, would compel the government to submit its entire evidence to the inspection and examination of counsel for the defendant in advance of the trial, which, in a proceeding for forfeiture based upon a charge of fraud in violation of the internal revenue laws of the United States, ought not to be allowed. But in the brief of counsel for the intervener the demand is modified to “seeking a discovery of the original measurements of the packages, the only existing evidence of which is the return of the gauger under form 59 $\frac{1}{2}$  as made to the revenue department, which is in its exclusive possession and control, and which can be reached by no other process than this motion.” The intervener is a wholesale liquor dealer, who claims to have purchased the packages from the distillers. But the United States attorney has not in his possession these original measurements. They are technically, it is true, in the possession of the government,—that is to say, of the internal revenue department,—but they are on file in the state and district where the brandy was distilled, and the intervener is entitled, upon application, to an inspection or to a certified copy of them. It is not the duty or province of the government to transport the originals here for the convenience of the intervener and his counsel, or to procure certified copies for that purpose. The originals are in the proper custody directed by the law, but not within this jurisdiction. If the intervener wishes to inspect them, he will have to make his application there, or procure from the collector of the proper district certified copies. The motion will be overruled.



## LOVELL v. JOHNSON.

(Circuit Court, D. Massachusetts. August 18, 1897.)

## 1. EQUITY—PLEADING—BILL AND ANSWER.

It is a settled rule that under equity rule 61, as interpreted by the supreme court, an allegation in the bill not noticed in the answer is to be proven by the complainant, in the absence of exceptions.

## 2. PATENTS—INVENTION—FORMATION OF COURTS.

The creation of a slot or other cavity of a particular form or size, or the change of form or proportions of an existing slot or cavity, merely to provide accommodation for the device which is the real conception, or for the really useful thing, does not involve patentable invention, unless under very extraordinary circumstances.

## 3. SAME—BREECH PIECES FOR GUNS.

The Entebrouk patent, No. 230,409, for an improvement in breech-loading firearms, consisting of a breech piece for a single-barreled gun, covers nothing but the construction of a cavity suitable to accommodate the working parts of a central hammer and a top snap in line, and is void for want of invention.

This was a suit in equity by Benjamin S. Lovell against Mary Elizabeth Johnson for alleged infringement of letters patent No. 230,409, granted to Charles H. Entebrouk, July 27, 1880, for an improvement in breech-loading firearms.

Maynadier & Mitchell, for complainant.

Causten Browne, for defendant.

PUTNAM, Circuit Judge. This is a bill in equity charging infringement of a patent issued for an alleged invention. The answer does not deny invention; but it is well settled under equity rule 61, as interpreted by the supreme court, that an allegation in the bill not noticed in the answer stands to be proven by the complainant in the absence of exceptions. The question of invention was not specifically opened by the briefs, but at the hearing it was raised incidentally by the respondent. In addition, it seemed to us that this question obtruded itself in such special manner that the court could not entirely overlook it, even though not urged by the parties. Accordingly, we requested additional briefs with reference thereto, and we are indebted to the counsel on either side for promptly complying with our request. The court believes it now has before it all that can in any way aid it with reference to this branch of the case. There is only one claim in the patent, which is as follows:

"The breech piece, A, of a single-barreled gun, slotted in two directions, as described,—that is to say, horizontally and vertically,—the vertical slot being in the center, whereby the hammer and top snap may be placed in line, and still the operating parts accommodated; all as set forth."

The complainant insists that the patent is for a new breech piece,—in other words, for a new manufacture; but in determining questions of this character it is necessary to avoid the danger of being misled by terms, and to ascertain exactly what was accomplished by the patentee. The case, in this particular, leaves no doubt in the mind of the court. The specification says as follows:

"A breech piece for a single-barreled gun has never heretofore been so contrived as to accommodate a central hammer and top snap, the difficulty being to get the hammer and top snap in line, as they are not in double-barreled guns,

and still to provide for the working of the locking bolt and other operative parts within the breech piece."

If the patent worked out the conception contained in this extract, it would result in a combination which would have been a subject-matter of a very different nature from what was in fact covered by the claim according to its undoubted interpretation, in the light both of its own phraseology and of the circumstances of the case. The specification, however, referring to the arrangement of the central hammer and top snap in line, says further as follows:

"There is nothing novel in these operative parts per se, and I have merely transferred them from double-barreled guns, and arranged them, as described, so as to fit in and work within the slotted breech piece that I have provided; the novelty of my device being in the structure of the breech piece."

The result of this leaves it clear that the entire invention covered by the claim was as follows: The patentee, or some one else, conceived the combination of a central hammer and top snap in line, either as an original thought or as an idea transferred to a single-barreled gun from a double-barreled gun. Taking the specification and the drawings together, it appears that the central hammer and top snap were brought into line in a single-barreled gun by an expedient which enabled the locking bolt, interposed between the operative parts of the top snap and the barrel of the gun, to be moved backwards and forwards, without interfering with the operation of the hammer. This was apparently done by opening a slot in the bolt, through which the hammer could drop, the slot being sufficiently long not to interfere with the hammer whether the bolt was pushed forward or drawn back. But, however done, this was the conception by means of which the central hammer and top snap were brought in line, and, this conception being completed, nothing remained except to form a cavity in the breech piece which would receive the parts constituting the combination. It being clear that the claim in no part covers the combination, or the arrangement of the parts operating the central hammer and the top snap, the creation of this cavity is all which remains to be covered by it, and all, indeed, which it assumes to cover. If necessary to make these propositions more clear, it is so made by an examination of the file-wrapper relating to this patent. The original application contained the following:

"My invention relates to that class of guns with one barrel using a firing pin, and loading at the breech in the way now common. Its object is to provide a single gun with both the central hammer and the top-snap, and it consists in the combination of a breech piece or frame slotted centrally for the hammer, a central hammer in this slot, and a top snap, consisting of the usual locking bolt, arranged centrally in the breech piece and in line with the hammer, and a lever and tumbler; all arranged as now to be described."

Also the following:

"The gist of the invention is the combination of the breech piece, A, slotted centrally to receive the hammer, B, and provided with the bolt, C, for locking the barrel, actuated by a tumbler or pin, c, which is vertical (instead of horizontal, as above explained); the advantage being that the finger lever, c<sup>1</sup>, is brought on the upper surface of the breech piece, instead of on the side. All single guns heretofore known to me, with central hammers, have had side snaps; and all single guns with top snaps have had side hammers. I have devised the means shown for combining both these desirable features in a single gun."

And the claim was as follows:

"The combination of centrally slotted breech piece, A, central hammer, B, and top snap, C, c, c', as shown."

This claim was strictly for a combination, and entirely unlike that of the patent as issued, which latter the complainant, as we have said, maintains is for a new breech piece as an independent manufacture, and not for a combination. The claim as originally made was rejected by the patent office. It cannot, therefore, be disputed that under the circumstances the claim in issue, both by its express terms and in connection with the specification, and also in view of its history, covers nothing except the construction of a cavity suitable to accommodate the working parts of a central hammer and a top snap in line. Therefore the question of invention is simply one of the form and proportions of a receptacle for something which had been devised by the patentee, or by some other person, and which is not claimed. That form and proportions may sometimes involve patentable invention under special circumstances, must be admitted. Such was the fact with the conical car in *Winans v. Denmead*, 15 How. 330; also with the last in *Mabie v. Haskell*, 2 Cliff. 507, Fed. Cas. No. 8,653. It is generally said, however, and properly so, that mere form and proportions do not constitute the basis of a patent, except for a design, which is not the nature of the patent here in issue. It would be hazardous to attempt to lay down a categorical rule which would determine under what circumstances form and proportions, or either of them, are patentable, and under what circumstances they are not so. Perhaps the most satisfactory statement is in *Winans v. Denmead*, at page 341. Without undertaking to explain in any general way under what circumstances a matter of form or proportions may properly furnish the basis for the issue of a patent, it is enough to say that when the creation of a slot or other cavity of a particular form or size, or the change of the form or proportions of an existing slot or other cavity, is simply in order to provide accommodation and room for the device which is the real conception, or for the really useful thing, the result occupies a part of the great field which is common to all mechanical arts, no part of which can be monopolized by any, unless under very extraordinary circumstances, not exhibited in the case at bar. Presumably, it is everybody's privilege to make a receptacle for whatever may need one. Considering, therefore, that, so far as any alleged invention covered by the claim in issue is concerned, it relates only to finding a cavity of proper form and proportions to accommodate parts and materials the arrangement of which had been previously conceived, it lies outside of the field of invention, and the patent cannot be sustained. This fact is so clear that none of the minor propositions urged by the complainant, which are often available to aid the court in determining the question of invention in doubtful cases, can properly receive any consideration; and the bill must be dismissed for the want of patentability. Let the respondent, on or before the 4th day of September next, file a draft decree dismissing the bill, with costs, and the complainant file corrections thereof on or before the 11th day of September next.

## HOLDEN v. UTAH &amp; M. MACHINERY CO. et al.

(Circuit Court, D. Utah. July 12, 1897.)

No. 162.

## 1. COURTS—JURISDICTION—AMOUNT IN DISPUTE.

Where the complaint on its face shows that the amount in dispute exceeds \$2,000, and there are no facts alleged from which the court can determine, as a matter of law, that there cannot be a recovery of the jurisdictional amount, the question will not be determined on ex parte affidavits.

## 2. SAME—DISMISSAL AT TRIAL.

It seems that since Act March 3, 1875, the court is not concluded on the question of jurisdiction by the amount laid in the complaint; and if, at the trial, that amount should appear, from the testimony of plaintiff and his witnesses, to have been laid beyond his reasonable expectation of recovery, the action should be dismissed.

Action at law by L. E. Holden against the Utah & Montana Machinery Company and George E. Chandler. Heard on motion to dismiss.

Bennett, Harkness, Howat & Bradley, for plaintiff.

C. C. Dey, for defendants.

MARSHALL, District Judge. The defendants move to dismiss this action on the ground that the matter in dispute does not exceed \$2,000, and is of no greater value than \$437.50. They have supported this motion by affidavits, and the plaintiff has filed affidavits tending to show that the value of the matter in dispute exceeds the jurisdictional limit. The complaint, after alleging the requisite diversity of citizenship, in substance states that, at the time of the wrong complained of, the plaintiff and the defendants were the owners, as tenants in common, of certain mining ground; that situated on and part of said premises were a certain frame building, a boiler, and a hoisting engine; that the defendants, without plaintiff's consent, wrongfully tore up, and separated from the realty, the said house, boiler, and engine, took the same away from said premises, and converted them to their own use, "and thereby perpetually damaged and diminished the value and wasted said estate, and the substance thereof, all to plaintiff's damage in the sum of \$3,750," for which sum judgment was demanded. The plaintiff's allegation of damage and demand for judgment of a sum exceeding \$2,000, exclusive of costs, is a sufficient allegation of the value of the matter in dispute, unless, from the facts stated in the complaint, it appears that, even if he should prevail, as a matter of law, he could not recover the jurisdictional amount. But in the case at bar the sum recoverable is indefinite, and there is no other means of making it definite than a trial of the action. The defendants, it is true, contend that the plaintiff, even if entitled to recover, has not been damaged in any such sum, but this simply emphasizes the fact that the damage claimed by the plaintiff is in dispute. The fact that on a trial the plaintiff may recover a less sum, or nothing, would only show a settlement of the dispute to some extent, or entirely, in favor of his adversary.

The principle was stated by Chief Justice Ellsworth, in an early case, as follows:

"In an action of debt on a bond for £100, the principal and interest are put in demand; and the plaintiff can recover no more, though he may lay his damages at £10,000. The form of the action gives in that case the legal rule. But in an action of trespass, or assault and battery, where the law prescribes no limitation as to the amount to be recovered, and the plaintiff has a right to estimate his damages at any sum, the damage stated in the declaration is the thing put in demand, and presents the only criterion to which, from the nature of the action, we can resort in settling the question of jurisdiction. The proposition, then, is simply this: Where the law gives no rule, the demand of the plaintiff must furnish one; but, where the law gives the rule, the legal cause of action, and not the plaintiff's demand, must be regarded." *Wilson v. Daniel*, 3 Dall. 401.

This statement of the law has been cited with approval in recent decisions of the supreme court of the United States. *Smith v. Greenhow*, 109 U. S. 671, 3 Sup. Ct. 421; *Barry v. Edmunds*, 116 U. S. 550-560, 6 Sup. Ct. 501. It is true that under section 5 of the act of March 3, 1875, the court is not concluded on the question of jurisdiction by the amount of damages laid in the complaint, but, as stated in *Barry v. Edmunds*, cited *supra*—

"If, upon the case stated, there could legally be a recovery for the amount necessary to the jurisdiction, and that amount is claimed, it would be necessary, in order to defeat the jurisdiction, since the passage of the act of March 3, 1875, for the court to find, as matter of fact, upon evidence legally sufficient, 'that the amount of damages stated in the declaration was colorable, and had been laid beyond the amount of a reasonable expectation of recovery for the purpose of creating a case' within the jurisdiction of the court."

Such an investigation as to the good faith of the plaintiff in estimating his damages cannot be safely prosecuted by means of *ex parte* affidavits. The amount of damage suffered is an issue in this action to be tried by a jury. In the course of that trial the evidence of the parties on this issue will be produced in court, where the opportunity for cross-examination afforded will furnish a guaranty of truth not pertaining to affidavits. Of course, the question of jurisdiction would not be decided by the result of the issue on the question of damages; but the damages as shown by the evidence would reflect on the plaintiff's "reasonable expectation of recovery" when he instituted the suit, and if it appeared from the testimony of the plaintiff, and his own witnesses, that a verdict of \$2,000 would be greatly excessive, there should be no hesitation in dismissing the action. *Maxwell v. Railroad Co.*, 34 Fed. 286, 290. It would, however, require a very strong case to justify a court in finding that the plaintiff had no reasonable expectation of recovering a verdict in any sum which is sustained by the testimony of credible witnesses. Counsel for defendants cite the cases of *Wilson v. Blair*, 119 U. S. 387, 7 Sup. Ct. 230, and *Street v. Ferry*, 119 U. S. 385, 7 Sup. Ct. 231, to the point that the court should determine the value of the matter in dispute on affidavits. In both cases the record was silent on the point, and it was a question of the appellate jurisdiction of the supreme court of the United States. Of course, the value in controversy could not be shown orally before the appellate court, and the further exercise of jurisdiction did not require a trial where the value would be in issue, and the witnesses thereto subjected to cross-examination. I do

not think that this practice in the supreme court, growing out of the necessities of the procedure in an appellate tribunal, has any bearing on the question presented here. In *Cattle Co. v. Needham*, 137 U. S. 632-636, 11 Sup. Ct. 208, 209, Mr. Chief Justice Fuller, speaking for the court, said:

"The practice of permitting affidavits to be filed in this court arose from instances of accidental omission where the value was not really in dispute, and it should not be encouraged to the extent of requiring us to reach a result upon that careful weighing of conflicting evidence so frequently involved in determining issues of fact. If there be a real controversy on the point, let it be settled below in the first instance, and on due notice; not here, upon *ex parte* opinions which may embody nothing more than speculative conclusions."

As the complaint, on its face, shows a matter in dispute exceeding in value the sum of \$2,000, the motion will be denied, without prejudice, however, to its renewal on the trial of the action.

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ADAMS v. FRASER.

(Circuit Court of Appeals, Eighth Circuit. August 2, 1897.)

No. 742.

1. FACTOR—RIGHT TO RECEIVE PURCHASE PRICE.

A factor who is intrusted with the possession of property, or other indicia of authority to transfer it, has implied power to receive the purchase price for the vendor at the time that he sells and delivers the property, or the title deeds to it.

2. SAME—RIGHT TO COLLECT THE PURCHASE PRICE AFTER MAKING THE CONTRACT OF SALE.

A broker or agent authorized to negotiate the sale of property, who concludes a contract for the vendor, which is to be performed at a future time by the delivery of the property, or the title deeds to it, and the simultaneous payment of the purchase price, has no implied authority to collect the price, to extend the time of payment, or to otherwise modify the concluded contract between the vendor and purchaser after it has been made.

3. SAME—EXERCISE OF POWER.

The defendant, Adams, was employed to negotiate the sale of certain letters patent for his principal, the Citizens' Match Company, but was not intrusted with any assignments of the patents, or power of attorney to make such. On May 18, 1886, he concluded a contract on behalf of his principal with the plaintiff, Fraser, to the effect that the latter should purchase the patents, and pay for them on August 10, 1886. After this contract was made, the defendant, without the knowledge of his principal, agreed to extend the time of performance of this contract until February 1, 1897, on condition that the plaintiff would pay to him the amount of his commission upon the sale, which he agreed to apply as a payment under the contract. *Held*, Fraser's authority as agent to sell the property was exhausted when he made the original contract, and he had no power, after that contract was concluded, to modify it, or to receive any part of the purchase price, and the plaintiff, who advanced the money in suit to Fraser without knowledge of his want of authority, was entitled to recover it back from him.

Appeal from the Circuit Court of the United States for the District of Colorado.

Charles J. Hughes, Jr., Tyson S. Dines, and Branch H. Giles, for appellant.

Henry J. O'Bryan (Edmund J. Moffat with him on the brief), for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. John Fraser, the appellee, brought a suit in equity against the appellant, Alonzo P. Adams, in the court below, to recover £1,000 sterling, which he had paid, and to obtain the surrender and cancellation of an acceptance for £600, which he had delivered, to Adams in part payment of the purchase price of certain patent rights which Fraser had agreed to buy from the Citizens' Match Company, a corporation in business in the city of Troy, in the state of New York. The appellee alleged in his bill that he had been induced to pay this money and to make and deliver the acceptance by the false statement of the appellant that he was authorized by the Citizens' Match Company to receive them in part payment of the purchase price of the patent rights under Fraser's contract with it, and by other misrepresentations that are not material to the disposition of the case in this court. Adams admitted that he represented that he had the authority, alleged and insisted that his representation was true, and the appellee proved that he was ignorant of the extent of Adams' authority, and was induced by his statement to pay the money and deliver the acceptance. The circuit court held that Adams had no authority to collect or receive any part of the purchase price owing to the match company under its contract with Fraser, and entered the decree prayed by the bill. Adams appealed, and the only question he presents is whether or not he had the authority which he claimed.

On January 20, 1886, the Citizens' Match Company made an agreement, and on the next day it made an amendatory agreement, with the appellant. Both these contracts were in writing, and the provisions of them which are material to the question at issue here are: That the match company authorized Adams to sell certain English letters patent which it owned for not less than \$100,000, and to negotiate sales of them at a less price, if, after diligent effort, he found the price of \$100,000 was excessive in amount; that the company covenanted to pay him 20 per cent. commission on the first \$50,000 which it realized from these sales, and 15 per cent. on the next \$50,000, and to make any assignments and conveyances required to carry out the sales he negotiated; that Adams agreed to pay his own expenses, to make, and ultimately to sell to the company, a machine which should embody some of the inventions secured by the patents, but the company agreed that, if it refused to make or ratify bona fide offers for or sales of the patents for amounts less than \$100,000, which, together with the amounts of the sales of other European patents, which the corporation, by the same agreement, authorized him to sell, would amount in the aggregate to \$150,000, then it would pay him \$1,000 per month for the time he spent in negotiating such declined offers; and that the corporation would not be liable to pay any commissions on any sale of any of the patents, unless the purchase money arising from such sale had been paid to the

company, or to such person or persons as it should authorize to receive and receipt for the same, before February 1, 1887. Adams went to London, and negotiated for and obtained from Fraser an offer to purchase the English patents for £8,000 sterling. He reported this offer to the corporation on May 10, 1886, and the company cabled its acceptance. Thereupon, on May 18, 1886, a written contract was made between the match company, by Adams, as its agent, and Fraser, to the effect that Fraser would purchase the patents, and would pay to the company in London £8,000 sterling for them on or before August 10, 1886, and that at that time the company would properly assign them to him, or to such persons as he should direct. On August 9, 1886, Fraser told Adams that he would be unable to pay the purchase price the next day, and soon thereafter Adams agreed to extend the time of performance of the contract of May 18, 1886, until February 1, 1887, on condition that Fraser would pay his commission on the sale, which was 20 per cent. of the purchase price. Fraser accepted the terms, and paid to Adams the £1,000, and gave him the acceptance for £600 over which this suit arose. Adams did not pay this money, nor did he deliver this acceptance to the match company. He did not report to that company that he had received them. When in October the corporation learned what he had done, it denied that Adams had any authority to receive any part of the purchase price fixed in the contract on its behalf.

A factor who has the possession of property, or who has assignments of it, or other indicia of authority to transfer it, has implied power to receive the purchase price for the vendor when he sells and delivers the property, or the title deeds to it. *Pickering v. Busk*, 15 East, 38; *Baring v. Corrie*, 2 Barn. & Ald. 137, 148. But a broker or other agent to sell property, who has concluded a contract of sale, which is to be performed by a delivery of the property, or the title deeds to it, and the simultaneous payment of the purchase price at some future time, and who is not intrusted with the possession of the property, or of the conveyances of it, has no implied authority to collect the purchase price, or to extend its time of payment, or to otherwise modify the contract between the vendor and the purchaser. *Butler v. Dorman*, 68 Mo. 298, 301; *Seiple v. Irwin*, 30 Pa. St. 513; *Hahnenfeld v. Wolff* (Com. Pl.) 36 N. Y. Supp. 473; *Clark v. Murphy*, 164 Mass. 490, 41 N. E. 674; *Higgins v. Moore*, 34 N. Y. 417, 419; *Kane v. Barstow* (Kan. Sup.) 22 Pac. 588. If the match company had intrusted to Adams assignments of its rights under the patents, or if it had given him authority, by a proper power of attorney, to convey them, and he had sold them for a price which he received at the time he delivered the conveyances, his authority to take it might well have been implied. But he had neither assignments nor authority to make them, and he did not sell these rights for cash, but simply concluded an agreement of sale between his principal and the purchaser, which was to be performed nearly three months after its date, by a simultaneous conveyance of the rights under the patents and a payment of the purchase price. When he concluded that agreement, he exhausted his power. He was an agent to sell, and when he had brought the vendor and the vendee into a binding agreement of sale, his duty was



performed, and his authority was at an end. The agreement of May 18, 1886, was a complete and enforceable contract. After that agreement was concluded, Adams had no authority to abrogate it, or to so change it that the portion of the purchase price which would ultimately belong to the vendor would become due five months later, in consideration of the immediate payment to him of the 20 per cent. commission, to which he would have been entitled if the entire purchase price had been paid. Authority to make a contract of sale does not import authority to abrogate or modify that contract, and to make new ones, after it is once completed and binding.

If there was any doubt that Adams exceeded his authority, the express provisions of his contract of agency would dispel it. That contract contains a covenant on the part of the match company to make the necessary assignments and transfers to complete the sales which Adams should negotiate. This covenant raises the implication that the parties did not intend that he should have power to complete the sales. The same contract contains a mutual covenant that none of the commissions which Adams was to receive should be a claim against the company "until the purchase money arising from the sale of said patents, granted or to be granted, shall have been paid to the said Citizens' Match Company, or such person or persons as they may authorize to receive and receipt for the same." This provision is a demonstration that Adams was not, and some other person was to be, authorized to receive and receipt for the purchase price. We are convinced that there was no error in the conclusion of the court below, that the appellant had no authority to receive the purchase price for these patent rights three months after he had negotiated and concluded the contract of sale. The judgment below is accordingly affirmed, with costs.

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**MAXWELL v. WILMINGTON DENTAL MANUF'G CO.**

(Circuit Court, D. Delaware. July 21, 1897.)

No. 145.

**1. RECEIVERS—ALLOWANCE OF COMPENSATION.**

The proper time for the final allowance of compensation to a receiver for services is at the close of the receivership; and until that time full compensation will not be made.

**2. SAME.**

Where a receiver of an insolvent corporation is clothed with the duty of winding up its affairs with all convenient speed, partial or intermediate allowances of compensation for the receiver should be materially less than the worth of the services rendered by the receiver prior to the making of such allowances; and the final allowance, made at the close of the receivership, should be so adjusted that the receiver will have fair and just compensation for his services as a whole, notwithstanding the inadequacy of the partial or intermediate allowances considered by themselves.

**J. H. Hoffecker, R. D. Maxwell, and A. H. Wintersteen, for receiver.**

**H. H. Ward and Andrew C. Gray, for creditors.**

**Benjamin Nields, for bondholders.**

**William S. Hilles, for stockholders.**

BRADFORD, District Judge. In this case The Girard Life Insurance, Annuity & Trust Company of Philadelphia has by petition applied for an allowance to it of compensation for its services as receiver of The Wilmington Dental Manufacturing Company, and also for the services of counsel employed by it as such receiver. Counsel for the receiver have made to the court alternative suggestions touching the amount which should now be allowed to the receiver for its own compensation, as follows: First, that such compensation be fixed at the sum of \$30,000, to cover all past and future services of the receiver; or, secondly, that, should the court deem it improper at this time to fix the total compensation of the receiver, the sum of \$15,000 be allowed for or on account of its services heretofore rendered.

The first suggestion is clearly inadmissible. Assets of the dental company to a large amount, consisting of both real and personal property, will in all probability have to be converted into cash, and properly applied and distributed, before the termination of the receivership, and it is impossible at this stage of the proceedings to foresee with any degree of accuracy what questions or complications may arise in the case before it reaches its conclusion. Future contingencies and exigencies, and the character of the future administration of the receivership, cannot be determined now, yet, when realized, necessarily must enter into and largely control any fair and equitable adjustment of compensation. The proper time for the final allowance of compensation for the receiver obviously is at the close of the receivership. Unless the receivership be practically at an end, any such final allowance is premature. Under the circumstances of this case the court cannot, with any propriety, now fix the total compensation of the receiver for past and future services.

The alternative suggestion of an allowance to the receiver of \$15,000 for or on account of services heretofore rendered has received very careful consideration by the court. The petitioner was by the decree of July 25, 1893, appointing it receiver, and by the order of this court made August 7, 1893, fully authorized and empowered to manage and operate the manufactories of the dental company, and to continue all the branches of its business, mercantile as well as manufacturing, until the further order of the court. But so long ago as June 6, 1896, the propriety of effecting a prompt and final settlement of the affairs of that company was clearly recognized by the court, for on that day an order was made that "The Girard Life Insurance, Annuity and Trust Company of Philadelphia, the receiver appointed by this court in the above cause, shall within ninety days from the date hereof wind up the business of the said The Wilmington Dental Manufacturing Company, and liquidate the claims of all the creditors of said company." While the New York, Washington, and Chicago branch houses of the dental company have been discontinued, and its assets there situated largely converted into cash, and the petitioner discharged from its ancillary receivership in those places, the affairs of the two principal houses in Delaware and Pennsylvania have not yet been closed. It is unnecessary at this time to discuss the various reasons why the property and business of the

company have not been completely wound up. It is sufficient to state that the court continues to regard an early settlement of the affairs and termination of the receivership of the dental company as imperatively required by the interests of its creditors and stockholders. It is the duty of the receiver to use all reasonable dispatch for the accomplishment of these objects. Reasonable dispatch is, under such circumstances, an integral part of any proper administration of the trust assumed by the receiver. Where a receiver of an insolvent corporation is clothed with the duty of winding up its affairs with all convenient speed, sound policy requires that partial or intermediate allowances of compensation for the receiver should be materially less than the worth of the services rendered by the receiver prior to the making of such allowances; and that the final allowance, made at the close of the receivership, should be so adjusted that the receiver will have fair and just compensation for his services as a whole, notwithstanding the inadequacy of the partial or intermediate allowances considered by themselves. Such a practice inures to the benefit of creditors and stockholders through its tendency to secure a reasonably prompt settlement of the affairs of the corporation, and a consequent curtailment of the expenses of the receivership. It is also calculated to insure the allowance to the receiver of such, and only such, compensation as shall be fair and just, as well to the creditors and stockholders as to the receiver. It may be that a receiver, after rendering valuable services in part performance of his duty, may be guilty of such laches or wrongdoing, to the prejudice of those interested in the estate under administration, as to forfeit in whole or in part the compensation which he would otherwise receive for those services. Upon the facts disclosed in the case, which it is unnecessary to recapitulate in this opinion, or at this time, and in view of the foregoing considerations, a present allowance of \$10,000 to the petitioner on account of its services as receiver seems to the court reasonable and proper, and accordingly will be made. The final adjustment of compensation at the close of the receivership will afford ample opportunity for the allowance to the petitioner of any excess of value of its services heretofore rendered over the amount of compensation now allowed.

It appears from the evidence adduced in support of the petition, and from the statements of counsel at the hearing, that the only unadjusted compensation for the services of counsel for the receiver is such as may be due to J. H. Hoffecker, Jr., Esq., and Robert D. Maxwell, Esq., the two principal attorneys of the receiver; and it has been suggested on the part of the receiver that the sum of \$10,000 be allowed at this time on account of their services heretofore rendered. Considerations of a nature kindred to those already discussed, affecting the quantum of partial or intermediate allowances to receivers for their own compensation, are applicable to such allowances for the services of counsel for the receiver. The court can perceive no reason why the affairs of the dental company should not be completely closed, final allowances made, and the receiver discharged, by a very early day. In the meantime an allowance of \$7,000 to the petitioner by way of joint compensation for the above-named counsel

on account of their past services connected with the receivership, principal or ancillary, of that company, is all that would seem to be justified. Such an allowance will therefore be made, with the proviso, however, that any and all moneys heretofore received by the said two counsel, or either of them, from the receiver, on account of their or his compensation for services connected with or relating to the receivership, principal or ancillary, be credited upon such allowance, and that only the balance of the said sum of \$7,000 so allowed, after deducting all such credits, be paid to the said two counsel.

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CHICAGO, R. I. & P. RY. CO. v. POUNDS.

(Circuit Court of Appeals, Eighth Circuit. August 2, 1897.)

No. 784.

RAILROADS—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE.

A deaf man who drives upon a railroad crossing, where the view is unobstructed, when a freight train is approaching at a high rate of speed, in plain sight, and so close that it cannot be stopped in time to prevent a collision, cannot recover for injuries sustained thereby.

In Error to the United States Court of Appeals in the Indian Territory.

M. A. Low and W. F. Evans, for plaintiff in error.

W. B. Johnson and A. C. Cruce, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This case comes on a writ of error from the United States court of appeals in the Indian Territory. The suit was brought by C. S. Pounds, the defendant in error, against the Chicago, Rock Island & Pacific Railway Company, the plaintiff in error, to recover damages which he had sustained by coming into collision with one of the defendant's freight trains at a road crossing in the town of Marlow, in the Indian Territory. The plaintiff below recovered a judgment in the trial court against the railway company for the sum of \$5,050. On an appeal taken by the defendant company to the United States court of appeals in the Indian Territory, the judgment of the trial court was affirmed. 35 S. W. 249. The case was brought to this court by the defendant company, and the question for decision is whether the trial court should have given a peremptory instruction to the jury to return a verdict for the defendant. The judges of the United States court of appeals in the Indian Territory were divided in opinion on this question; one of them voting in the affirmative, and the others in the negative.

The material facts in the case, concerning which there was no controversy, are as follows: On the day of the accident the plaintiff drove into the town of Marlow, from the south, with a load of wood, over a road which ran parallel with the defendant's railroad track, on the east side thereof, and in close proximity thereto, for a considerable distance south of the station. As the plaintiff entered the

town, driving along said road, a through freight train was also approaching the town from the south over said track, at the rate of about 25 or 30 miles per hour. At a point within the town the road in question turned at right angles to the west, and crossed the defendant's railroad track about 100 feet south of the station. When the plaintiff, following this road, reached the crossing, his vehicle was struck by the freight train. For some time before the plaintiff reached the point where the road turned west, and until he went upon the track at the crossing, the freight train was in plain view, and might have been seen by him at any moment, had he simply turned his head and looked down the track. When the plaintiff turned west to cross the track, the train was still from 300 to 500 yards south of the crossing, and was seen by every one in his vicinity who looked in the direction from which the train was approaching. No one who witnessed the accident saw the plaintiff look in the direction from which the train was coming at any time, either before or after he reached the turn in the road; but the plaintiff testified, in substance, that as he reached the turn he looked south, but did not see any train, and could not see down the track more than 300 yards, to a place where a fence approached the track, because the wind raised a cloud of dust which obstructed his view beyond that point. He did not claim that he again looked down the track before driving upon the crossing, although it was about 50 feet from the turn to the crossing. The usual crossing signals were given by the engineer when the train was about one-half of a mile south of the station, and as soon as the engineer discovered that the plaintiff was about to drive over the crossing he sounded the stock-alarm whistle, and made strenuous efforts to stop the train by applying the air brakes and the driving brakes. The plaintiff had been deaf for some years, and did not hear these signals. The accident occurred in broad daylight.

In view of these undisputed facts, we think that the trial court should have directed the jury to return a verdict for the defendant. The doctrine is too well settled to admit of controversy that a person is guilty of culpable negligence if he walks or drives upon a railroad crossing in close proximity to an approaching train, which is in plain view, and might have been seen for a considerable distance before he reached the track. The precautions which a person traveling upon the highway must take when he approaches a railroad crossing are so well defined that it is no longer the province of a jury to decide whether such person was guilty of negligence, in those cases where it is obvious that in approaching the crossing he failed to look up and down the track as he might have done, and thereby avoided all risk of injury. It is universally conceded that a person omits not only a reasonable but a necessary precaution when he drives upon a railroad crossing, at a place where his view is unobstructed, without looking along the track with sufficient care to ascertain with certainty whether a train is coming from either direction. A railroad track is in itself a warning of danger, because trains may be expected to pass at any moment. Therefore the courts have repeatedly declared that a person is, as a matter of law, guilty of contributory negligence if he drives upon a crossing without making a vigilant use of

his senses of sight and of hearing. If either of these senses is impaired, or for any reason cannot be exercised to advantage, he ought to be more vigilant in the use of the other. *Railroad Co. v. Houston*, 95 U. S. 697; *Pyle v. Clark* (decided by this court at the present term) 25 C. C. A. 190, 79 Fed. 744, and cases there cited; *Salter v. Railroad Co.*, 75 N. Y. 273; *Railroad Co. v. Miller*, 25 Mich. 274; *Railway Co. v. Garcia*, 75 Tex. 583, 13 S. W. 223; *Beach*, Contrib. Neg. § 63. The application of these principles to the case at bar demonstrates, we think, that it should have been withdrawn from the jury, inasmuch as it was clearly shown, and was not denied, that for more than 200 yards before the plaintiff reached the railroad crossing he was in plain view of the approaching train, and could have seen it by making the slightest exertion. It is suggested, however, that there was evidence tending to show that at one point, about 50 feet from the crossing, the plaintiff did glance down the track, but failed to see the train, and that such testimony rendered it necessary for the jury to determine whether he exercised due care. There are two answers to this suggestion: In the first place, it seems physically impossible that the plaintiff could have looked at the point indicated without seeing the train, which was then in plain view, and was seen by every one else in his vicinity. *Artz v. Railroad Co.*, 34 Iowa, 153, 159. In the second place, if we concede that he did look, and did not see the train because there was a cloud of dust about 300 yards south of the station, then, under such circumstances, he should have looked again before venturing on the crossing, or into such close proximity thereto as to render his situation dangerous. It is further suggested that there was testimony tending to show that the speed of the train was slightly checked at a point some distance south of the station, and somewhat increased as it approached the crossing, about the time that the stock alarm was sounded; and on the strength of such testimony it is urged that the jury were at liberty to find that the train might have been stopped in time to avoid the injury, after the engineer became aware that the plaintiff did not hear or see the train, and was about to pass over the track. With reference to this contention, it is only necessary to say that we find no testimony in the record which tends to show that the trainmen could have stopped the train after they became aware that the plaintiff intended to drive over the crossing in advance of the train. No witness expressed the opinion that it was possible to have stopped the train after the engineer became aware that there was danger of a collision. There was abundant testimony that every effort was made by the engineer to stop it at the time last indicated, and that such efforts failed, while there was no evidence to the contrary. Moreover, as the train was in plain view of the plaintiff at every moment before he drove upon the track, and as it was incumbent upon him to keep a diligent outlook until he was safely over the crossing, the injury which he sustained would, in any event, appear to be due in part to his own negligence. For these reasons the judgment of the United States court in the Indian Territory and the judgment of the United States court of appeals in the Indian Territory are each reversed, and the cause is remanded to the former court for a new trial.

**BRICKELL et al. v. FARRELL et al.**

(Circuit Court, E. D. Missouri, E. D. June 24, 1897.)

No. 4,024.

**1. TAX SALES—SUIT BY STATE TO ENFORCE TAX LIEN—AFFIDAVIT FOR NOTICE BY PUBLICATION.**

The attorney employed, pursuant to Rev. St. Mo. 1889, § 7681, to prosecute a suit by the state to enforce its lien for delinquent taxes, is the proper person to make the affidavit prerequisite to an order for publication of notice to unknown owners.

**2. PROCESS—PUBLICATION—UNKNOWN PARTIES.**

Under Rev. St. Mo. 1889, § 2027, which authorizes an order for publication, as to unknown parties interested in the subject-matter, to be made where the petition alleges that there are such persons, and describes "the interest of such persons, and how derived," allegations that the unknown heirs of a person named are the owners of certain real estate by descent sufficiently describe their interest, and how it was derived.

**3. TAX SALES—SUIT TO ENFORCE TAX LIEN—BENEFICIARIES IN TRUST DEED AS PARTIES.**

Where there has been no foreclosure nor sale under a trust deed of real estate, a suit to enforce the state's lien for taxes on the property is properly brought against the heirs of the deceased grantor, and not against the beneficiaries in the deed.

**4. ESTOPPEL—ACCEPTING SURPLUS PROCEEDS OF TAX SALE—RECOVERY OF DAMAGES.**

Where the owners of land sold under a judgment for delinquent taxes, who were served by publication, afterwards instituted a suit to set aside the deed so made, which suit was decided adversely to them, and they subsequently accepted a surplus realized on said sale, and also recovered damages for the loss of said real estate, against a lessee who had negligently failed to pay the taxes for which the sale was made, such owners are conclusively estopped from denying the validity of the title of the grantee in such tax deed.

This was an action in ejectment, brought by Mary A. Brickell and others against James P. Farrell and others.

Henry T. Kent and James W. Williams, for plaintiffs.

Daniel Dillon and E. P. Johnson, for defendants.

**ADAMS, District Judge.** This is an action in ejectment. The plaintiffs sue for the possession of a lot of ground in the city of St. Louis, Mo., and in their proof deraign title from one Mary O. Smith, whose first conveyance of the lot in controversy was by deed dated December 10, 1842. The defendants deny the validity of plaintiffs' title, and set up in their abstract and at the trial two other defenses: First. That the general taxes on the lot in controversy became delinquent for the year 1879; that on September 7, 1881, suit was instituted in the circuit court of St. Louis by the state of Missouri at the relation of the then collector of the revenue, N. C. Hudson, against the unknown heirs of Mary O. Smith, for the enforcement of the state's lien for such delinquent taxes; that an order of publication was duly made and executed, subjecting such unknown heirs to the result of the suit; that such proceedings were had in said suit that on March 22, 1882, judgment was rendered against said lot for the delinquent taxes, and the same was duly sold by deed of the sheriff of St. Louis, bearing date April 23, 1882, to Mary Wing, from whom

the defendants derain their title. And, second, that if the deed to Mary Wing was void, the plaintiffs, by receiving the surplus proceeds of sale of said lot, are now estopped from denying its validity. In my view of the case, it is not necessary to examine into or pass upon the various objections made to the several deeds introduced in evidence by plaintiffs, in making proof of their title from Mary O. Smith. The case may be more readily disposed of by a consideration of the merits of the title of the defendants under the proceeding referred to for the enforcement of the state's lien for taxes. This proceeding will hereafter, for the sake of brevity, be referred to as the "State's Suit." The statutes of Missouri in force in the year 1881 (section 7682, Rev. St. 1889) provide, in substance, that the owners of property sought to be charged with the lien for delinquent taxes must be made parties to the suit, and, as construed by the supreme court of Missouri in repeated cases, and notably in *Blevins v. Smith*, 104 Mo. 583, 16 S. W. 213, the word "owner," as used in the statutes relating to the collection of delinquent taxes, does not necessarily mean the actual owner. If the person or persons who, according to the land records, appear to be the owners, are made parties to the litigation, it is sufficient, even though there may be unrecorded title in other persons. There is also a provision found in the same section of the statute for suits against "nonresident unknown parties, or other owners on whom service cannot be had by ordinary summons." In the prosecution of suits against such parties the general laws of the state relating to practice and proceedings in civil cases are applicable. Section 2027, Rev. St. 1889, provides as follows:

"If any person shall allege in his petition under oath that there are, or that he verily believes there are persons interested in the subject matter of the petition, whose names he cannot insert therein because they are unknown to him, and shall describe the interest of such persons and how derived, so far as his knowledge extends, the court, or the judge, or clerk thereof in vacation, shall make an order as in case of non-residents, reciting moreover all allegations in relation to the interest of such unknown parties."

At the institution of the state's suit against the unknown heirs of Mary O. Smith, in the year 1881, it appears to have been known to the state of Missouri that Mary O. Smith herself was dead. She is shown by the proof to have died in 1868. A deed on record in the recorder's office of the city of St. Louis, bearing date December 10, 1842, conveyed the lot of ground in controversy from Mary O. Smith to one Cheatham, subject to a certain trust therein mentioned, concerning which the supreme court of Missouri, in the case of *Fontaine v. Lumber Co.*, 109 Mo. 63, 18 S. W. 1149, says:

"The question, therefore, is whether this deed to Cheatham in trust conveyed away the whole title of Mary O. Smith, or whether it is simply an instrument in the nature of a mortgage. It is clearly nothing more than a conveyance to Cheatham, in trust, to protect and save harmless the sureties on the bond given by Mary O. Smith, binding her at her death to pay over \$4,315 to the heirs of her deceased husband, N. P. Smith. The deed of trust is, in substance and effect, a mortgage. There never has been a sale under it, nor has it ever been foreclosed."

Whatever effect this deed might have had on the title to the lot in 1881, it, and all remedy under it, are now effectually barred by limitation. *Sess. Acts Mo. 1891*, p. 184. This deed of trust, it ap-



pears, was the only conveyance of record affecting Mary O. Smith's title at the time the state's suit for taxes was instituted. The state's suit, therefore, was against the owners of the lot,—that is to say, against the heirs of the deceased last owner of record,—and affected the title to the lot as against everybody except the beneficiaries in the last mentioned, or Cheatham, deed of trust, who were not made parties, but whose rights are now barred by limitation, as already seen. Accordingly, the entire title must now be held to have been subject to the state's suit, and the only question for consideration is whether the proceedings in the suit, and the deed to Mary Wing thereunder, are void. Plaintiffs' attorneys attack these proceedings and this deed on three grounds: First, because the affidavit on which the order of publication issued against the unknown heirs of Mary O. Smith was made by the attorney in charge of the suit, and not by the collector himself; second, because the interest of the unknown heirs was not properly described, or how the same was derived was not properly stated; and, third, because Mary O. Smith had no title to the lot in controversy at the time of her death, and the suit should have been against the heirs of Henry P. Brickell and the devisees of Lemuel Smith, Jr., deceased, who were the beneficiaries in the Cheatham deed of trust. Answering the first of these objections, it is to be observed that section 7681, Rev. St. Mo. 1889, was in force at the time the state's suit was instituted. According to its provisions, the collector had the power, with the approval of the mayor of the city of St. Louis, to employ such attorneys as he deemed necessary for the purpose of prosecuting suits for delinquent taxes. It appears that, pursuant to the provisions of this statute, the collector had employed M. B. Jonas, Esq. This attorney signed the petition against the unknown heirs of Mary O. Smith, and in it averred as follows:

"Plaintiff further states that said unknown heirs of Mary O. Smith, the defendants herein, are the owners of the following described real estate, situate, lying, and being within the said city of St. Louis, to wit. [Here the lot of ground is described.] Plaintiff further says that said heirs of Mary O. Smith are the owners of said real estate by descent, and that their names and places of residence cannot be inserted herein, because they are unknown to the plaintiff."

This petition, at least all thereof relating to the unknown heirs of Mary O. Smith, is sworn to by M. B. Jonas. I cannot agree to the first criticism of the defendants' counsel. The state's suit was brought for the purpose of enforcing the state's lien for taxes. The state was the beneficial party plaintiff. In its corporate capacity, it was unable to make an affidavit. Therefore the provisions of section 2027, supra, which require a plaintiff to make the affidavit, could not be literally complied with. The state of Missouri cannot make affidavits. Necessarily, therefore, in such cases some agent must do it for her. All corporations, of whatsoever kind, act through agents. The statute (section 7681, supra) makes provision for an attorney to prosecute suits for delinquent taxes. This attorney is the state's agent, and, in my opinion, is the proper person to make the affidavit concerning nonresidents, or concerning unknown heirs, prerequisite to orders of publication. He is the one who must, of necessity make, or be entirely familiar with, the investigation con-

cerning the title to the land, and the interest of the parties therein. I therefore hold that the affidavit as to the unknown heirs of Mary O. Smith, and their residence, was properly made by M. B. Jonas, the attorney for the state in the suit brought against them, and the fact that such affidavit was not made by the collector, N. C. Hudson, or any person other than M. B. Jonas, does not vitiate the proceedings.

Again, it is argued that the affidavit made to secure the order of publication was not sufficient, in that it did not properly describe the interest of the unknown heirs of Mary O. Smith in and to the lot in controversy, or state how it was derived, as required by section 2027, *supra*. This section requires, as a condition precedent to making an order of publication against unknown persons in a suit for the enforcement of the state's lien for taxes, that the petition shall, under oath, "describe the interest of such persons, and how derived," so far as the knowledge of the plaintiff extends. A reference to the petition and affidavit, already sufficiently quoted, shows that the unknown heirs of Mary O. Smith are declared to be the owners of the real estate by descent. To say that one is "the owner" of land is, in my opinion, a comprehensive and sufficient description of his interest. It means, unless modified by averment, that he is the owner in fee simple. By way of designating the derivation of the title, as is required by the statute, *supra*, it is said, in effect, that the unknown persons against whom the order of publication was asked were the heirs of Mary O. Smith, and that they inherited their title to the lot in controversy from Mary O. Smith. The language of the affidavit is equivalent to saying that the defendants were unknown persons, who have acquired the land in controversy by descent from Mary O. Smith. I think this is a sufficient statement of how their interest was derived. The plaintiffs in this case are, I believe, the grandchildren of Mary O. Smith. Notwithstanding this fact, they derived their title to the lot in controversy, and in 1881, at the time of the institution of the state's suit, held the same, as an inheritance from Mary O. Smith, whether they were children or grandchildren.

Defendants next contend that Mary O. Smith had no title to said lot at the time of her death, and that, therefore, an order of publication against her unknown heirs did not affect the title of anybody. Defendants' counsel contend that the title at that time was vested in Henry Brickell, and the devisees of Lemuel Smith, Jr., deceased, who were the beneficiaries named in the deed of Mary O. Smith to C. Cheatham, of date December 10, 1842, already referred to. I have already considered this conveyance in direct connection with another phase of this case, and deem it sufficient now to say that I agree with the construction placed upon it by the supreme court of Missouri in the case of *Fontaine v. Lumber Co.*, *supra*, and I accordingly hold that the legal title to the lot in question stood in Mary O. Smith at the time of her death, subject only to the obligations in the nature of a mortgage, now barred by limitation; and that the title of her heirs, the plaintiffs in this suit, was effectually destroyed by the proceedings in the state's suit for taxes.

There is another ground on which I believe this case can be satisfactorily disposed of, and that is that the plaintiffs are estopped from

denying the validity of the defendants' title under the Mary Wing purchase. The facts are as follows: About a year after the judgment and sale of the property to Mary Wing, to wit, on the 5th day of April, 1883, the plaintiffs in this case, who now are, and then were, the heirs of Mary O. Smith, deceased, together with two or three other parties, who claimed some interest in it, instituted a suit in the circuit court of the city of St. Louis against Nathaniel C. Hudson, Mary Wing, and others, to set aside, cancel, and annul the deed to Mary Wing, and the judgment on which the same was founded, for reasons which were particularly set forth in the petition. E. T. Farrish, Esq., appeared as plaintiffs' attorney. This last-mentioned suit took the usual course of cases in court. The pleadings were perfected, depositions of parties taken, and finally, on April 8, 1884, the same was brought on for trial, submitted to the court, and decided adversely to the plaintiffs. The bill was dismissed. Afterwards the same was taken by appeal to the supreme court of Missouri, where, on November 14, 1887, the judgment of the circuit court was affirmed. See *Fontaine v. Hudson*, 93 Mo. 62, 5 S. W. 692. Apparently acquiescing in the judgment of the supreme court against them, the plaintiffs in that suit, who are also plaintiffs in this, by their attorney, E. T. Farrish, Esq., on the 19th day of November, 1887, instituted a suit in the circuit court of the city of St. Louis against the Schulenberg & Boeckler Lumber Company, charging, in substance, that said company, in the year 1879, was in possession of the lot of ground in controversy under and subject to an obligation on its part to pay the taxes assessed thereon as a part of the rental thereof; that said lumber company failed to pay such taxes, and as a result thereof the back-tax suit already considered was instituted for the enforcement of the state's lien for taxes for the year 1879, and that such suit resulted in a judgment against the property; that execution was issued thereon, and the property was sold to Mary Wing, and that by reason thereof (employing the language of the petition in the case against the lumber company) "said property, and the right and title of the plaintiffs thereto, became wholly lost to them." Such proceedings were had in this last-mentioned suit that on October 7, 1889, judgment was rendered for plaintiffs. Afterwards an appeal was duly prosecuted to the supreme court of Missouri, where, on March 14, 1892, the judgment of the lower court was affirmed. See *Fontaine v. Lumber Co.*, 109 Mo. 55, 18 S. W. 1147. It appears that at the sale of the lot in controversy under execution in the state's suit for taxes, Mary Wing's bid was in excess of the amount of the judgment and costs in the case in the sum of \$400.46, which, when paid, became a surplus in the hands of the sheriff, belonging to the owners of the lot. Twenty-one days after the affirmation of the judgment in the case instituted by the plaintiffs against N. C. Hudson, Mary Wing, et al., to set aside the tax deed to Mary Wing, to wit, on December 5, 1887, E. T. Farrish, Esq., attorney for the plaintiffs in that case, and who had just then instituted the suit for them against the Schulenberg & Boeckler Lumber Company, received such surplus from the sheriff, and appropriated it to the payment of attorney's fees earned and costs incurred in the several law-

suits already referred to. If it be true that Mr. Farrish was authorized to represent the plaintiffs in receiving this surplus proceeds of sale, such receipt by him will undoubtedly estop the plaintiffs from now asserting the invalidity either of the Mary Wing deed or any of the proceedings in the state suit for taxes which resulted in the deed. Even though these proceedings are void, and obnoxious to all the objections urged by the plaintiffs, yet, if plaintiffs elected to take the surplus proceeds of the sale, they are clearly estopped from asserting their invalidity. *Nanson v. Jacob*, 93 Mo. 331, 6 S. W. 246; *Boogher v. Frazier*, 99 Mo. 325, 12 S. W. 885; *Clyburn v. McLaughlin*, 106 Mo. 521, 17 S. W. 692; *Fischer v. Siekmann*, 125 Mo. 180, 28 S. W. 435.

It is contended by the plaintiffs that they knew nothing about the suit of the state against the unknown heirs of Mary O. Smith, or the suit of themselves (with others) against N. C. Hudson, Mary Wing, et al., to set aside the Wing deed, or the suit of themselves against the *Schulenberg & Boeckler Lumber Company* to recover damages for failure to pay taxes, by reason of which they lost the title to the lot in controversy, and that they knew nothing about Mr. Farrish representing them as attorney in these various suits, and especially knew nothing of his acts or conduct in receiving the surplus proceeds of sale arising from the Wing purchase. This contention, on its face, appears to me unreasonable. It involves the possibility of quite a large number of persons having their names employed in several suits, involving important litigation extending through the trial and appellate courts of Missouri for a period of more than 10 years, without their knowledge; it involves the stultification of a well-known and reputable attorney who appeared for them by name, and claimed to represent them in all these suits; it involves the improbability that the plaintiffs, who must be presumed to know that their land in St. Louis was subject to taxation, and to be sold for nonpayment of taxes, would deliberately abstain from giving it any attention, and thereby subject it to forfeiture. The plaintiff *Lamar Fontaine*, in testifying in this case, says he knew nothing about any of these suits; did not know that the lot had been sold for taxes; did not know of the suit brought by himself and the heirs of Mary O. Smith against Hudson and Wing, or of the suit brought by him and them against the *Schulenberg & Boeckler Lumber Company*. He further testifies that he had for a long time represented his wife and his sister-in-law, who are the other plaintiffs, in taking care of the lot in controversy. Under the circumstances, this ignorance of his seems improbable, and especially so in the light of the following facts in evidence: He gave his deposition in the two suits last referred to, and in the one against Hudson and Mary Wing testified, in the deposition given on the 12th day of May, 1884, as follows:

"I did not know that the lease of *Schulenberg & Boeckler* had expired, or that said lot 98 of the city of St. Louis had ever been sold for taxes, as I never received any notification that any taxes were due, or to be paid by the same."

If I had nothing else upon which to base my decision, I would certainly hold that no person could give such testimony as this, and not be aware, at the time he gave it, of the facts which he says he

did not know before then. At any rate, a very stupid man would then, at the latest, have been put upon such inquiry in relation to the facts as to bind himself with a knowledge of everything which inquiry might impart. Again, I am not credulous enough to believe that an intelligent man, like Lamar Fontaine, would be giving his deposition in cases without knowing what the cases related to. It is claimed by him that a law firm of Hudson & Hudson, in Mississippi, were his and his wife's general attorneys, and that Mr. Farrish got his directions from them, and that they (Lamar Fontaine and wife) knew nothing about Mr. Farrish's employment for them, or nothing about his conduct of the cases for them. This possibly may be so in fact, but I cannot believe it. In depositions taken in this case, E. T. Farrish is referred to as a person who might have certain deeds of the plaintiffs that were called for. Why might E. T. Farrish have certain deeds that belonged to the plaintiffs? The plaintiffs' theory does not answer this question. Again, it is a significant fact that Lamar Fontaine alone testified to his want of knowledge of the receipt by Mr. Farrish of the surplus proceeds of the back-tax sale. It is to be noted in connection with this testimony that he is not a party in interest except the husband of one of the plaintiffs, who is one of the heirs of Mary O. Smith. The two women—his wife and sister-in-law, who are the real plaintiffs—do not testify at all in relation to any ignorance concerning the former litigation with respect to this property, or any ignorance with respect to Mr. Farrish's general authority, or his conduct in receiving this surplus money. The issue of estoppel was fairly presented by the defendants, and the plaintiffs must be presumed to have known it by the abstract of title filed in this case pursuant to the rules of this court. This abstract was filed April 8, 1897, and one of the links in defendants' title, as stated in the abstract, is as follows: "Testimony showing that plaintiffs took the surplus proceeds of the sale to Mary Wing, in cause 2,767, thereby ratifying and intending to ratify said sale, and to estop themselves from longer claiming title to said lot." It is incomprehensible to me that with such an issue presented, the meritorious plaintiffs in this case would not at least have testified that they personally knew nothing about this former litigation, or Mr. Farrish's acts, if such were the facts. Mr. Farrish himself, in his testimony, states that he represented Lamar Fontaine, Lemuella S. Fontaine, and Mary A. Brickell, who are the plaintiffs in this case, in the litigation in the circuit court of the city of St. Louis, already referred to. Notwithstanding the fact that he appears to have gotten his authority from the general attorneys of the plaintiffs in Mississippi, as shown by his cross-examination, I think it would be unfair and unjust to relieve the plaintiffs in this case from the effect of the conduct and acts of their ostensible (and I think real) representative. I shall therefore hold that the receipt by Mr. Farrish of the \$400.46 surplus proceeds of the sale of the lot in question from the sheriff of the city of St. Louis, and the appropriation of the money for the benefit of the plaintiffs in this case, under the circumstances as disclosed in the evidence, estop the plaintiffs from denying the validity of the sale to Mary Wing. This will dispose of the case.

A great many objections were made at the trial to documentary evidence offered by the plaintiffs. Some deeds were objected to because of alleged uncertain and inadequate descriptions. Others were objected to because of alleged noncompliance with the requirements of the statutes of Missouri concerning acknowledgments. It may be that some of these objections were well taken. I have not considered them, because I dispose of the case, as already seen, more readily by a consideration of the outstanding title in the grantees of Mary Wing. Again, I notice that the answer of the defendants consists of a general denial only. If objection had been taken during the trial to the introduction of any evidence on the issue of estoppel, such objection might possibly have been sustained. But as the parties have taken a broad view of the case, introduced much evidence on both sides, on the issue of estoppel, and elaborately argued the same, the court takes them at their word, and passes upon this issue, among others. Certain it is that the plaintiffs were advised of the purpose of the defendants to rely upon estoppel as a defense, from the abstract of title, which distinctly pointed to evidence on that issue as a part of the defendants' chain of title. Both plaintiffs and defendants seemed to rely upon adverse possession as a factor in their titles. But I am of the opinion that neither party proved any such adverse possession. The case must therefore stand on the record title and on estoppel in pais as already stated, and judgment must be for the defendants.

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CLUNE v. MADDEN et al.

(Circuit Court of Appeals, Seventh Circuit. July 1, 1897.)

No. 368.

1. PATENTS—INVENTIONS—FOLDING BEDS.

There is no invention in the use of a pin or hook on the back of a folding bed-lounge to automatically engage with an eye on the headrest when the two sections are folded together, thus holding the back firmly in place. 77 Fed. 205, affirmed.

2. SAME.

The Clune patent, No. 394,957, for a folding bed-lounge, is void as to the first claim for want of invention. 77 Fed. 205, affirmed.

Appeal from the Circuit Court of the United States for the District of Indiana.

This was a suit in equity by Michael Clune against Thomas Madden, Edward J. O'Reilly, and Christopher A. O'Connor for alleged infringement of a patent relating to folding bed-lounges. The circuit court held the patent invalid, and dismissed the bill. 77 Fed. 205. The complainant has appealed.

Chester Bradford, for appellant.

V. H. Lockwood, for appellees.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. This appeal is from a decree dismissing a bill for infringement of the first claim of patent No. 394,957, issued

December 25, 1888, to Michael Clune, of Indianapolis, Ind. The claim reads as follows:

"A bed-lounge composed of two folding sections hinged together, the lower one having a back rigidly attached thereto, and a fastening for the same, composed of two parts, one of which is fixed at or near the top of the inside of the head of the upper folding section, the other at or near the top of the back, so that when the lounge is folded up the two parts will engage with each other, securing the headrest of the frame to the back, substantially as shown and described."

As stated in the opinion of the court below (77 Fed. 205):

"The only novelty in the combination claimed by the complainant consists in the use of an eye on the headrest of the lounge, and a pin or hook on the back, so placed that the two will automatically engage when the two sections are folded together, and thus hold the back firmly in place."

We quite agree with that court that, in view of the common and diversified uses of similar devices for the accomplishment of similar purposes, it is impossible to find patentable novelty in the invention. The Braun patent, No. 177,462, shows a similar construction, designed to secure the upper head section on the lower stationary section, or, in other words, to prevent horizontal movement of the upper section; but it needed no power of invention to put into the groove in the back of Braun's lounge a pin, which should engage automatically with a hook, or spring catch, or other device there used, for the further purpose of holding the back firmly; especially since devices composed of two parts, but which were engaged by hand, had been used theretofore upon lounges for the same purpose. The decree is therefore affirmed.

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#### UNIVERSAL WINDING CO. v. WILLIMANTIC LINEN CO.

(Circuit Court, D. Connecticut. July 27, 1897.)

##### 1. PATENTS—PRESUMPTIONS FROM GRANT—ANTICIPATION.

The grant of a patent raises a presumption of operativeness and of some utility, and, if prior, though it be a mere paper patent, it may anticipate, if it sufficiently discloses the principle of the alleged invention. Such a patent may also be relevant, to show that another device does not infringe such an invention, but is merely an improvement on the prior patent, or an application thereof to a new purpose.

##### 2. SAME—CONSTRUCTION OF CLAIMS—INFRINGEMENT—MACHINE FOR WINDING COPS.

The Wardwell patent, No. 480,157, for a machine for winding cops, construed, and *held* not infringed as to claims 1, 2, 3, and 4; and *held*, also, that claim 4 cannot be sustained in view of the prior state of the art, if so construed as to embrace unequal cone-pulleys as an equivalent of the means therein claimed.

##### 3. SAME—ANTICIPATION—MUSEUM EXHIBITS.

Proof that long prior to the granting of a patent for a cop wound in a particular way several specimens of cops wound, so far as can be seen from their exterior layers, in exactly the same way, had been imported from the Fiji Islands, and kept on exhibition in the National Museum at Washington, and were known to many persons prior to the date of the alleged invention, is sufficient evidence of anticipation.

##### 4. SAME—PROCESS AND PRODUCT PATENT COPS.

The Wardwell patents, Nos. 480,158 and 486,745, for a method of winding cops, and for a cop, respectively, are void for want of patentable novelty.

This was a suit in equity by the Universal Winding Company against the Willimantic Linen Company for alleged infringement of three patents covering, respectively, a machine for winding cops, a method of winding cops, and a cop wound according to such method. On final hearing.

Dickerson & Brown, for complainant.

Mitchell, Bartlett & Brownell, for defendant.

TOWNSEND, District Judge. Complainant herein, at final hearing on the usual bill and answer, prays for an injunction and accounting by reason of the alleged infringement of patents No. 480,157, for an apparatus for winding cops, No. 480,158, for a method of winding cops, both dated August 2, 1892, and of No. 486,745, for a cop, dated November 22, 1892, all of said patents having been issued to Joseph R. Leeson as assignee of Simon W. Wardwell, Jr., and duly assigned to this complainant. A cop—the subject-matter to which these patents relate—consists generally of a ball or roll of thread or rope wound in helixes or spirals on a spindle. In most of the ordinary and earlier cops the successive coils of thread were irregularly wound upon the spindle, without any attempt to arrange the threads parallel to each other. The alleged invention of the cop patent No. 486,745 is therein stated by the patentee to consist in a “cop wound \* \* \* so as to have greater uniformity, density, and compactness, and so as to facilitate the unwinding, and prevent tangling, and insuring other advantages.” Before discussing the patents in suit, it will be necessary to make some general statements concerning the art. Irrespective of certain alleged anticipations, to be hereafter considered, there were found in the prior art various forms of cops, distinguished by differences in pitch or angle of the thread and the relations of the threads to each other. Certain of these winds are designated ball wind, cross wind, surface wind, Z wind, spool wind, Spach wind, etc. It is unnecessary to state their distinguishing characteristics. A special form of wind of the prior art is known as the half wind or crescent wind. The wind of the patents in suit is known as the V wind or Wardwell wind. In each of these two winds the thread is ordinarily wound on a core, without any head at the ends, from one end of the core to the other in the direction of a helix or spiral, and is then so reversed as to form a knuckle or abrupt bend, and wound in a reverse helix or spiral to that end of the core where the winding was started. In each the thread is again reversed to form another such knuckle, and, passing across the first helix, is wound in a second helix, parallel and generally close to the first. In each, complete parallel layers will thus be laid one above the other, forming a solid cylindrical cop alike throughout. The complainant differentiates the crescent wind as follows: (1) It is a modified form of ball wind. (2) It is not wound in spirals, but in the form of a semi-circle or semiellipse, and will therefore in its first courses slip towards the middle of the core, and therefore the successive threads may not lie parallel to each other. (3) The threads will never cross each other intermediate of the ends of the core, and hence do not in-



terlock, and therefore the cop will not be cylindrical in form, and will easily lose its shape. (4) This wind is adapted only for winding extremely small cops. Whether the crescent wind is a modified ball wind is immaterial except in so far as under such designation complainant's expert includes it in the foregoing criticisms of ball winds in general. The criticisms of ball winds generally do not necessarily apply to the crescent wind. The essential feature of the Wardwell wind, as claimed by complainant, is that the wind is spiral in the sense that "the thread turns more than half a revolution in extending from one end of the cop to the other" at such an angle "that when the complete spiral is laid—that is, when the thread has been wound to the end of the cop and has returned—the angle of delivery and return shall be such that the thread will remain where it is put." The distinguishing feature of the crescent wind, as claimed by complainant, is that the thread, although wound in substantially the same direction as in the Wardwell wind, is not spirally wound, because the angle is such that the thread turns only one-half a revolution in extending from one end of the cop to the other, and therefore "the turns of the thread constitute substantially circles or rings at an angle to the axis of the holder or tube." This difference of angle is claimed as Wardwell's invention and as the basis of the alleged differences in results. The line between what is thus included within and excluded from the Wardwell invention may be shown by the following statements:

Complainant's expert Foster first says:

"I was wrong in stating that a complete revolution was necessary to lay such a spiral or helix as is required by the patent."

Later he says:

"Q. Then, if I understand you, everything else being alike in machine, in wind and in cop, a spiral crossing in five-eighths of a turn would not exclude the Leeson invention, a spiral crossing in four-eighths of a turn would exclude the Leeson invention, and as to a spiral crossing in nine-sixteenths of a turn you are somewhat in doubt? A. So far as I can tell without seeing the cop, a spiral crossing in five-eighths would have reverse spirals interlocking between the ends, and would embody this feature of the Wardwell invention. I do not recognize that there would be a spiral at all at four-eighths of a turn, because that would be a one-half turn, winding what I have pointed out as a ball-wind cop. As regards a spiral of nine-sixteenths, if the thread was fine, and the cop relatively long, this would embody this feature of the Wardwell wind if it caused the reverse spirals to be interlocked between their ends."

Wardwell himself, in the patents in suit, does not claim that any exact pitch or number of turns in the spiral constitutes his invention. On the contrary, he says, in No. 486,745:

"I make use of a tube of any suitable character, and I wind the thread, X, thereon, with any suitable number of turns or coils to the length of the tube."

In No. 480,157 he says:

"As a result of this operation, the reversal of the movement of the guide takes place, not upon the completion of a rotation (or fraction or multiple of a rotation) of the holder, but after, and only after, the holder has reached the point in its revolution beyond that necessary to complete such movement, and beyond that point which it occupied at the time the guide was reversed upon its preceding reversal of movement, so that the thread held by the guide is not

started on its return winding until it has been laid over onto the outer side of the previous coil."

The crescent cops do not necessarily slip towards the middle of the core. Whether such a wind thus slips depends upon the angle at which it is wound, and the abruptness of the reversal, and may also depend upon whether the core is rough or smooth. The crescent cops, as originally wound, were small sewing-machine cops, and in them the thread did not cross intermediate the end of the core. This point will be discussed hereafter. Wardwell created the cop in the method and by the machine which are the subjects of the three patents in suit. Complainant claims that therein he first disclosed the angle at which threads could be so laid on a cylinder that they would lie parallel to, and generally in contact with, each other, without slipping, and would cross each other and interlock intermediate the ends, and the method and means for accomplishing said result, and that he was the first inventor thereof. Patent No. 480,157 covers Wardwell's machine for winding the cops of No. 486,745 by the method of No. 480,158. The claims alleged to be infringed are the following:

"(1) In a cop-winding machine, the combination, with a revolving holder for supporting the cop, and with a reciprocating thread guide supported to move in a course parallel to the axis of the cop, of mechanisms adapted to give the holder an increment of movement at each rotation, for the purposes set forth. (2) A machine for winding cops, provided with a holder for the cop, and a reciprocating guide for the thread supported to move parallel to the axis of the cop and outward as the cop increases in diameter, and means for turning the holder and for reciprocating the guide, and mechanisms for varying the relative movements of the holder and guide to insure an increment of movement to the holder at each rotation, whereby each reversal of the movement of the guide takes place after the holder has turned beyond the point of its revolution occupied at the moment of the preceding reversal of the movement of the guide, substantially as set forth. (3) A machine for winding cops, provided with a revolving holder for supporting the cops, and with a reciprocating thread-guide and means for varying the relative movements of the thread-holder and guide, constructed substantially as described, to secure each successive reversal of the movement of the guide at the outer end of the holder after, and only after, the holder in its rotation has reached a point beyond the point reached at the moment of the preceding reversal of the movement of the guide at such end substantially as set forth. (4) In a cop-winding machine, the combination of a guide and means for imparting to the same a regular reciprocating movement parallel to the cop, and a holder for supporting the cop, and means for imparting to the same a progressive rotary movement at each rotation, substantially as set forth."

The patented machine comprises a cop holder in the form of a cylinder, and a thread-guide operating close to said cylinder, and so arranged that as the cylinder rotates the thread-guide reciprocates in a line parallel to the axis of the cylinder, and so that, as the thread is brought to either end of the cop thus formed, each succeeding coil shall be abruptly bent at a point just beyond the bend in the last preceding coil, and shall form such a bend or knuckle beyond the preceding one that the thread shall thereafter lie parallel to the thread of the preceding coil, and preferably in direct contact therewith. The patentee does not limit himself to any precise means for accomplishing this result. He describes and illustrates, however, a machine mounted on a frame provided with a cylinder supported be

tween two disks on conical hubs, which turn loosely on a shaft driven at a uniform speed by suitable gear and pinion devices.

In view of the conclusion reached that the Wardwell machine involved invention, it is unnecessary to describe the mechanical details, fully stated in said specification, whereby the desired result may be accomplished. For the purposes of this case it suffices to say that by means of a cross-arm carrying a lever attached to a pivoted spring pawl and a rock shaft carrying arms, one of which is connected with said lever, while the other extends over a cam upon a sleeve turning on said driven shaft, not only do one of said disks and said pawl revolve with said shaft, but the revolution of said sleeve is retarded, and one of the arms is released, and throws said pawl forward. The patentee says:

"The pawl therefore derives its motion from two sources: First, from the rotation of the shaft and the cross-arm carried by the shaft, which would give to the pawl and to the disk the same rate of rotation as the shaft; second, from the cam which imparts to the pawl a progressive or forward traveling movement in excess of that derived from the shaft, so that at the completion of each revolution of the shaft, or upon each successive reversal of the movement of the guide, the pawl and the disk will have traveled not only the extent of a complete revolution (or a complete fraction or multiplication of a revolution), but will also have moved an additional extent corresponding to the movement imparted to the pawl by the cam."

The patentee also suggests that provision might be made for a momentary action of the cam, instead of the described gradual and constant movement, by the substitution of a radial pin for said cam.

The features claimed as distinctive of the Wardwell machine are: (1) The rotatable cop holder; (2) the reciprocating thread-guide, so operated as to be constantly close to the cop; (3) the means for so rotating the cop holder relatively to the thread-guide that the thread will be deposited in helixes or spirals of such a pitch that they will not slip on the cop holder; "(4) a cam, or equivalent device, reciprocating the thread-guide, and so constructed that it will, at the ends of the reciprocations of the thread-guide, reverse it with that celerity which is necessary for producing the knuckles or abrupt bends;" "(5) means for producing an increment of motion, whereby the thread, about the time of being reversed, will be made to cross a portion of a previously laid angle or abrupt bend, in order that after reversal the thread may be alongside of and parallel to the latter." The defendant's machine differs materially in construction from complainant's machine. It has necessarily a revolving cop holder, a reciprocating thread-guide, and devices for so adapting their movements to each other as to produce the same result as is produced by complainant's machine. But the contention of the defendant is that its machine does not infringe, because it produces this result without the use of the essential elements claimed in complainant's patent. The complainant's patent, it will be remembered, describes two sources from which the pawl derives its motion, and by means of which an increment of motion is imparted to the thread-guide at each succeeding reversal of movement. The result of this twofold speed relationship, says the patentee, "is the same whether the rotating cop gains sufficient at each revolution to carry the thread being laid

across that previously laid at the end of the cop or the cop rotates uniformly without gain, and the guide, as it reaches each end of the cop, is held for a longer time than is necessary for the cop to complete its rotation." In the defendant's machine, the desired result is secured by regulating the speed relation between the spindle and thread-guide by means of the relative proportions of the wheels which connect these two shafts to the driving shaft. The defendant, therefore, does not use the means for the throw or increment of motion described in complainant's patent. But the patentee states that he does not confine himself to the described or preferable construction; and he describes an ingeniously devised apparatus, which produces an improvement upon prior products.

The issue, therefore, may be fairly reduced to the scope of the claims in suit. For the purposes of this discussion it will be necessary to further examine the prior art in general, and the prior experiments of Wardwell and others, and their results. The Morrison use in 1879, if sufficiently proved, would invalidate all of complainant's patents. But it would be unsafe to find anticipation upon such doubtful evidence. Morrison, who swears that he made an anticipating machine, was an employé of defendant. He built only one original machine. It is not proven that the model is in certain essential parts like the original. The persons for whom it was made abandoned its use, and took a license under the three patents in suit. Patent No. 146,210, granted January 6, 1874, to Samuel K. Smith, shows a spooling machine adjusted for winding threads close together with coils inclined so as to cross each other back and forth the length of the spool. The patent does not show such an apparatus as that of the patent in suit for forming the knuckles or bends, nor would it, without modification, make a cop, such as is made by the machine of the patent in suit. But, in connection with its spindle and thread-guide, it shows, for giving to said guide its reciprocating motion, a grooved cam, an arm projecting into said groove, and two conical pulleys with a belt for connecting the cop-turning mechanism with the guide-reciprocating mechanism, like those shown in defendant's machine. It is a paper patent. If it does not anticipate complainant's machine, it bears directly, if not decisively, upon the question of infringement. The grant of a patent raises a presumption of operativeness, and of some utility, and, if prior, even though it be a mere paper patent, it may anticipate, provided it sufficiently discloses the principle of the alleged invention. Such prior patent may be relevant also to show that another device is not an infringement of such alleged invention, but is merely an improvement upon the prior patent, or an application thereof to a new purpose. *Pickering v. McCullough*, 104 U. S. 319; *Dashiell v. Grosvenor*, 162 U. S. 432, 16 Sup. Ct. 805. In this case the conclusion reached upon all the evidence is that the defendant's device is such an improvement or adaptation of the art existing at the date of the invention in suit. Neither the drawings nor the description of the Heal British patent discloses the whole machine. The drawings further fail to show the speed relation between guide and spindle, and the thread is delivered from the guide at a considerable distance from the cop. But earlier pat-

ents, and notably the British patent to James Combe of 1867, show the thread-guide bearing directly upon the cop, and this Combe patent illustrates the positive connection of thread-guide with a cam, and of uniform pitch rotating uniformly with respect to the rotation of the spindle, which are characteristic features of defendant's machine. Neither the Heal nor the Combe patent shows the variation of rotary movement of spindle or the added movement or increment of motion covered by the patent in suit. Neither of these machines, therefore, is like the patent in suit. But no reason is shown why a skilled mechanic could not supply from the then prior art the necessary connection between spindle and thread-guide shaft, or provide means for actual contact between the the thread-guide and spindle at the point of delivery of the thread; and complainant's expert does not deny that such modifications could be made, or assert that it would require inventive skill to make them, or that, if made, they would constitute invention.

A mass of testimony has been introduced as to the date of Wardwell's conception and reduction to practice of his invention. The evidence as to Wardwell's experiments shows that, having been engaged by complainant to make a machine to wind cops, he conceived first the idea of a method of so laying parallel threads and crossing them at an abrupt angle as to make a compact cop; that later he devised two machines, the earlier of which, on account of its complicated construction, was abandoned in an incomplete state, and the later of which was finished in October, 1891. This machine embodies the construction shown and claimed in the patent in suit. Wardwell's earlier drawings and both machines show the means employed for securing the increment of motion which is a characteristic of his patent. As to this he testifies as follows:

"Q. State whether or not there is any difference in the result of the two arrangements of the pawl shown in the drawing and in the patent. A. The results were substantially the same. The pawl operated to draw or push the cop in excess of the motion imparted by its shaft."

It is significant, as bearing upon the claim as to Wardwell's conception of a V wind as distinguished from a ball wind, that in complainant's exhibit "Wardwell's first machine drawing," the sharp angles of the cam are such as to suggest a ball wind, and the cop therein illustrated is a ball-wind cop. The defendant has been experimenting in cops since 1889. It claims that prior to October, 1890, the superintendent of its factory showed the Merrick cop, to be hereafter considered, to one of its machinists,—Palmer,—and asked him whether he could wind such a cop, and that in October, 1890, he did make such a cop by the use of a crude device having a flyer or thread guide on an angle with the spindle; that he continued these experiments, and in 1891 produced one machine, and in 1892 another improved machine, which made the cop of the patent in suit. It is unnecessary to discuss the bearing of this evidence upon the claim of anticipation. It is relevant, however, as throwing light upon the problem presented, and the means adopted by different persons for its solution.

If now we again compare the patented machine with defendant's machine, we shall find in the former the completed practical devel-

opment of the original conception of the increment of motion to secure the parallelism of threads, the knuckle or abrupt bend, and the other advantages of the Wardwell cop. We shall find the embodiment of this invention—First, in the rotating cam shaft operating the thread-guide through its cam and the cop shaft, and said cop shaft rotating the spindle; second, in two distinct speed relationships, one determined by the relation between the cop-shaft and cam-shaft, the other the “relative movement of the tube holder with respect to its shaft or the thread-guide cam with respect to its shaft, which causes an increment of motion.” The patentee’s description of this increment of motion or added movement by means of motion from two sources has already been given in connection with the description of his machine. In the defendant’s machine the spindle is fastened to and revolved by its shaft, and the thread-guide is caused to reciprocate by a cam on another shaft. They are operated by means of belts, pulleys, and gears connected with the main driving shaft. Two slightly tapering pulleys with a belt provide means for adjusting the relative proportions of the speed relations between the thread-guide and the spindle. This may be accomplished by shifting the belt lengthwise of the pulleys. The differences of construction material in this connection are the loosely turning spindle holders of complainant’s machine, while that of the defendant is fast to its shaft, and the arrangement of belts and tapering pulleys in defendant’s machine, to produce the result accomplished in complainant’s machine by means of arms, pawl, cam, and geared wheel, as already described.

The question at issue is therefore reduced to one of infringement depending upon the scope of the invention. The first, second, and third claims do not cover defendant’s machine. Its mechanism is not “adapted to give the holder an increment of movement at each rotation,” nor does it provide means “whereby each reversal of the movement of the guide takes place after the holder has turned beyond the point of its revolution occupied at the moment of its preceding reversal of the movement of the guide, substantially as set forth.” But the fourth claim is much broader in its terms, and covers “the combination of a guide and means for imparting to the same a regular reciprocating movement parallel to the cop, and a holder for supporting the cop, and means for imparting to the same a progressive rotary movement at each rotation, substantially as set forth.” And it will be remembered that the patentee has, in his specification, stated that he does not limit himself to the preferable forms therein described, and that “different means may be employed for causing such a relative variation of movement as will effect the above-described result.” The defendant contends that its device for regulating the relative motion between thread-guide and cop was old and well known in this and allied arts at the date of the patent in suit. The prior art already considered has shown a single-speed relationship, but has not been discussed in connection with defendant’s construction for regulating the relation of speed. Patent No. 245,373, granted to J. Hargraves in 1881, and one of the British patents granted to J. C. & F. A. Spach in 1885, show cone pulleys and a belt thereon, so arranged that, by shifting it lengthwise of said pulleys, the relative

speeds of the two driving shafts may be adjusted. Further evidence as to defendant's construction is found in the so-called "Merrick use." Upon final hearing, defendant, in connection with proof of an alleged prior use by the Merrick Thread Company of certain machines and methods claimed to anticipate or limit the patents in suit, introduced two machines known respectively as "Merrick 1890 machine" and "Merrick 1890 machine showing stopover attachment." The latter machine was so provided with unequal pulleys that, if prior use and knowledge thereof in the United States had been sufficiently proved, it would have been fatal to the claims of the machine patent in suit, if not as an anticipation, at least as showing noninfringement, as will be hereafter explained. The proof of priority, however, was not so limited. Upon motion of defendant the case was opened to permit the introduction of further testimony on this point. Much of the new evidence on each side is indefinite and contradictory. Some of the witnesses are manifestly prejudiced, even if their recollection is accurate. The whole evidence as to the Merrick use, taken together, shows that in 1890, and prior to the date of Wardwell's machine invention, the Merrick Thread Company used in its mill at Holyoke, Mass., machines for making half-wind cops by the use of conical pulleys of equal size. They embody substantially the defendant's construction, except that in the latter the conical pulleys are unequal. The great preponderance of evidence is to the effect that the "Merrick 1890 machine, with stopover attachment," hereafter to be called the "Second Merrick 1890 Machine," with conical pulleys of unequal size, also was practically operated in said mill in 1890. Green, the alleged inventor, Baker, the draftsman, Prentice, a superintendent, and Hopkins, president and acting manager of the Merrick Company, interested but intelligent witnesses, testify more or less satisfactorily on this point. Of the witnesses for complainant on the reopening, Cressy is ignorant, untrustworthy, and contradicted by Mary Lipps, and by his former testimony. Mary Lipps testified that cones of different sizes might have been used on one or more of these twenty-six machines without her knowing it. Lizzie McDowell's memory is defective; and Hollingsworth is intelligent, but manifestly hostile to defendant. He testifies that he was a draftsman for the Merrick Company until December 24, 1890, and that he never saw a machine with unequal pulleys while in their employ. While, however, the weight of evidence as to said second Merrick machine so strongly preponderates in favor of defendant, I am not satisfied that it establishes the claim of anticipation beyond a reasonable doubt. It does, however, furnish substantial support to the view herein taken upon the question of infringement.

It will be recalled that the prior Hargraves patent showed a machine with conical pulleys of unequal size, capable of producing on cards a wind like that of the second Merrick 1890 machine. Furthermore, defendant's witness Green, in the first claim of an abandoned application for a patent sworn to on September 13, 1890, used the following language:

"(1) In a cop-winding machine, the combination with a winding shaft carrying a mandrel and a cone pulley of a secondary shaft carrying a cam and a

cone pulley, a vibratory thread-guiding lever operatively engaging the cam on said secondary shaft, and a belt connection between the cone pulleys on said shafts, whereby the speed of said secondary shaft can be varied at will, substantially as and for the purposes described."

This statement seems to be sufficiently comprehensive to embrace either equal or unequal conical pulleys. In view of the Spach and Hargraves patents, it would be unnecessary to specify that the relative speed relations could be varied by unequal pulleys, for that was already old. In this abandoned application reference is also made to the method of making cops of varying width, and to winding the threads upon a tube in uniform layers. The issue of infringement herein may be most directly presented by a comparison of the confessedly prior first Merrick 1890 machine with the second Merrick 1890 machine, the prior use of which is denied by complainant. In the former, by the use of a belt at the center of the equal pulleys, a half-wind cop is produced. Defendant contends that the adjusting devices of the first Merrick 1890 machine are so constructed that by shifting the belt a V wind may be produced thereon. This the complainant denies. I have not been able to satisfactorily determine this question. In the second Merrick 1890 machine the cone pulleys are of unequal size, thus providing a speed relationship which makes the V wind between the ends of the cop. This is the sole material difference in the construction and resultant operation of the two machines. It may be assumed that this modification was subsequent to the alleged Wardwell invention. It is proved that it made what is known as the "Wardwell cop." Whether the V wind, crossing intermediate the ends, was an essential feature of Wardwell's invention is very doubtful. He illustrated the half wind in his drawings. The term "V wind" is not found in any of the patents. Such crossing is mentioned only once in the three specifications. Most of the claims cover only the crossings at the end of the cop, and no reference is made to the V wind in the expert testimony in chief; and in his later patent, No. 533,934, Wardwell himself, in disclosing certain improvements on his alleged inventions already patented, illustrates and describes, not the V wind or full wind, but a wind of quarter turns, thus forcibly suggesting that his conception of his invention was not in the length, but in the character, of the spirals. It may be further assumed that it would have involved invention to thus change the size and resultant operation of the pulleys, if such change had not been in the prior art. But in the Hargraves patent, already considered, are found such pulleys used to produce said V wind upon a flat card. The considerations already suggested show that, if Wardwell's fourth claim could be so construed as to embrace all means for imparting progressive rotary movement to the cop at each rotation, it would be void by reason of lack of patentable novelty. If so construed as to include only the device described in the specification, it is not infringed.

If it be conceded, on behalf of complainant, that the proof of the alleged Morrison use is insufficient; that the date of the Morrison second machine, which contains the Wardwell invention, is not proved beyond a reasonable doubt; that the abandoned application of Green failed to describe how the variation of speeds included in the first



claim was to be accomplished, and failed to show a mode of forming cops of any desired width by varying the throw of the guide lever; that the Crescent and Merrick 1890 cops were irregular in their first layers because of slippage; that the evidence as to the Wardwell Columbian Exposition cops is immaterial; that the first Merrick 1890 machine, with equal cones, could not be commercially operated so as to produce the Wardwell cop; and that the priority of the second Merrick 1890 machine has not been conclusively shown, and, as stated by complainant's counsel that, "if anything is clear under all these patents it is that they are drawn to monopolize a cop, a method and a machine involving layers of winding uniform throughout from the innermost to the outermost, and as to every characteristic except size. It is equally clear that these results were set forth in the specification, and illustrated in the drawings as due to the laying of a helix substantially more than a half turn; or, in other words, substantially more than half way around a cop, and, hence, of such a character that, when reversed, there would be a crossing of the thread and a tying down of the helixes intermediate the ends of the cop,"—the issue between the parties would be practically embraced in the following statements in the closing brief of complainant's counsel:

"Defendant's contention that the substitution of unequal cones bearing a certain relation to each other, for equal cones in 'Defendant's Exhibit Merrick 1890 Machine' would have resulted in the production of a cop of the one wind or V wind type, has already been discussed. If no other change had been necessary for a successful machine, that would have been sufficient to confer patentability, for only the eighth turn of an adjusting screw distinguished the Rice telephone from Bell's, and yet Rice's was held to be absolutely immaterial. The suggestion that the unequal cones were found in Hargraves' patent, No. 245,373, \* \* \* is immaterial, because in the Hargraves patent they were in a different combination, as will be seen from the discussion of that patent in our original brief."

That the substitution of unequal cones does produce the Wardwell cop is proved. Such unequal cones, however, were already known and used for an analogous purpose in the art of winding spools.

Assuming, further, the correctness of complainant's contention as to the V wind, and the material difference between the Wardwell cop and the earlier Merrick cop is in the intermediate crossings of the threads. The angle required to avoid slippage is a mere matter of mechanical experiment and adjustment. The fundamental law of the operation of the two machines is the provision of means for definite speed relations between the tube shaft and guide shaft, and for such changes therein "as to allow one to gain or lose on the other at each revolution by as much as the thickness of the threads to be wound." In order to extend the operation of this fundamental law to a V wind crossing intermediate the ends, Wardwell devised the special means for securing the increment of motion already explained, while defendant, or Merrick, applied the unequal cone pulleys of the prior art. The conclusion reached upon the whole case is, therefore, that the defendant does not infringe the first, second, and third claims of the machine patent, in suit, No. 480,157, because the defendant's device neither contains the combination of elements nor uses the second source of motion specifically claimed therein, and that it does not

infringe said fourth claim, because, in view of the state of the art, said claim cannot be sustained if so construed as to embrace unequal cone pulleys as an equivalent of the means therein claimed.

The foregoing discussion is relevant to the consideration of the other patents in suit. The characteristics of the patented cop have already been discussed. Its utility and commercial success and defendant's infringement are sufficiently proved.

In addition to the defense of lack of patentable novelty in view of the art, already considered, defendant further claims anticipation as matter of law by reason of the prior process patent and anticipation in fact by reason of certain museum exhibits. It is clear that the patented cop can be produced only by the patented method, and that the patented method cannot be followed without producing the patented cop. It is not necessary to determine the effect either of a prior patent for a product, or of a prior patent for a subsidiary improvement upon a later patent for a broad generic invention. In this case there was but a single invention involved, namely, the method of laying threads on a core in such relations to each other that a certain result is produced. It clearly falls within the first principle stated in *Underwood v. Gerber*, 37 Fed. 682, and affirmed in numerous later decisions. Here, as in that case, there was no invention in the later patent in view of the earlier patent. There it was held, as it must be here, that cases where the later patent was granted for an improvement upon the earlier one have no application. The defendant has introduced four rope or cord cops which correspond precisely in appearance with the patented cop. Two of these cops have been publicly exhibited in the National Museum at the city of Washington since 1884. The other two cops were similarly accessible to the public in the American Museum of National History at New York for more than two years prior to January 1, 1891. It is proved that all of these cops were known to various persons in the United States long prior to the patent in suit. The complainant has attempted to meet this evidence by proof that these rolls were made in the Fiji Islands, that they were used for decorative purposes at the museum, that the whole of said rolls could not be seen by the general public, and that they were neither sold nor used in the United States. I do not see how any of these facts, if admitted, militate against the proof that they were in the United States and known to persons other than the patentee in the United States prior to the date of the alleged invention. They were on public exhibition, where they could have been examined by visitors at any time. It is true that it does not appear, and cannot be certainly determined without further examination, whether the interior coils are wound in the same manner as the exterior ones. It may therefore be said that without such proof the museum cops do not anticipate the patented cop. But this evidence only serves to shift the defense from anticipation to a denial of patentable novelty, at least so far as the cop patent is concerned. Whether the process of winding was the same is immaterial in this connection. The completed product is identical in appearance, and such of said completed product as was known and open to inspection

shows every element of the cop patent precisely as claimed in the first, second, and third claims. In view of the utility of the patented cop, the manifest advantages resulting from its construction, and its success in the market, it may be assumed that Wardwell invented it. But "the statutes authorize the granting of patents only for such inventions as have not been known or used by others in this country, and not patented or described in any printed publication in this or any foreign country, before the applicant's embodiment of his own conception. It may be a hardship to meritorious inventors, who, at the expenditure of much time and thought, have hit upon some ingenious combination of mechanical devices, which, for aught they know, is entirely novel, to find that in some remote time and place some one else, of whom they never heard, has published to the world in a patent or a printed publication a full description of the very combination over which they have been puzzling, but in such cases the act none the less refuses them a patent." *New Departure Bell Co. v. Bevin Bros. Manuf'g Co.*, 19 C. C. A. 534, 73 Fed. 469. And because the expert testimony satisfactorily proves that the parts of the museum cops which are in suit so fully show their construction that any mechanic ordinarily skilled in the art could make the patented cops therefrom without invention, and because they appear to be, and would more naturally be, uniform throughout, I am constrained to find, whether they are or are not thus uniform, that there could be no creative conception and no patentable ingenuity or invention in a cop made up of layers arranged alike throughout in the pattern disclosed by the museum cops. It is significant in this connection that in the 123 pages of rebuttal testimony of the learned and skillful expert for complainant, Charles E. Foster, he nowhere denies the testimony of defendant's expert that a person skilled in the art could have supplied any supposed omission or arranged any supposed variations in the museum cops so as to make the cops of the patent. This patent is void by reason of lack of patentable novelty. In view of these circumstances, the additional defense against the process patent No. 480,158 on the ground that it covers merely the function of a machine, will not be discussed. The conclusion reached is that, in view of the state of the prior art, there was no patentable novelty in said process. Let a decree be entered dismissing the bill.

**FOLLETT v. TILLINGHAST.**

(Circuit Court, D. Washington, W. D. July 24, 1897.)

**REMOVAL OF CAUSES—NATIONAL BANK RECEIVERS.**

A receiver of an insolvent national bank, appointed by the comptroller of the currency, against whom an action is brought in a state court to recover less than \$2,000, has no right to remove the same to a federal court.

T. W. Hammond, for plaintiff.

Phillip Tillinghast, in pro. per.

**HANFORD**, District Judge. This is an action at law against a receiver of an insolvent national bank, appointed by the comptroller of the currency, to recover less than \$2,000. The plaintiff has moved to remand the case to the superior court of the state of Washington for Pierce county, in which it was commenced, on the ground that, as the amount involved is less than \$2,000, this court has no jurisdiction. As I read the statutes defining the jurisdiction of the United States circuit court, and the decisions of the supreme court, the only civil actions involving less than \$2,000 of which jurisdiction is given to United States circuit courts are cases in which the government of the United States, or an officer thereof in his official capacity, is plaintiff; suits against the United States; cases between parties claiming lands under grants from different states; cases under the laws of the United States relating to patents and trademarks; cases under the postal and revenue laws; cases under the interstate commerce law; and cases which are ancillary to other cases pending in the same courts. See 1 Supp. Rev. St. (2d Ed.) 611, note; *U. S. v. Sayward*, 160 U. S. 493-498, 16 Sup. Ct. 371; *White v. Ewing*, 159 U. S. 36-40, 15 Sup. Ct. 1018. This case does not belong in either of the classes enumerated. The right of removal to this court was claimed on the ground that as the action is against the receiver of a national bank, to reach funds in his official custody, it is a case arising under the laws of the United States, within the rule of the decision of the supreme court of the United States, in the *Railroad Removal Cases*, 115 U. S. 1-25, 5 Sup. Ct. 1113; but in the *Sayward Case*, cited above, the supreme court has made it plain that jurisdiction is not given on this ground, unless the amount or value in dispute exceeds \$2,000. The defendant is not an officer or agent of this court, and the case is not ancillary to any other case in this court. In *re Chetwood*, 165 U. S. 443-462, 17 Sup. Ct. 385; *Hallam v. Tillinghast*, 75 Fed. 849. Motion to remand granted.

**NORTHERN PAC. RY. CO. v. KURTZMAN**, County Treasurer.

(Circuit Court, D. Washington, S. D. August 16, 1897.)

**1. FEDERAL COURTS—JURISDICTION—EQUITY POWERS—ATTACK ON JUDGMENT OF STATE COURT.**

The federal courts have jurisdiction, and in the exercise of their general equity powers will grant relief, where the suit is a direct attack for the purpose of nullifying a judgment of a state court obtained by fraud or rendered without jurisdiction, and to enjoin a threatened sale of lands thereunder.

**2. EQUITY PLEADING—JUDGMENT FOR TAXES—THREATENED SALE.**

Where the facts alleged in the bill show that a judgment has been rendered in a state court against complainant's lands for taxes not assessed, and for which such lands were not liable to assessment, that the judgment was rendered by the court without substantial compliance with the statutory requirements to give it jurisdiction, and that his lands are about to be sold to satisfy such judgment, they are sufficient to entitle complainant to equitable relief.

This was a suit in equity by the Northern Pacific Railway Company against Fred Kurtzman, treasurer of Franklin county, Wash., to remove a cloud on the title to certain lands, and to enjoin the sale thereof for taxes under a judgment of a state court, which judgment is alleged to be null and void. The cause was heard on demurrer to the complaint.

F. M. Dudley, for complainant.

P. C. Ellsworth, for defendant.

HANFORD, District Judge. The object of this suit is to remove a cloud from the complainant's title to certain lands included in its grant from the United States, and for an injunction to restrain the officers of Franklin county from making sale of said lands for delinquent taxes. The material allegations of the bill of complaint are as follows: On August 28, 1893, upon the application of the treasurer of Franklin county, a judgment in form as authorized by section 105, c. 124, Laws Wash. 1893, was rendered in the superior court of Franklin county for the amount of taxes, assessments, interest, penalties, and costs claimed to have been levied upon the lands in question for the year 1890, and on November 28 and 29, 1893, said lands were offered for sale, pursuant to said judgment, and, there being no bidder therefor, they were declared forfeited to the county. On May 14, 1894, the superior court of Franklin county, upon application of the county treasurer, rendered two similar judgments,—one for taxes, assessments, costs, penalties, and interest claimed to have been levied upon said lands for the year 1890, being the same taxes, assessments, etc., for which said lands had been declared forfeited to the county in 1893; and the other for the taxes, assessments, costs, and interest claimed for the year 1891. The defendant, claiming to be authorized by said judgment to sell said lands for said taxes, assessments, etc., advertised a notice of sale, and was about to sell said lands pursuant to said notice, when this suit was commenced. The bill of complaint avers that the several judgments rendered by the superior court are void for want of jurisdiction of the court to render the same, and specifies with particularity noncompliance with the statutes of the state prescribing the manner of giving notice of proceedings initiated to obtain judgments against real estate for delinquent taxes; and also specifies failure on the part of the county treasurer to make an affidavit required by section 104 of the revenue law of the state of Washington of 1893 to be appended to a list of the lands against which the proceedings are taken; and also specifies that there was no order authorizing the proceedings made by the board of county commissioners, such order by the board of county commis-

sioners being made essential by section 136 of the revenue law of 1893; and also specifies that the judgments are void because the amount of taxes upon the various parcels of land is not set forth; and also specifies that the judgments are void for the reason that the lands were not assessed in the years 1890 and 1891, respectively. The bill also sets forth irregularities in the levy of taxes by the board of county commissioners. The bill also avers that by force of section 3, c. 85, of the Laws of Washington of 1891, the taxes for the year 1890 ceased to be a lien upon the lands on the 1st day of November, 1892, and that the judgment rendered for said taxes of 1890 is void for the reason that the proceedings were not initiated until after the lien had expired by the statute of limitations herein cited. The bill also avers that the lands were not subject to taxation at the time of making the assessment for the years 1890 and 1891, the title being then vested in the government of the United States. The relief prayed for is that the court will, by its decree, declare the sale heretofore made, and the various tax proceedings, to be null and void, and that the threatened sale of the lands may be enjoined. The defendant has appeared by counsel, and demurred to the bill, alleging as grounds for demurrer: First, that the court has no jurisdiction of the subject-matter of the cause; second, that the facts alleged are not sufficient to entitle the complainant to any relief in a court of equity.

In the argument, counsel for the defendant treated the case as one in which the primary object is to enjoin proceedings to enforce a decree rendered by the superior court of the state in and for Franklin county. I recognize the absolute correctness of the proposition that the federal courts are forbidden by express provisions in the laws enacted by congress to issue injunctions to stay proceedings in any court of a state, but that principle is not applicable where the suit in the federal court is a direct attack upon a judgment rendered in a state court for the purpose of nullifying such judgment, upon the ground that the same was obtained by fraud, or because the court in which such judgment appears of record had no jurisdiction to render the same. In the exercise of their general equity powers, the circuit courts of the United States have always been free to grant relief of this nature in cases coming within their jurisdiction. *Galpin v. Page*, 18 Wall. 351-375; *Pennoyer v. Neff*, 95 U. S. 714-748; *Arrow-smith v. Gleason*, 129 U. S. 86-101, 9 Sup. Ct. 237; *Marshall v. Holmes*, 141 U. S. 589-601, 12 Sup. Ct. 62. The bill of complaint attacks the judgment of the superior court on the ground that it acted without jurisdiction in rendering the judgments. The statute under which the court assumed to act prescribes the time and manner of giving notice of the proceedings. In all special statutory proceedings substantial compliance with the terms of the statute as to the notice is essential to jurisdiction, unless waived, and in this particular the averments of the bill are sufficient to show *prima facie* that the superior court did not have jurisdiction, for it specifically alleges noncompliance in particulars which are material, so that, taking the bill to be true, the judgments are void; therefore the bill is sufficient, as tested by a general demurrer. In the case of *De Forest*

v. Thompson, 40 Fed. 375-381, the defendants disputed the jurisdiction of the United States circuit court for the district of West Virginia on the ground that the sale of the land for nonpayment of taxes under the decree of a state court could not be brought into question except in the state court which rendered the decree for sale of the lands, and that the courts of the United States were without jurisdiction to pass upon the validity of the title to lands acquired by purchase at a sale pursuant to a decree of a state court. In the opinion of the court by Judge Jackson, and concurred in by Mr. Justice Harlan, the objection was overruled. The learned judge states the question and the ruling as follows:

"The question to be determined herein is whether the orders of the Boone circuit court, under which the lands in dispute were sold, are conclusive and binding upon the plaintiffs, when assailed in an independent collateral proceeding, and may be decided as well here as in a state court. The presence of such a question in the case does not affect the jurisdiction of this court, for it is competent for the federal court, in a controversy between citizens of different states, to pass upon the question whether the state court had jurisdiction or power to order the lands in question sold by the school commissioner. *Payne v. Hook*, 7 Wall. 425; *Johnson v. Waters*, 111 U. S. 640, 4 Sup. Ct. 619; *Arrowsmith v. Gleason*, 129 U. S. 86, 9 Sup. Ct. 237. In the last case referred to, the court said: 'These principles control the present case, which, although involving rights arising under judicial proceedings in another jurisdiction, is an original, independent suit for equitable relief between parties; such relief being grounded upon a new state of facts, disclosing not only imposition upon a court of justice, in procuring from it authority to sell an infant's lands, when there was no necessity therefor, but actual fraud in the exercise, from time to time, of the authority so obtained. As this case is within the equity jurisdiction of the circuit court, as defined by the constitution and laws of the United States, that court may, by its decree, lay hold of the parties, and compel them to do what, according to the principles of equity, they ought to do, thereby securing and establishing the rights of which the plaintiff is alleged to have been deprived by fraud and collusion.'"

From what appears in the complaint, the complainant has ample grounds for maintaining a suit in equity, and this court has jurisdiction of the subject-matter of the controversy and all of the parties. A general demurrer must be overruled whenever it appears by the record that all the facts exist upon which the jurisdiction of the court depends, and sufficient facts are shown to entitle the complainant to any part of the relief prayed for. The defendant's solicitor, in his argument, interposes an objection to maintenance of the suit, based upon a statute of this state, which, in effect, prohibits the bringing of suits of this nature, unless the complainant shall have first paid or tendered and deposited the amount of taxes justly due. I regard this statute as just and wise, and in accordance with the principles of equity. If there were no such statute, the court would require a complainant seeking relief in a court of equity to first do equity, and, if any sum appeared to be a valid tax upon the lands, the complainant would be required to pay or tender the same as a prerequisite to the bringing of a suit of this nature; but the court cannot apply this principle in ruling on a general demurrer. The difficulty in the way is in the fact that, taking the complaint to be true,—which must be done until its averments are put in issue by an answer,—there is no sum of money whatever due or properly charge-

able upon the lands for the taxes of 1890 and 1891. If the lands were not assessed, they are not subject to any taxes, and, if there is nothing chargeable, the complainant cannot pay or tender any amount as taxes justly due. The demurrer will be overruled.

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INDIANAPOLIS GAS CO. v. CITY OF INDIANAPOLIS.

(Circuit Court, D. Indiana. August 17, 1897.)

No. 9,493.

**1. JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION.**

A suit to restrain the enforcement of a city ordinance limiting charges for artificial gas, on the ground that it allows no profit to the gas company, and therefore deprives it of its property without due process of law, and denies it the equal protection of the laws, contrary to the fourteenth amendment, is one involving a federal question, and a federal court has jurisdiction, regardless of the citizenship of the parties.

**2. INJUNCTION—TEMPORARY RESTRAINING ORDER.**

Whether a temporary restraining order should be granted pending litigation in a suit for perpetual injunction depends largely on the character and extent of the inconvenience or injury that will result to the one party or the other from granting or refusing it. If the injury to the complainant, from its refusal, should his contention be sustained, would be practically irremediable, it will be granted on terms protecting the rights of the defendant.

F. Winter, for complainant.

James B. Curtis, for defendant.

BAKER, District Judge. 1. The defendant insists that this court cannot take cognizance of this cause, because both parties are citizens of this state. The same objection was made in the case of *Citizens' St. R. Co. v. City Ry. Co.*, 56 Fed. 746. This court overruled the objection so made, and asserted its jurisdiction on the ground that the suit was arising under the constitution of the United States. On appeal the supreme court (166 U. S. 557, 17 Sup. Ct. 653) affirmed the decision of this court, declaring that its jurisdiction was undoubted. These cases are conclusive of the jurisdiction of this court in the present case.

2. The supreme court has decided in many cases that there is a remedy in the courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of property of companies engaged in the carrying business, and especially may the courts of the United States treat such a question as a judicial one, and hold such act of legislation to be in conflict with the constitution of the United States, as depriving the companies of their property without due process of law, and as depriving them of the equal protection of the law. This principle extends to and protects all corporations and persons engaged, as is the complainant, in quasi public employments, whether the deprivation of their property without due process of law or the deprivation of the equal protection of the law arises from a legislative enactment or a municipal ordinance. In this case no denial has been made of the



truth of the facts set out in the bill of complaint, which is supported by affidavits. These facts must, therefore, for the purposes of the present application for a temporary restraining order, be taken to be true. Assuming all the facts so alleged to be true, in my opinion a case is presented which entitles the complainant to invoke the judgment of the court as to whether or not the ordinance in question will practically deprive it of its property without due process of law, and also deprive it of the equal protection of the law by compelling it to sell artificial gas without any return therefor in the way of profit. Whether a temporary restraining order ought to be granted pending such judicial inquiry will depend largely on the character and extent of the inconvenience or injury to the one party or the other from the granting or refusing of it. It is settled that upon a preliminary application for a temporary restraining order all that the judge should, as a general rule, require, is a case of probable right, and of probable danger to that right without the interference of the court, and its discretion should then be regulated by the balance of inconvenience or injury to the one party or the other. *New Memphis Gas & Light Co. v. City of Memphis*, 72 Fed. 952. It is evident, if the restraining order is refused, and the ordinance should eventually be held invalid, the injury resulting to the complainant from its enforcement would be practically irremediable, because of the number of its patrons and the small amount to be recovered from each. On the other hand, if a temporary restraining order is granted until the validity of the ordinance can be judicially determined, the rights of the city can be fully protected by requiring the complainant to give a bond that it will pay to the city the amount collected by it in excess of the rate prescribed by the ordinance in the event that such ordinance shall be adjudged to be valid. The court, therefore, will award a temporary restraining order pendente lite, and until the further order of the court, as prayed for in the bill of complaint, upon the complainant entering into an undertaking with sureties to the approval of the clerk of this court in substance as follows:

"We undertake and promise to pay to the city of Indianapolis a sum equal to two-fifths (2-5) of all sums of money collected or received by the Indianapolis Gas Company from or on account of the sale of artificial gas during the pendency of the temporary restraining order in the above-entitled cause, without any relief whatever from valuation or appraisal laws, and with attorney's fees, if the said Indianapolis Gas Company shall fail to obtain a perpetual injunction as prayed for in its bill of complaint."

The clerk will enter a temporary restraining order as prayed for in the bill of complaint upon the giving of the undertaking as above required.

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#### NATIONAL S. S. CO., Limited, v. TUGMAN.

(Circuit Court of Appeals, Second Circuit. July 21, 1897.)

#### 1. APPEAL AND ERROR—JUDGMENT AFTER REMOVAL.

Where removal of a cause to the United States circuit court is denied by a state court, and affirmed by the appellate and supreme courts of the state, but reversed, on appeal, by the supreme court of the United States,

and remanded to the state court, with directions to accept the bond tendered, and proceed no further in the case, a judgment in favor of the appellant for costs in the various courts, thereupon rendered by the state court, is a nullity.

**2. JUDGMENTS IN SAME CASE—FAILURE TO OFFSET COSTS—EQUITABLE RELIEF.**

Where removal of a cause has been denied by a state court, and it is carried by successive appeals to the supreme court of the United States, where it is reversed because removal was improperly denied, and the cause then proceeds in the United States circuit court, where, on final hearing, judgment is rendered against the appellant, he may, on motion, have his judgment for costs on reversal in the supreme court set off against or deducted from the amount of the recovery; and, if he fails to avail himself of this right, he cannot afterwards assert it in an equity proceeding.

**3. SET-OFF—INTEREST ON JUDGMENT.**

Where a judgment is properly allowed to be set off against another, the decree should include interest thereon at the legal rate from the date of the judgment.

Appeal from the Circuit Court of the United States for the Eastern District of New York.

John Chetwood (J. Parker Kirlin, of counsel), for appellant.  
Willard U. Taylor, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

**PER CURIAM.** The proposition need not be controverted that upon the appeal of the complainant, the defendant in the suit in the state court, the appellate courts had jurisdiction to review the judgment appealed from, and, if a reversal had been adjudged, would have been authorized to order a judgment for the costs of the suit in his favor. But there was no judgment of reversal, or for costs, by either of the appellate courts. Consequently, upon the reversal by the supreme court of the judgment in the state court (because the suit had been properly removed to the United States circuit court, and thereafter the state court was without power to proceed further), the only authority of the state court was such as was conferred by the mandate of the supreme court. That mandate directed the state court to "accept the bond tendered" by the complainant, and "proceed no further in the cause." 1 Sup. Ct. 58. Thereafter all that the state court could properly do in the cause was to make the mandate its judgment. No action upon its part could add to, any more than it could detract from, the force of the mandate. The mandate did not direct the state court to render any judgment for costs in favor of the complainant. The general clause remanding the cause to the state court "in order that such execution and further proceedings may be had in the cause, in conformity to the judgment and the decree of this court above stated, as, according to right and justice and the constitution and laws of the United States, ought to be had therein," was not intended to override or modify the specific injunction to "proceed no further in the cause," but was inserted merely to authorize the state court to carry the mandate into execution by appropriate entries in the records of the court. It follows that the judgment thereafter rendered by the state court, awarding the complainant the costs of the action therein, including the appeals, was a nullity.

After the reversal by the supreme court, when the cause proceeded in the United States circuit court to which it had originally been properly removed, and a recovery was adjudged against the complainant upon the merits, it was open to him to apply to have his judgment for the costs of the reversal awarded by the supreme court set off against or deducted from the amount of the recovery. It was a judgment in the same cause. Having neglected to avail himself of this right, he has no standing to assert it in the present action. A court of equity will not assist a party to a remedy of which he could have availed himself in a court of law without expense, delay, or inconvenience to his adversary, but which he has deliberately neglected to assert. By his inaction, then, and by subsequently filing the bill in the present cause, the complainant has delayed his adversary for more than five years in collecting a just demand.

The court below, as appears by the opinion of Judge Wheeler (67 Fed. 16), intended to permit the other judgment of the complainant to be set off against the judgment of the present defendant. The interest upon this judgment was incident to it, and necessarily a part of it; but in formulating the decree nothing was stated respecting interest. The omission may have been a clerical oversight, or may have been considered of no materiality. If the appellant desires, the decree will be modified so that the amount to be offset shall include interest at the legal rate from the date of the rendition of that judgment. The decree of the circuit court is otherwise affirmed, and the cause is remitted to that court to decree in conformity with this opinion, with costs of this appeal against the complainant.

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UNITED STATES RUBBER CO. et al. v. AMERICAN OAK LEATHER CO.

METROPOLITAN NAT. BANK v. SAME.

(Circuit Court of Appeals, Seventh Circuit. October 4, 1897.)

Nos. 387, 388.

**1. CIRCUIT COURTS OF APPEAL — APPEAL FROM INTERLOCUTORY DECREE — EXTENT OF REVIEW.**

On appeal from an interlocutory order, in determining whether an injunction was properly granted in connection with the appointment of a receiver, the propriety of the entire order or decree may be considered, notwithstanding the statutes do not provide for an appeal from an order appointing a receiver.

**2. FRAUDULENT BUSINESS ARRANGEMENT — INJUNCTION AND RECEIVER.**

Where appellants joined in an arrangement for extending additional credit to an insolvent business corporation, whose insolvency was not known, whereby it was enabled to continue in business without apparent change of management, in consideration of receiving from the debtor corporation judgment notes for their entire indebtedness and being permitted to substitute their own appointees for the secretary and a majority of the

directors of such corporation, in order to prevent other preferences, their appeal from an interlocutory order, made in a suit by a subsequent creditor of such corporation, appointing a receiver, enjoining transfers, and requiring appellants to surrender to the receiver property, money, books, papers, and accounts in their possession, will be dismissed as without merit.

Appeals from the Circuit Court of the United States for the Northern District of Illinois.

Edward S. Isham, Robert T. Lincoln, William G. Beale, and Pierrepont Isham, for appellants United States Rubber Co. and L. Candee & Co.

Thomas M. Hoyne, George A. Follansbee, John O'Connor, and Mitchell B. Follansbee, for appellant Metropolitan Nat. Bank.

Jacob Newman, George W. Northrup, and S. O. Levinson, for appellee American Oak Leather Co.

William J. Manning, for appellee Eagle Tanning Works.

S. P. McConnell and Horace Kent Tenney, for appellee Pfister-Vogel Leather Co.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. While two appeals have been docketed, they are from a single decree, and are presented on one record. It is not apparent why a joint appeal, perhaps with separate specifications of error for each appellant, would not have been proper; and, indeed, it is not clear that the appeals ought not each to be dismissed on the ground that without a severance neither appellant can prosecute an appeal to which the other is not a party.

The decree in question is an interlocutory one, made upon a motion for the appointment of a receiver. The hearing was had upon the bill, answers, affidavits, and an oral statement of counsel, which was received by consent. The essential facts, it is conceded, are stated correctly, except in unimportant particulars, in the opinion of the court below. 77 Fed. 671. The substance of the case is that in January, 1896, a business corporation called C. H. Fargo & Co., which had become embarrassed, and was in fact, though not known to be, absolutely insolvent, made an arrangement with two of its principal creditors, the United States Rubber Company and L. Candee & Co., designated in the briefs as the "Rubber Companies," whereby those companies gave additional credit by loans or indorsements to the amount of \$50,000, and for the entire indebtedness received of the debtor company judgment notes, and, in order to secure the Rubber Companies against the possibility of preference being given in any form to other creditors, the secretary and a majority of the directors of the debtor company resigned, and their places were filled with men employed in the office of the firm of lawyers who represented the Rubber Companies. Under this arrangement the business was kept going until the 1st of August, 1896, when the appellant the Metropolitan National Bank, already a creditor without security to the amount of \$40,000, was applied to for a further loan, and, having been informed of the arrangement with the Rubber Companies, consented to advance and did advance the further sum of \$10,000, taking judgment notes for the entire sum of

\$50,000, and at the same time agreed with the Rubber Companies that all sums realized upon their respective demands should be divided between them in proportions corresponding to the amounts due them. In pursuance of the agreement by which the bank consented, and was permitted, to come into the scheme for preference, the bank at once received a conveyance of property for one-half of its demand, and took judgment for the remainder, the Rubber Companies at the same time taking judgment on the notes executed to them; and thereupon, as was inevitable, the debtor company ceased to do business. Between January and August, 1896, while the business went on without apparent change of management or control, the appellee and others, in ignorance of the situation, gave credit in the usual course of business to C. H. Fargo & Co. in sums exceeding \$50,000, yet unpaid, and for which they received no security. The court, besides appointing a receiver, made orders enjoining transfers, and requiring the surrender to the receiver by the appellants of property, money, books, papers, and accounts in their possession or control.

That there is right of appeal from such a decree was decided by this court in *Andrews v. Pipe Works*, 18 U. S. App. 458, 10 C. C. A. 60, and 61 Fed. 782; and, while the statute of March 3, 1891, and the amendatory act of February 18, 1895, do not give an appeal from an order for the appointment of a receiver, it does not follow, as contended, that, in determining whether an injunction granted in connection with the appointment of a receiver was right, the propriety of the entire order or decree may not be considered. See *Lake St. El. R. Co. v. Farmers' Loan & Trust Co.*, 46 U. S. App. 630, 23 C. C. A. 448, and 77 Fed. 769. Indeed, it has been decided by the supreme court, and may now be regarded as settled, that the appeal allowed from an interlocutory order or decree is from the whole order or decree, and not from that part of it only which grants or continues or refuses an injunction. *Smith v. Iron Works*, 165 U. S. 518, 17 Sup. Ct. 407.

Upon the merits of the case numerous propositions have been advanced and argued at great length, but they ought not to be decided here before there has been a full and final hearing below. It is enough now to say that we approve the conclusion of the circuit court. It has been said with force that "the law always visits with stern disapproval any conduct, whether of individuals or corporations, which induces another party to give up something of value in a case in which he would have declined to do so if he had comprehended fully the true situation"; and in a court of equity or conscience it is impossible that a transaction like that presented should obtain sanction. It is incompatible with fair dealing in business and with good morals. They who evolved the scheme showed their appreciation of its true character when they avowed that without disclosing the situation it would be bad faith to ask further loans of the Metropolitan National Bank. It was no better to permit credit to be obtained of the appellee and others, who were kept in ignorance, when, if they had known the facts, they certainly would not have given credit. The position of the Metropolitan National Bank, as we understand it, is no better than that of the other appellants. It joined in consummating and took advantage of the objectionable scheme with full

knowledge of its character, and by advancing to the debtor an additional sum of \$10,000, without restriction upon the disposition thereof, increased to that extent the unlawful preference, and correspondingly enhanced the resulting injury to the appellee and other unsecured creditors. Whether the transaction should be regarded as an intentional wrong, or fraud in fact, as distinguished from fraud in law; whether it was a fraud against all creditors, or against those only who became creditors after the scheme was concocted; and whether the appellants should receive nothing until other creditors shall have been paid in full, or should share *pari passu* with other creditors in whatever distribution shall be made,—are questions which, if they arise, can be better considered and determined after a final hearing. This appeal is without merit, and is therefore dismissed.

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VANCE et al. v. ROYAL CLAY MANUF'G CO. et al.

(Circuit Court, N. D. Ohio, E. D. September 1, 1897.)

No. 5,532.

**1. NOVATION—SALE OF BONDS PLEDGED AS COLLATERAL—RIGHTS OF HOLDERS.**

Where bonds of a corporation, pledged as collateral security for debts of the corporation, are subsequently sold by the board of directors, the purchaser assuming and agreeing to pay such debts, the sale does not create a novation of the indebtedness, so as in any wise to affect the rights of the creditor to proceed against the corporation, or its property in the hands of a receiver.

**2. PRIORITY OF LIENS—LEVY BY SHERIFF—PROPERTY SURRENDERED TO RECEIVER.**

A sheriff levied an execution on the property of an insolvent corporation, and left it in custody of the president of the corporation, who agreed to hold it for him. Subsequently a receiver was appointed by the federal court, who took possession of the property in the absence of the custodian and the sheriff, and subsequently agreed with the sheriff that, if any lien attached under his levy, and it had not been lost by abandonment, it might be asserted in the federal court. *Held*, that the judgment creditors acquired a prior lien on the property thus levied on, which had not been lost by abandonment, and which would be enforced by the federal court.

Henry M. Russell, for plaintiffs.

D. H. Hollingsworth, for defendants.

TAFT, Circuit Judge. This cause, which was begun by a bill filed by certain stockholders in the Royal Clay Manufacturing Company to set aside a deed of assignment for the benefit of the creditors of all the property of the company, made without proper authority by the president and secretary to J. Ross Alexander, and which was, by intervening petitions and by cross bill, subsequently given the form of a suit in the nature of a creditors' bill, and of one to foreclose a real-estate mortgage upon the property, comes on now to be heard upon the report of the master appointed to take evidence and find the facts and report his conclusions of law as to the amount and priorities of the claims of creditors against the property of the Royal Clay Manufacturing Company. I have examined the record with considerable care, have read all the evidence before the master,

and, after a consideration of the briefs of counsel, have reached the conclusion that in all respects the report of the master should be confirmed. The attorney for the receivers who was appointed by the court to defend the interests of the stockholders against lien and other creditors has filed a number of exceptions to the findings and conclusions of the master. It may be well to state in a summary way the issues which he has made, and the conclusions which I have reached in regard to them. Many of the claims which the master has found to be valid against the company are based on cognovit notes given by the president, A. J. Baggs, and the secretary, H. W. Rhoads. It is objected on behalf of the stockholders that Baggs and Rhoads had no special authority given to them by the board of directors to contract such obligations, and that any one receiving such notes from the president and secretary was charged with knowledge that they did not bind the company. The master finds that the board of directors was fully advised of and fully approved of the action of Baggs and Rhoads in contracting the debts, and in giving evidence of them in the form of cognovit notes. The evidence satisfies me beyond a doubt that all the directors knew that Baggs was in the habit of giving such notes for debts of the corporation, and that he had general authority to contract debts for the company in this form.

The attorney for the stockholders disputes the finding of the master as to the indebtedness of the company to the Deposit Bank of Dennison, Ohio, or to its assignee, Bailey. It seems that neither Baggs nor Rhoads made entries of the items of this indebtedness upon the books of the Royal Clay Manufacturing Company, although all interested were cognizant of the existence of a large indebtedness at one time. There is no doubt that the indebtedness does appear upon the books of the bank, and the bank-deposit book was eight times balanced without objection by either Baggs or Rhoads, and each balance showed the indebtedness which is objected to. The complaint is rested rather on the looseness with which Baggs did business than on any defect in the evidence which the bank produces of the indebtedness.

W. B. Simpson was one of the directors of the Royal Clay Manufacturing Company and one of the executive committee of the board. He indorsed much of the company's paper. The bonds of the company to the amount of \$100,000 were issued by the company, but they were not all of them sold. Bonds to the par value of twenty-nine thousand dollars, with the acquiescence of the board of directors, were used by Simpson as collateral for debts of the company contracted with West Virginia banks and other creditors. These banks and other creditors now appear as holders of the bonds, and ask that their claims be allowed to the extent shown by them to be valid, and that the mortgage securing the bonds be foreclosed, so that they may derive the benefit to which they are entitled from their collateral. An exception is taken to the finding of the master in favor of these creditors on the ground that, after the bonds had been deposited as collateral with these creditors, and at the last meeting of the board of directors, these bonds, amounting to \$29,000, were sold

to W. B. Simpson in consideration of his assuming the debts which they were pledged to secure. Whether this was a valid action by the board of directors or not, taken, as it was, at a special meeting, of which two of the directors had no notice, is not, it seems to me, material. Such a contract with Simpson did not create a novation of the indebtedness as between the creditors who held the notes of the company and the bonds as collateral and the Royal Clay Manufacturing Company, however it might affect the relations of Simpson and the company to the indebtedness. Hence the exception to the allowance of these claims and their priority, so far as the collateral is concerned, is overruled.

The only other exception to which it is necessary to advert is that directed to the finding of the master that certain levies of execution in favor of the Citizens' National Bank of New Philadelphia, Ohio, and S. O'Donnell and others secure to the judgment claims of these execution creditors a priority in the distribution of the proceeds of the sale of the personal property upon which the executions were levied. It is first objected that the judgments were void because rendered on cognovit notes which Baggs, as president, had no authority to make. I have already approved the finding of the master that there was authority to make such notes derived from the course of business of the board of directors, and the acquiescence of the board in Baggs' conduct of the business. It is unnecessary, therefore, to consider the question of the conclusiveness of the judgment on such notes, and whether the judgment can be collaterally attacked on the ground that there was no authority to make the notes, because the finding of this court is that there was authority, and that the debts were valid debts. The second question raised is as to the validity of the execution. The sheriff, after the deed of assignment was made by Baggs, as president, and Rhoads, as secretary, to J. Ross Alexander, trustee, and before the receiver was appointed herein, went to the yard of the Royal Clay Manufacturing Company, and, having in view all the personal property, made levies thereon. He at once notified Baggs, the president, who was in charge for the company, that he had made the levy, and put the custody of the personalty for him in Baggs, which Baggs accepted. The master finds this to be the fact on the positive statement of the sheriff and two persons who accompanied him, and Baggs does not deny it. When the receiver appointed by this court went to the premises, he found no one in charge, but he was advised by the sheriff that the sheriff had possession of the personal property, and, in order to prevent a conflict of jurisdiction, a stipulation was entered into between the sheriff and the receiver by which the receiver agreed to take possession and dispose of the goods under order of the court without prejudicing the right of the sheriff to assert any lien which this court might determine that the judgment creditors had by reason of his levies. Under the decisions in Ohio, especially those in *Murphy v. Swadener*, 33 Ohio St. 85, and *Acton v. Knowles*, 14 Ohio St. 28, the levy lost nothing of its validity from the circumstance that the sheriff placed the goods in the hands of Baggs, the president of the company, as his custodian. Baggs' temporary ab-



sence from the grounds at the time the receiver entered them is not an abandonment of his possession as custodian, and therefore there was a lawful levy on the personal property by the sheriff in force at the time the receiver took possession. The receiver agreed with the sheriff that his taking possession should not affect the validity of any lien which might have been created by the sheriff's levy and continued in force until the receiver's taking possession. The arrangement made by the sheriff and the temporary receiver is to be commended. It was a judicious compromise to avoid a conflict between jurisdictions, and certainly this court will not permit the commendable spirit of confidence which the sheriff showed in the justice and equity of this court to be made a ground for depriving him or those whom he represented of the rights in the property which had been acquired and maintained by lawful levy and subsequent official custody. The finding of the master that the judgment creditors, by reason of these levies, acquired a priority of lien, is confirmed.

The contention that the levy was at all affected by the prior assignment by the executive committee of the board of directors to J. Ross Alexander cannot be sustained. The assignment, it is practically conceded by all parties to the suit, and by even J. Ross Alexander himself, was invalid, because made without the authority of the board of directors; and, as it was invalid, and as this court has never recognized its validity, it cannot recognize it merely for the purpose of defeating the subsequent levies.

A decree for the sale of the real estate, both that not covered and that covered by the mortgage, will be entered. The property has once before been offered under a decree made before the filing of the cross bill. In view of the fact that the case has taken a somewhat new form, the prior decree for sale will be set aside, and a new decree entered. Owing to the temporary loss of all the papers in the case by an express company, to which they had been intrusted, the decision of the case has been somewhat delayed. I do not think, however, that the delay has worked any disadvantage to the parties interested, because the business outlook has so much improved that probably a later date will result in a more beneficial sale.

The new decree will first find that the assignment to Alexander was invalid; second, that the Royal Clay Manufacturing Company is insolvent; third, that the stockholders and creditors who are parties by intervening petition and otherwise are entitled to have its entire assets sold, and the proceeds applied in payment of its debts; fourth, that the mortgage to Alexander on the real estate covered by its terms is valid, that the condition thereof has been broken, and that the trustee and the beneficiaries thereof—the holders of bonds—are entitled to the relief prayed in their cross bill, to wit, the foreclosure of the mortgage, and, on a failure of the company to redeem the mortgaged premises, to a sale of the same in foreclosure. The order for sale will include both a sale of the mortgaged premises and the real estate not mortgaged. The decree will also provide for a sale of the personal property at the same time as the sale of the real estate, or within a week thereafter, within the discretion of

the receivers, upon notice by public advertisement of the sale, the extent of such advertisement to be determined by the receivers. The decree will also confirm the report of the master in all respects, and make his findings and conclusions the findings and conclusions of this court.

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MOFFETT CO. v. CITY OF ROCHESTER et al.

(Circuit Court, N. D. New York. August 18, 1897.)

1. MUNICIPAL CORPORATION—BID MADE BY MISTAKE—RELIEF IN EQUITY.

A bid for public work can be withdrawn, upon the ground of mistake, although the charter of the city contains a provision that bids cannot be withdrawn or canceled "until the board shall have let the contract for which such bid is made and the same shall have been duly executed."

2. SAME—INJUNCTION.

A court of equity will enjoin the enforcement of such bid, induced by the mistake of one, although it could not reform such bid unless the mistake had been mutual.

Louis Marshall and Joseph Mullin, for complainant.

William F. Cogswell and A. J. Rodenbeck, for defendants.

COXE, District Judge. The question in this controversy is plain and simple: Shall the complainant be held to an erroneous bid by which it agreed to do certain work for the city of Rochester for \$63,800 less than was intended? The work related to the construction of a conduit to convey the water of Hemlock Lake to the city. By a mistake of Mr. Burlingame, its engineer, the complainant bid 50 cents per cubic yard for earth excavation in open trenches when it intended to bid 70 cents, and \$1.50 for earth excavation in tunnel when it intended to bid \$15. The proof of these mistakes is clear, explicit, and undisputed. As soon as the item proposing to do the work for 50 cents, as aforesaid, was read at the meeting of the executive board and before any action was taken thereon Mr. Burlingame stated that it was an error and that complainant intended to bid for route B the same as for route A, viz.: 70 cents. There is some testimony of a negative character that this prompt repudiation of the bid did not take place, but the great weight of testimony is in favor of the complainant. Had the errors been corrected the complainant's bid would still have been \$200,000 below the next lowest bid. On route A the complainant's bid was \$903,324. The mistakes all occurred on route B and yet route A was selected and the work awarded to other bidders for \$1,123,920, or \$220,596 more than the complainant's proposal.

Upon the principal issue there is no disputed question of fact. Counsel for the defendants, though not admitting the mistakes, which are the basis of the action, do not dispute them. The oral argument proceeded upon the theory that the mistakes were made precisely as alleged. In order that no injustice may be done to the defendants, their position in this regard is stated in the language of their brief as follows:

"We admit that the evidence of the complainant shows that Mr. Burlingame entered in his proposal sheets, certain figures and numbers different from those which he intended to make, and that the defendants have no evidence to contradict his testimony."

The facts being undisputed the question is one of law. It would seem almost a reproach to our jurisprudence if equity shall be compelled to confess itself helpless in such circumstances. To grant the relief asked for does no injury to anyone. To refuse it entails upon the complainant a possible loss of \$90,000; a penalty so out of proportion to its fault that its enforcement would seem repugnant to those principles of natural justice which are the foundation of all law. The learned senior counsel for the defendants concedes that were this a dispute between individuals "the one making the proposal can undoubtedly withdraw the same at any time before acceptance by the person to whom such proposal is made." He concludes, however, that the rule is different where competitive proposals are invited for public work. Why this difference the court is unable to perceive. The law is based upon broad, general rules applicable alike to individuals and corporations. A party dealing with a municipal corporation should not be held to the strict letter of his agreement where he would be released if dealing with an individual. But it is argued, though relief might be granted in other circumstances, there can be none here, for the reason that the charter of the city of Rochester provides that "neither the principal nor sureties on any bid or bond shall have the right to withdraw or cancel the same until the board shall have let the contract for which such bid is made, and the same shall have been duly executed." It is thought that this clause is not applicable to the peculiar facts here shown. The complainant is not endeavoring "to withdraw or cancel a bid or bond." The bill proceeds upon the theory that the bid upon which the defendants acted was not the complainant's bid; that the complainant was no more responsible for it than if it had been the result of agraphia or the mistake of a copyist or printer. In other words, that the proposal read at the meeting of the board was one which the complainant never intended to make and that the minds of the parties never met upon a contract based thereon. If the defendants are correct in their contention there is absolutely no redress for a bidder for public work, no matter how aggravated or palpable his blunder. The moment his proposal is opened by the executive board he is held as in a grasp of steel. There is no remedy, no escape. If, through an error of his clerk, he has agreed to do work worth \$1,000,000 for \$10, he must be held to the strict letter of his contract while equity stands by with folded hands and sees him driven into bankruptcy. The defendants' position admits of no compromise, no exception, no middle ground.

It is argued that the mistakes were not mutual and, therefore, that there is no ground of equitable cognizance. It should be remembered, however, that the complainant does not seek to reform a contract but to be relieved from an unconscionable bid by its rescission or cancellation. Equity cannot reform an agreement unless both parties were mistaken, but it can interfere to prevent the enforcement of an un-

just agreement induced by the mistake of one. This principle is well expressed in 15 Am. & Eng. Enc. Law, p. 647, as follows:

"Equity will not reform a written contract unless the mistake is proved to be the mistake of both parties, but may rescind and cancel a contract upon the ground of a mistake of facts, material to the contract, of one party only."

Prof. Pomeroy says:

"Cancellation is proper when there is an apparently valid written agreement or transaction embodied in writing, while in fact by reason of a mistake of both or one of the parties, either no agreement at all has really been made, since the minds of both parties have failed to meet upon the same matters; or else the agreement or transaction is different, with respect to its subject-matter or terms, from that which was intended." 2 Pom. Eq. Jur. § 870.

See also: *Crowe v. Lewin*, 95 N. Y. 423; *Smith v. Mackin*, 4 Lans. 41; *Bradford v. Bank*, 13 How. 57, 68; *Railroad Co. v. Jackson*, 24 Conn. 514; *Snell v. Insurance Co.*, 98 U. S. 85.

It is said that the complainant has an adequate remedy at law. This objection does not appeal strongly to the court in a case where all the parties are on the record, where all the facts bearing upon the transaction have been collected with great diligence and expense and where the questions in dispute have been fully and ably debated. In such circumstances the court should not, unless clearly compelled to do so, adopt a course which will render nugatory all this labor and expense. Believing that the complainant is entitled to relief the duty of granting it should not be devolved upon another tribunal in order that a doubtful theory may be vindicated. But is there a legal remedy? How could the complainant in an action on the bond take advantage of its mistakes? If a court of law could not declare the proposal rescinded for mistake it would be compelled to treat the complainant as in default and enforce the bond. The complainant is entitled to a decree rescinding its proposals and enjoining the defendants as prayed for in the bill.

#### FRASER v. McCONWAY & TORLEY CO.

(Circuit Court, D. Pennsylvania. August 26, 1897.)

##### 1. CONSTITUTIONAL LAW—RIGHTS OF RESIDENT FOREIGNER—TAX ON LABORER—PENNSYLVANIA LAW.

The Pennsylvania law of June 15, 1897, imposing on every employer of foreign-born unnaturalized male persons over 21 years of age a tax of three cents a day for each day that each of such persons may be employed, and authorizing the deduction of that sum from the wages of such employes, deprives the latter of the equal protection of the law, in violation of the fourteenth amendment to the constitution of the United States.

##### 2. SAME—CITIZENS AND FOREIGNERS—FOURTEENTH AMENDMENT.

The equal protection of the laws declared by the fourteenth amendment to the constitution, and enforced by the laws of the United States, is not confined to citizens, but secures to every person within the jurisdiction of the state exemption from any burdens or charges except such as are equally laid upon all others under like circumstances.

This was a suit by John Fraser, a subject of the queen of Great Britain, against the McConway & Torley Company, a corporation of

the state of Pennsylvania. The cause was heard on demurrer to the bill of complaint.

Knox & Reed, for complainant.

Thos. Patterson and N. S. Williams, for defendant.

ACHESON, Circuit Judge. The first section of an act of assembly of the state of Pennsylvania approved the 15th day of June, 1897, provides:

"That all persons, firms, associations, or corporations employing one or more foreign born unnaturalized male persons over twenty-one years of age within this commonwealth, shall be and are hereby taxed at the rate of three cents per day for each day each of such foreign born unnaturalized male persons may be employed, which tax shall be paid into the respective county treasuries; one-half of which tax to be distributed among the respective school districts of each county, in proportion to the number of schools in said districts; the other half of said tax shall be used by the proper county authorities for defraying the general expenses of county government."

It is further provided by the act:

"That all persons, firms, associations, and corporations shall have the right to deduct the amount of the tax provided for in this act from the wages of any and all employees, for the use of the proper county and school district as aforesaid."

As the employer is authorized by the act to deduct from the wages of the employé the prescribed tax, it is quite clear that the tax is upon the employé, and not upon the employer. *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 239, 10 Sup. Ct. 533.

The court is here called upon to consider whether these provisions of this act of assembly are in conflict with the constitution or laws of the United States. The fourteenth amendment to the constitution of the United States declares:

"Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The general purpose and scope of these constitutional provisions were thus stated by Mr. Justice Field in delivering the opinion of the supreme court of the United States in *Barbier v. Connolly*, 113 U. S. 27, 31, 5 Sup. Ct. 359:

"The fourteenth amendment, in declaring that no state 'shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness, and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one, except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses."

Congress has enforced the above-quoted provisions of the fourteenth amendment by legislation embodied in sections 1977 and 1979 of the Revised Statutes. The former of these sections enacts:

"All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

It will be perceived that this statute, following in this regard the constitutional provisions themselves, embraces within its protection not citizens merely, but all "persons" within the jurisdiction of the United States. The question of the extent of the application of these constitutional provisions with respect to persons was before the supreme court in *Yick Wo v. Hopkins*, 118 U. S. 356, 369, 6 Sup. Ct. 1064, and it was there decided that the guaranties of protection contained in the fourteenth amendment to the constitution embraced subjects of the emperor of China residing in the state of California. Mr. Justice Matthews, in delivering the opinion of the supreme court there, said:

"The fourteenth amendment to the constitution is not confined to the protection of citizens. It says: 'Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."

There can be no doubt that the fourteenth amendment embraces the case of the present plaintiff, who, although a British subject, is, and since about April 27, 1893, has been, a resident of the state of Pennsylvania, and whose right to reside within the United States is secured to him by treaty between the United States and Great Britain.

Can the tax laid by the Pennsylvania act of June 15, 1897, be sustained consistently with the principles enunciated by the supreme court of the United States in the cases which have arisen under the fourteenth amendment? I think not. This tax, as we have seen, is imposed "at the rate of three cents per day for each day each of such foreign-born unnaturalized male persons may be employed." The tax is of an unusual character, and is directed against and confined to a particular class of persons. Evidently the act is intended to hinder the employment of foreign-born unnaturalized male persons over 21 years of age. The act is hostile to and discriminates against such persons. It interposes to the pursuit by them of their lawful avocations obstacles to which others, under like circumstances, are not subjected. It imposes upon these persons burdens which are not laid upon others in the same calling and condition. The tax is an arbitrary deduction from the daily wages of a particular class of persons. Now, the equal protection of the laws declared by the fourteenth amendment to the constitution secures to each person within the jurisdiction of a state exemption from any burdens or charges other than such as are equally laid upon all others under like

circumstances. The Railroad Tax Cases, 13 Fed. 722, 733. The court there, in discussing the prohibitions of the amendment, said:

"Unequal exactions in every form, or under any pretense, are absolutely forbidden; and, of course, unequal taxation, for it is in that form that oppressive burdens are usually laid."

It is idle to suggest that the case in hand is one of proper legislative classification. A valid classification for the purposes of taxation must have a just and reasonable basis, which is lacking here. Railroad Co. v. Ellis, 165 U. S. 150, 165, 17 Sup. Ct. 261. Mr. Justice Brewer, in delivering the opinion of the court there, said:

"It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground,—some difference which bears a just and proper relation to the attempted classification,—and is not a mere arbitrary selection."

I am of opinion that the act of assembly of the state of Pennsylvania of June 15, 1897, here in question, is in conflict with the constitution and laws of the United States, and cannot be sustained. The demurrer to the bill of complaint is therefore overruled.

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BASS, RATCLIFF & GRETTON v. CHRISTIAN FEIGENSPAN.

(Circuit Court, D. New Jersey. July 31, 1897.)

EQUITY PLEADING—AMENDMENT OF BILL AFTER REPLICATION.

When the substance of the bill contains ground for relief, and the prayer and proofs are in conformity therewith, leave to amend, enlarging the claim of right, and changing the character or quantity of the relief sought, will not be granted after replication filed and proofs taken.

This was a suit in equity by Bass, Ratcliff & Gretton against Christian Feigenspan, a corporation, to restrain the alleged infringement of a trade-mark. The cause was heard on complainant's motion to amend its bill of complaint.

James L. Steuart, for the motion.

Chauncy H. Beasley, opposed.

KIRKPATRICK, District Judge. The complainant in this cause filed its bill of complaint November 8, 1895, and on January 16, 1896, by leave of the court, amended the same by striking out all of the original bill, and substituting therefor an amended bill of complaint. The complainant claims in its amended bill that it has for many years used a red, triangular-shaped figure for the purpose of distinguishing its pale ale, and has used the same on labels on bottled ale, and for the purpose of stamping it on heads of casks containing ale, and that it now has the sole right to use a trade-mark consisting of a red, triangular-shaped figure in connection with the manufacture and sale of pale ale and all other malt liquors; also a claim to the generic right to the exclusive use of the designation "Triangle," and to a figure, mark, or design of triangular shape or outline. The relief

sought is an injunction prohibiting the defendant from making use of said trade-mark in connection with the sale of pale ale, or half and half, or any other malt liquor or combination of malt liquors, or using the word "Triangle" or a red, triangular-shaped figure in connection with packages, casks, or bottles containing any malt liquor whatsoever. Answer and replication have been filed. The complainant has closed its *prima facie* proofs, and now makes application to amend its bill, widening its scope so as to include within its claim of exclusive right any figure or design of triangular shape, whatever color might be included within its outlines, and to specifically charge the defendant with the use of such figure upon bottles, packages, and casks containing other malt liquors than pale ale and half and half. The twenty-ninth equity rule provides that amendment to bill may be made after replication filed "upon proof that the matter of the proposed amendment is material." The purpose of the amendment must be, not to strengthen or enlarge the complainant's case, not to change the character or quantity of the relief for which he has asked, but to enable the court to administer substantial justice. To this end, when a case for relief is made out, but not that shown in the bill, or specifically asked for in the prayer, an amendment will be allowed, even on a final hearing. *Neale v. Neale*, 9 Wall. 1; *The Tremolo Patent*, 23 Wall. 518; *Graffam v. Burgess*, 117 U. S. 194, 6 Sup. Ct. 686. To the same effect are the other cases cited in complainant's brief. Where the substance of the bill contains ground for relief, and the prayer and proofs are in conformity therewith, leave to amend will not be granted after replication filed and proofs taken. "The instances where it will be done are confined to those where it appears from the case made by the bill that the plaintiff is entitled to relief, although different from that sought by the specific prayer. When the object of the proposed amendment is to make a new case, it will not be permitted." 1 Daniell, Ch. Prac. (5th Ed.) 384. There is no defect in the bill filed in this cause which will prevent the complainant from obtaining the relief sought by the prayer. The prayer is general in its nature, and under it the court may grant any appropriate relief consistent with the case made by the bill. If the complainant is entitled to any other relief than that which it shows by and prays for in its bill, its proper course is to file either an original or supplemental bill, as the nature of its relief requires. To expand its claim of right from that set out in its bill to the one which it seeks by amendment to make it, is to make a new and different case. It is admitted by complainant's counsel that the amendment relating to "Burton Ale" raises a new issue, which defendant is entitled to try upon a new bill. As to the other matters the complainant has made its case by its bill. There is no need for amendment to enable it to obtain a proper decree upon the issues raised, or for the court to do substantial justice. The motion to amend will be denied.



## BRENDDEL v. CHARCH et al.

(Circuit Court, S. D. Ohio, W. D. September 1, 1897.)

## 1. EQUITY—JURISDICTION—ACTION FOR LEGACY.

Under the decisions of the supreme court of the United States and of the supreme court of Ohio, a suit for a legacy in that state is of equitable cognizance.

## 2. FEDERAL COURTS—JURISDICTION OF SUIT FOR LEGACY—PENDENCY OF PROBATE PROCEEDINGS.

Pending the settlement of an estate in the probate court, a citizen of another state, who is a legatee under the will, may maintain a suit in the federal court against the resident executor and the other legatees and heirs to recover such legacy.

Harmon, Colston, Goldsmith & Hoadly, for complainant.

Gunckel, Rowe & Shuey and Oscar M. Gottschall, for respondents.

TAFT, Circuit Judge. The complainant, a citizen of Texas, files her bill to compel the executor of John S. Charch, deceased, to account for and to pay over to her the remainder of a legacy of \$5,000 left to her by will of the testator, upon which she has already received \$3,000, and also the amount due her as her share under a residuary bequest in the same will to herself and others. The executor, and the other legatees under the will, who are all citizens of other states than Texas, are made parties defendant. Demurrers to the bill are filed by the executor and by one of the defendant legatees. The demurrers raise three objections to the bill. The first is that the action is not of equitable cognizance; the second is that the same cause is pending in the state court; and the third is that, as the estate is being settled in the probate court of Montgomery county, the jurisdiction of this court is ousted on principles of comity.

1. It is a question somewhat controverted whether an action for a legacy is of equitable cognizance, and authorities differ. The supreme court of the United States, however, has assumed the affirmative of the question to be correct (*Association v. Hart*, 4 Wheat. 1; *Armstrong v. Lear*, 12 Wheat. 169; *Lewis v. Darling*, 16 How. 1); and such seems to have been the view of the Ohio supreme court before the adoption of the new constitution fusing law and equity and providing for the modern organization of probate courts (*Cram v. Green*, 6 Ohio, 429; *Grosvenor v. Austin's Adm'r*, *Id.* 104). In this jurisdiction, therefore, it must be held that the cause of action stated in the bill justifies equitable relief.

2. It does not appear from the bill that the complainant is a party to any proceeding in any other court to obtain the same relief here asked. But, if it did, it would not be a ground for abatement of this suit. *City of North Muskegon v. Clark*, 22 U. S. App. 522, 10 C. C. A. 591, and 62 Fed. 694; *Gordon v. Gilfoil*, 99 U. S. 168.

3. The pendency of the proceeding to settle the estate in the probate court of Montgomery county does prevent this court from taking the estate out of the hands of that court, and administering it, and distributing the same according to the old equity practice, but it

does not and cannot prevent the citizen of another state, entitled under a will to share in an estate, or to a legacy under a will, from litigating his right to the same in the forum provided by the constitution and laws of the United States for the litigation of suits between citizens of different states, and from obtaining a decree against the resident administrator or executor for the amount found due him. State laws, providing exclusive methods for settling estates, the distribution of the same, and the payment of legacies, cannot oust the jurisdiction of federal courts of equity to afford equitable relief in such cases to distributees or legatees who are citizens of other states than that of the testator and executor. The distinction between a complete administration of the estate and a seizure of the property thereof on the one hand, and the entertaining of a suit by a nonresident distributee against the representatives of the deceased to enforce collection of his share, is very clearly brought out in *Byers v. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906. In that case it was held that federal courts have no original jurisdiction in respect to the administration of decedents' estates, and that they could not, by entertaining suits against an administrator, which they had full power to do in certain cases, draw to themselves the possession of the res, or invest themselves with the authority of determining all claims against it, but that a citizen of another state might proceed in the federal court to establish a debt against the estate, which could not, however, be enforced against the estate itself, and that a distributee, a citizen of another state, might establish his right to a share in the estate, and enforce such adjudication against the administrator or executor personally, or against his sureties, or against other persons liable therefor, or proceed in any way which does not disturb the actual possession of the property of the estate by the state court. See, also, *Hess v. Reynolds*, 113 U. S. 73, 5 Sup. Ct. 377; *Green v. Creighton*, 23 How. 90; *Hyde v. Stone*, 20 How. 170; *Bank v. Jolly*, 18 How. 503; *Suydam v. Broadnax*, 14 Pet. 57. As the complainant, on the facts alleged in the bill, is entitled to a decree against the executor for more than \$2,000, the demurrers must be overruled. The clerk will make the entry.

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TUCKER v. RUSSELL, Governor, et al.

(Circuit Court, E. D. North Carolina. July 20, 1897.)

**1. CONSTITUTIONAL LAW—AMENDING CHARTER OF RAILROAD COMPANY—NORTH CAROLINA ACT.**

The North Carolina statute of February 25, 1897, entitled "An act to amend an act entitled an act to incorporate the Atlantic and North Carolina Railroad Company and the North Carolina and Western Railroad Company," impairs the obligations of the contract in the charter, by repealing the provision that the voting power of the state as a stockholder shall be 300, and that the voting power of each stockholder shall be ascertained by a fixed rule therein stated, and is therefore unconstitutional and void.

**2. SAME—STATE AS A STOCKHOLDER—POWER TO REMOVE DIRECTORS AND PROXY.**

It is no violation of the contract between the state and the private stockholders of the North Carolina & Atlantic Railroad Company for the state

to remove, before the expiration of their terms, without the consent of the private stockholders, the directors and proxy which it is by the charter entitled to appoint.

Suit in equity by W. R. Tucker against D. L. Russell, governor of North Carolina, and others. Heard on bill and answer on a rule for injunction.

Jones & Boykin, for complainant.

P. M. Pearsall, Simmons & Ward, S. W. Hancock, and Aycock & Daniels, for defendants.

SIMONTON, Circuit Judge. The bill of complaint is filed by a private stockholder in the Atlantic & North Carolina Railroad Company. The gravamen of the complaint is the passage by the legislature of North Carolina in 1897 of two acts which, it is charged, change the original charter of the company, and impair the fundamental contract contained therein, and that, under said two acts, changes in the management and constitution of the company are threatened which will materially impair, if they do not destroy, the rights and property of the private stockholders in the corporation. The legislature of North Carolina in 1852 incorporated the Atlantic & North Carolina Railroad Company, with one terminus at Beaufort and another at Goldsboro, in that state, giving all powers necessary for constructing its railroad. The act made provision also for the subscription to its capital stock by individuals, private corporations, and municipal bodies, and invited and encouraged such subscriptions. The charter is most liberal in its terms, and the purpose of the act was to make it a part of a grand scheme of internal improvement effecting railroad communication from the Atlantic, through the center of the state, to meet the Tennessee line. The capital was fixed at a maximum of \$900,000. At the session of 1854-55 an act was passed amending this charter, and by this act the state became a stockholder in the company. The capital stock was increased to \$1,600,000. And as soon as it appeared to the board of internal improvement that one-third of the capital stock had been taken by solvent individuals or companies, and that \$300,000 thereon was paid to the treasurer of the company, the board was authorized to subscribe, on the part of the state, for the remaining two-thirds of the stock, and to pay for it as in the act provided. Two sections of this amending act bear upon the matters in controversy in this case,—sections 3 and 4. Section 3 provides that the affairs of the company shall be managed and directed by a general board, to consist of twelve directors, eight of whom shall be appointed annually by the board of internal improvements, and may be removed in like manner, and four to be elected by the stockholders at their next general meeting, provided that no one but a stockholder holding at least five shares can serve as director. Section 4 provides a scale of voting in case a stock vote be taken in all elections and on all questions in any general meeting of stockholders; that is to say, the owner of one or two shares shall have one vote. The owner of not less than three and not more than four shares shall be entitled to two votes, the owner of not less than five or more than six shares to three votes, and so on, followed by this proviso:

"Provided, that no individual or company holding stock in said company shall be entitled to more than two hundred votes, except the state, which shall be entitled to three hundred votes, but should the state hereafter transfer any part of its stock, then its vote shall be in proportion to what may be retained as compared with the amount now represented in said corporation. The state shall at all general meetings of stockholders be represented by an agent or proxy appointed by the governor, and such agent or proxy shall be entitled in the general meetings aforesaid, to vote according to the above scale on all questions, except in the election of directors by the individual stockholders."

It may be noted here, and may save time in the further discussion of this case, that these provisions as to a scale of voting are essential provisions in the contract between the individual private stockholders and the state as stockholder. It contains mutual concessions as the consideration of the contract. The state agrees to the vote to be cast for her on the maximum of the stock, and makes provision for the reduction of that vote in certain contingencies. No provision whatever is made for an increase of her vote in any contingency. The advantages of this contract inure to, and are a part of the property of, each stockholder and each share of stock. Another thing must be noted: The act provides that at each general meeting of stockholders the state shall be represented by a proxy. The use of this imperative word renders it necessary that a state proxy be present at all such meetings. This original charter, with its amendments, under the law then existing in North Carolina, were not subject to modification, amendment, or repeal by the legislature, against the will of the stockholders.

In 1897 the legislature of North Carolina passed an act entitled:

"An act to amend an act entitled an act to incorporate the Atlantic and North Carolina Railroad Company and the North Carolina and Western Railroad Company."

This act strikes out section 4 of the former act quoted above, and inserts in lieu thereof the following:

"In all general and special meetings of stockholders the state shall be represented by an agent or proxy appointed by the governor, who shall be entitled to vote the stock of the state on all questions arising in said meeting, except in the election of directors by the individual stockholders and the presence of the state's proxy shall be necessary to constitute a quorum in said meeting. All laws and clauses of laws in conflict with this act are repealed."

Ex vi termini, this act seeks to repeal all provisions made as to the scale of voting, and destroys the equilibrium fixed in the charter. The state, desiring to go into this enterprise, invited the subscriptions of individuals, and agreed that when \$300,000 of these were paid she would put in the remainder. The rights of each stockholder, and the relative rights of the state as a shareholder to the other shareholders, were fixed at the same time, as a part of the inducement to subscribe, and surely these were fundamental. The right of each stockholder is secured to him, not to be taken away or surrendered without his consent. As to this complainant, a large stockholder, this act must be inoperative if he dissents, as he does dissent, thereto. *Bank v. Knoop*, 16 How. 369; *Railroad Co. v. Reid*, 13 Wall. 264; *Fry v. Railroad Co.*, 2 Metc. (Ky.) 314; *Cook, Stocks & S.* §§ 494, 500; *Mor. Priv. Corp.* § 645.

At the same session, in 1897, the legislature of North Carolina

passed another act, entitled "An act to restore to the state of North Carolina the control and management of the Atlantic and North Carolina Railroad." Strictly speaking, this is not an act amending the charter of this railroad company. It is more in the nature of a bill of pains and penalties. In it the state, as sovereign, makes provision for the protection of her interests as a shareholder in a private corporation. The act provides a speedy mode and a special tribunal for ascertaining the necessity for such protection, and a sort of legislative execution for the enforcement of its conclusions. The first section of this act provides that whenever it appears to the satisfaction of the governor that the proxy or directors heretofore or hereinafter appointed to represent the interest of the state in this railroad company have been in any particular unfaithful or negligent in the discharge of their duties to the state, or have done or suffered any act to be done by the stockholders or directors in said company, the intent, purpose, or effect of which was to lessen or impair the rights of the state as a majority stockholder in the company, given either by its charter or by-laws, or deprive or take away its right of control through the board of directors in the management or control of the company, or if the governor becomes satisfied that, having so acted negligently and unfaithfully, the said proxy or said directors shall continue in said dereliction of duty, it is made the duty of the governor and the board of internal improvements forthwith to remove said proxy and directors, and appoint others in their stead, who shall at once enter on their duties, and the directors, or any two of them, shall call a meeting of the directors, and elect a president, who shall be in full charge. Any officer, agent, or employé of the company who shall refuse to turn over and deliver to said president the property, books, and records of the company shall be guilty of a misdemeanor, and on conviction be fined or imprisoned. The second section is to the same effect. The third section provides that in case of the refusal of any officer, agent, or employé to turn over the property, books, and records, and in case any officer, agent, attorney, or stockholder shall, by litigation or otherwise, obstruct, retard, or in any way interfere with the organization of the new board of directors, or with the prompt delivery of the property, etc., so that the road might be involved in litigation, it is made the duty of the governor, through such persons as he may designate, to institute proceedings in the name of the state or otherwise, as he may be advised, in the superior court of any county through which the road runs, for the possession of the road; and it is made the duty of the judge to appoint a receiver to take possession of said road and to manage the same until, in the judgment of the court, the state is restored to her control in the direction of the affairs of the company.

The bill, as has been seen, is filed by a private stockholder. He makes defendants to the bill D. L. Russell, governor, Z. B. Walser, attorney general, the board of internal improvements of North Carolina, a body corporate, and Robert Hancock, Esq., and seven other gentlemen, who have been appointed directors in behalf of the state in this corporation, and the railroad corporation itself. The bill sets out in detail the original and amended charter of the company,

and the two acts of 1897 above referred to, and charges that they are in violation of right and unconstitutional; that their enforcement destroys the property rights of the private stockholders; that the company has been and is perfectly solvent, and under the recent administration was prosperous; that now the penalties of the act of 1897 are threatened against any stockholder who resists its enforcement. It charges political motives in the passage of the act, especially on the part of Mr. Hancock. The bill concludes with prayer for process, and for an injunction (1) that the said governor, and any person or persons designated by him for the purpose of instituting proceedings under section 111 of the act of 1897, be restrained from suing for the possession of the said railroad, or for the appointment of a receiver to manage and continue the same under the provisions of said section; (2) that the said governor be restrained from appointing the state proxy as authorized by the act of 1897, ratified 25th February, 1897, without the concurrence of the board of internal improvements as the charter requires, and that the said defendants the said directors and governor be restrained from seeking to enforce the provisions of said act ratified 25th February, 1897, in any meeting, for whatever purpose it may be called; (3) that the said acts of 1897 be declared unconstitutional and void. The bill ends with a prayer for general relief. An amendment of the bill states that the private stockholders are enjoined from holding any meeting of the company.

The defendants, in response to a rule for that purpose, have shown cause, by answer, why the prayer of the bill be not granted. It appears from this return that at the time of the passage of the acts of 1897 there were a board of directors, a president, and a state proxy for the Atlantic & North Carolina Railroad Company; that after the passage of these acts this board of directors, as well as the proxy, were removed, and Mr. Hancock and his board of directors were appointed; that the old board acquiesced and surrendered; and that when this bill was filed the new board was in actual and peaceable possession. The reasons given for the removal of the old board and of the proxy were these: The private stockholders, anticipating some change in the state's representation in the company, had been splitting up the shares, and putting them in various names, thus taking advantage of the result of the scaling provisions of the charter, which gave greater voting power to the small shares. To aid in accomplishing the result sought,—increase of power in private stockholders,—the provision of the by-law which required the presence of the state proxy in forming a quorum at meetings was repealed. A large proportion of the power of the president was taken away, and vested in a finance committee of the board. The answer also charges misconduct in other respects on the part of the old board, justifying its removal.

With regard to the policy under which this railroad company is administered, the wisdom or unwisdom of its management, the dereliction of duty on the part of any of its officers or employes, this court can have no concern. These are corporate acts, and, if done under regularly constituted authority, must be corrected, if correc-

tion be needed, by the corporation itself. Our sole duty is with the legal points made. With regard to the general purpose of the act to restore to the state the control of and management of the Atlantic & North Carolina Railroad Company, I am not prepared to say that it is in conflict with the constitution of the United States. The contract in the charter between the state and the other stockholders was that they should put in a certain sum of money, and that the state should put in a certain other sum; that on the board of directors the state should appoint a certain number, the private stockholders for themselves appointing the remainder; that the voting power of the state was fixed at a certain figure; and that the voting power of each private stockholder should be ascertained according to a fixed rule. These were mutual covenants looking to the administration of the corporation, and securing in advance the rights of subscribers to its stock. They cannot be changed by one of the parties, cannot be affected by legislation on the part of the state, without impairing the obligation of the contract. But when it comes to the question how each stockholder should vote, in person or by proxy, this was left to himself. The proxy could be appointed or removed at pleasure. To say that the state, which can only act through a proxy, could not remove him, however incompetent or unfaithful or distasteful he might be, would subject the state to a disadvantage under which no other stockholder labored. So also with the directors. The eight directors are named by the state, and in their selection the private stockholders have no voice whatever. They act for the state, representing her interests in a private corporation. Under our system of government, the power that appoints, as a general rule, has the right to remove. But be this as it may; assume that, during their term of office, directors could not be removed; this is their personal right. But no such controversy exists here. Whatever rights the old directors had, they have voluntarily surrendered them, and acquiesced. The new board are peaceably in possession, and their right of possession is not challenged.

With regard to so much of the act as provides for the appointment of a receiver, as an abstract question, much could be said. It comes perilously near confounding the legislative department with the judicial department. If the legislature can usurp the discretion of a judge, and instruct him, in a given case, to pursue a given course, it can by degrees take within its control other and more important judicial functions. But there is at present no suit pending under this section, none threatened. The necessity for such suit, the prospect or probability of such a suit, do not exist, may never exist. The preventive process of this court cannot meet such a case. Nor can the court decide a legal principle upon which it cannot make a practical application. *Williams v. Hagood*, 98 U. S. 72. It can only consider the existing facts before it, and upon such facts pronounce the law and apply the remedy.

From what has been said it follows: That the first prayer of the bill for an injunction cannot be granted, as there is no suit, or threat of suit, or prospect of a suit for the possession of this railroad by the governor, or by any one designated by him. On the contrary, the oc-

casion for such a suit cannot arise, as the new board are in full possession, the old board having surrendered, and neither the complainant nor any one else asks that they be removed. That the second prayer for an injunction against the appointment of a proxy in behalf of the state cannot be granted, as the former proxy has resigned and vacated the office, because the charter makes it imperative that the interest of the state be represented by proxy at all general meetings of the company. The fourth section of the amended charter gives the appointment of the proxy to the governor. That so much of the prayer for injunction as seeks to prevent an enforcement of the act of 25th February, 1897, entitled "An act to amend an act entitled an act to incorporate the Atlantic and North Carolina Railroad Company and the North Carolina and Western Railroad Company," or to adopt and accept the same without the consent of the private stockholders, should be granted. Let an injunction be prepared in accordance with this opinion. The bill, as against D. L. Russell, governor, Z. B. Walsler, attorney general, and the board of internal improvements, is dismissed. Let it be retained as to all the other parties.

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**AMERICAN FREEHOLD LAND-MORTGAGE CO. OF LONDON, Limited, v. WOODWORTH.**

(Circuit Court, N. D. New York. August 18, 1897.)

No. 3,178.

**CORPORATIONS—CREDITORS' SUIT AGAINST STOCKHOLDER — EFFECT OF RECEIVERSHIP.**

Under the statute of Kansas giving a judgment creditor of a corporation the right to proceed by action to charge the stockholders with the amount of the judgment, such a creditor of a Kansas corporation may maintain an action in a federal court against a stockholder in another state, though the corporation is in the hands of a receiver.

This was a suit in equity by the American Freehold Land-Mortgage Company of London, Limited, a judgment creditor of an insolvent Kansas farm-mortgage company, against Chauncey B. Woodworth, to enforce defendant's liability as a stockholder in the Kansas corporation under the Kansas statute. The cause was heard on demurrer to the bill.

P. Tecumseh Sherman and W. Pierrepont White, for plaintiff.  
William F. Cogswell and William N. Cogswell, for defendant.

COXE, District Judge. When this demurrer was first before the court it was decided that the action could be maintained upon the judgment alone without alleging or proving the original indebtedness. 79 Fed. 951. The remaining propositions were argued at the June term. Since the argument the circuit court of appeals for this circuit has rendered a decision which disposes of all the questions involved in favor of the plaintiff, with possibly one exception. *Whitman v. Bank*, 83 Fed. 288. It is argued that as the Kansas Mortgage Company is in the hands of a receiver, he is the only party who



can maintain this suit for the benefit of all the creditors. Although this precise point is not involved in the Whitman Case it is covered by the logic of that decision and the authorities cited in the former opinion herein. The Kansas law gives a right of action to the judgment creditor. This is enough. The demurrer is overruled, with costs. The defendant may answer within 20 days.

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NORTHERN PAC. RY. CO. v. BALTHAZAR et al.

(Circuit Court, D. Washington, W. D. August 14, 1897.)

PUBLIC LANDS—GRANTS TO NORTHERN PACIFIC RAILROAD COMPANY—FORFEITURE.

The Northern Pacific Railroad Company not having definitely located any line of road between Portland and Wallula, the original grant of lands to it by Act July 2, 1864 (13 Stat. 365, § 3), never took effect as to lands between those points; and those of such lands lying contiguous to the line built from Portland to Tacoma, and within the limits of the grant made by the joint resolution of May 31, 1870 (16 Stat. 378), were embraced within the latter grant, and on compliance with its conditions the title thereto vested in the company and its grantees, and was not affected by the forfeiture act of September 29, 1890 (26 Stat. 496).

F. M. Dudley, for complainant.

C. E. S. Wood, for defendants.

HANFORD, District Judge. This suit was originally commenced by the receiver of the Northern Pacific Railroad Company, in behalf of said company, to quiet title and determine questions as to the rights of the company, under its land grant, to certain lands, aggregating about 200,000 acres, situated in the counties of Clark and Cowitz, in the state of Washington, which the company claims to have earned by the construction of that part of its road extending from Portland to Tacoma. Said lands were sold in tracts by the railroad company, and a large number of its vendees were made parties defendant, for the purpose of obtaining a decree restraining them from commencing actions to recover the purchase money paid to the company. The Northern Pacific Railway Company has been substituted as party plaintiff, it having succeeded to all the rights of the Northern Pacific Railroad Company and its receiver, by having purchased the railroad, with its lands and business, at the foreclosure sale. The controversy as to the title grows out of the act of congress of September 29, 1890, forfeiting that portion of the land grant coterminous with the line of the Northern Pacific Railroad between Portland and Wallula, through the valley of the Columbia river, which its charter authorized the company to construct.

In order to understand the questions submitted, it is necessary to consider the following acts and resolution of congress: By the act of July 2, 1864 (13 Stat. 365), the Northern Pacific Railroad Company, was created a body corporate, and said company was authorized to construct—

"A continuous railroad and telegraph line, with the appurtenances, namely, beginning at a point on Lake Superior, in the state of Minnesota or Wisconsin;

thence westerly by the most eligible railroad route, as shall be determined by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude to some point on Puget Sound, with a branch via the valley of the Columbia river to a point at or near Portland, in the state of Oregon, leaving the main trunk line at the most suitable place, not more than three hundred miles from its western terminus."

And section 3 of the act provides:

"That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the general land office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the secretary of the interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections."

And by a joint resolution of May 31, 1870 (16 Stat. 378), it is provided that the company may—

"Locate and construct under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget Sound, via the valley of the Columbia river, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound; and in the event of there not being in any state or territory in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the secretary of the interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such state or territory, within ten miles on each side of the said road beyond the limits prescribed in said charter, as will make up such deficiency, on said main line or branch, except mineral and other lands as excepted in the charter of said company of eighteen hundred and sixty-four, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixty-four."

The act of September 29, 1890 (26 Stat. 496), forfeiting unearned land grants, provides:

"That there is hereby forfeited to the United States, and the United States hereby resumes the title thereto, all lands heretofore granted to any state or any corporation to aid in the construction of a railroad opposite and co-terminous with the portion of any such railroad not now completed and in operation, for the construction or benefit of which such lands were granted; and all such lands are declared to be a part of the public domain."

The argument of the defendants is based upon the decision of the supreme court in the case of *U. S. v. Northern Pac. R. Co.*, 152 U. S. 284-300, 14 Sup. Ct. 598, in which it was held that by the original charter of the company no lands were granted to aid in the construc-

tion of a railroad from Portland to Puget Sound, and that the joint resolution of May 31, 1870, made an additional grant for that portion of the road, but in no way affected lands which had been previous to that date granted to another company; and the argument assumes that the lands in controversy were granted to the Northern Pacific Railroad Company by the act of July 2, 1864, and therefore were not affected by the joint resolution of May 31, 1870; in other words, that it is not to be presumed that congress intended to make two distinct grants of the same lands. And it is further assumed that, as the company failed to earn the lands in controversy by compliance with the conditions of the original grant, the title has reverted to the United States by force of the forfeiting act of September 29, 1890, notwithstanding the fact that the lands are within the limits of the grant as extended by the joint resolution of May 31, 1870, and contiguous to the railroad from Portland to Tacoma, which has been completed. I am constrained, however, by the decisions of the circuit court of appeals for this circuit in the cases of *Oregon & C. R. Co. v. U. S.*, 23 C. C. A. 15, 77 Fed. 67-82, and *Land Co. v. Wilcox*, 25 C. C. A. 164, 79 Fed. 719, to hold that, as the Northern Pacific Railroad Company never made a definite location of any line of road between Portland and Wallula, the original land grant never took effect as to any land between said places; therefore the lands in controversy were, for aught that appears to the contrary, at the date of the joint resolution of May 31, 1870, and at the time of the definite location of the railroad from Portland to Tacoma, nonmineral public lands of the United States, not reserved, sold, granted, or otherwise appropriated, and by said joint resolution the same were granted to the company upon conditions which have been performed, so that the title of the company and its vendees has become vested and perfect. Upon the authority of the cases last cited, the demurrer to the bill of complaint is overruled.

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UNITED STATES TRUST CO. v. WESTERN CONTRACT CO. ECHOLS et al. v. CENTRAL TRUST CO. WESTERN CONTRACT CO. v. ECHOLS et al. BROWN et al. v. WESTERN CONTRACT CO.

(Circuit Court of Appeals, Sixth Circuit. July 6, 1897.)

Nos. 445-448.

On Petition for Rehearing. The opinion on the original hearing is reported in 81 Fed. 454.

Chas. S. Grubbs and Helm Bruce, for Echols and others.

W. O. Harris, for Trust Co.

Alex. P. Humphrey, for Western Contract Co.

Reargued before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge. A petition for rehearing and modification of the judgment of the court herein has been filed. The mandate has

gone down because the judgment of the court was entered more than 30 days before the filing of the petition. Counsel ask to have the mandate recalled, because the printed opinion, upon which the petition for rehearing is based, was not filed until 29 days after the judgment of the court was entered. We think that the petitioner's counsel would have been in a better position had they applied to the court for an extension of the time within which to file a petition for rehearing before the 30 days after the entry of the judgment had expired. But we recognize the difficulty counsel may have in determining whether a petition for rehearing is to be filed before the printed opinion of the court has been examined, and we have to-day changed the rule for filing petitions for rehearing so as to make the period within which they must be filed 30 days after the deposit of the printed opinion in the clerk's office. As we have concluded that the judgment in the cases under consideration should be modified somewhat, we are not disposed to enforce the rule strictly against the petitioner, and will order the mandate recalled for the purpose of making such modification.

The first ground of the petition for rehearing is that the court, under its own reasoning, should have allowed the Western Contract Company to set off against the claim of the receiver of the Chesapeake & Ohio Southwestern Railway Company at least the amount of interest which was due under its guaranty from the railway company and was unpaid before the contract company took back the majority of stock in the Ohio Valley Railway Company. The petition for rehearing states its ground as follows:

"The court seems to hold that the Western Contract Company would be entitled to its set-off if it were not for the fact that by taking back the stock it has relieved the Chesapeake Company of its guaranty. The court seems to hold that the contract company gave the Chesapeake Company control of the Valley road in consideration that the Chesapeake Company would guaranty the Valley bonds, of which the contract company was a large holder; that the reciprocal benefits to the parties were concurrent,—control of the road on the one side, receipt of interest on the other. Assuming this to be true, the court has failed to observe the fact that the Chesapeake Company did not pay the interest which fell due on the Valley bonds January 1, 1894, although it had control of the road during the six months represented by the interest which then matured. It seems to us, therefore, that to the extent of the interest which was due January 1, 1894, we are entitled to have our offset allowed."

Counsel for the petition have misapplied the reasoning of the court. The court did and does hold that the real consideration of the contract to part with a majority of stock of the Valley road by the Western Contract Company was the agreement on the part of the Chesapeake & Ohio Southwestern Company to guaranty the bonds of the Valley Company, and that the other provisions of the contract with reference to the deposit of bonds to pay off the liabilities of the Valley Company were only preliminaries which were to be regarded as executed before the execution of the contract in its main features began. Now, the Western Contract Company might have relied simply upon a suit to recover damages against the Chesapeake & Ohio Southwestern Railway Company for failure to fulfill its guaranty, but the contract company did not do so. It stipulated in the contract that it might have the right to take back the majority of

stock in the Valley Company, which was the main consideration for the guaranty. The court was and is of opinion that, as between the parties, this stipulation was, in effect, for a rescission of the contract, and that, like any rescission, it was a remedy inconsistent with a remedy by way of damages for a breach of the contract. The court therefore held, and still holds, that by taking back a majority of the stock, the contract company parted with all the right to hold the Chesapeake & Ohio Southwestern Railway Company for a breach of any part of its contract of guaranty, whether that breach occurred before or after the voluntary rescission of the contract by the Western Contract Company. The first point of the petition for rehearing is therefore overruled.

The second objection to the judgment of the court stated in the petition for rehearing is that it was erroneous in holding that the claim of the United States Trust Company in the right of the Newport News Company to share in the security of the bonds deposited by the Western Contract Company was in fact a claim of the Chesapeake & Ohio Southwestern Railway Company, of which the Newport News Company was nothing but an assignee, and that as such assignee the Newport News Company, or its assignee, the United States Trust Company, was entitled to the benefit of the security which the Chesapeake & Ohio Southwestern Company, as the payor of the car-trust obligations, would be entitled to under its contract with the Western Contract Company. It is objected that the United States Trust Company did not make any averments in its intervening petition justifying the inference that it contended that the Newport News Company was the assignee of the Chesapeake & Ohio Southwestern in respect of the claim which it was asking to have paid in its intervening petition. The petitioner states, moreover, that such is not the fact, and intimates that, if the issue had been made by the United States Trust Company by a proper averment, it would have been met by a denial, and the proof would not have supported the averment. We are still of opinion that the facts of the record justify the inference which we drew. It is true, however, that the averment in the intervening petition of the United States Trust Company is not specific upon the point now mooted. To avoid any injustice in the cause, we have concluded not to make our judgment final in the matter. The judgment of the court heretofore rendered will be modified so as to remand to the lower court for the hearing of the issue whether the Newport News & Mississippi Valley Company was in fact the assignee of the Chesapeake & Ohio Southwestern Company in respect of the claim arising from the payment by the Newport News Company of car-trust obligations of the Ohio Valley Railroad Company, with leave to the United States Trust Company to amend its pleading so as to make this averment specific, and to the contract company to deny the same, and with leave to both to adduce evidence upon the issue thus joined. In the original judgment of this court we taxed one-half of the costs of the appeal against the receiver of the Chesapeake & Ohio Southwestern Railway Company, and one-half against the contract company and S. S. Brown. The counsel for the petitioner suggest that, if the court will examine

the record, it will find that at least nine-tenths thereof relates solely to the claim made by the receiver of the Chesapeake Company to the preference for material and supplies furnished, which claim was defeated in the court below and also in this court, and with which claim the Western Contract Company and Brown had nothing to do, and that the issue of the Western Contract Company and the others growing out of the bonds could have been presented in a very short record, which would have been very inexpensive both to copy and to print. We have examined the record in the light of this suggestion, and are convinced that there is some ground for the objection made to the judgment already entered. We shall therefore alter that judgment, and assess only one-fourth of the costs against the Western Contract Company and S. S. Brown, and three-fourths thereof against the receiver of the Chesapeake & Ohio Southwestern Railway Company. The judgment of the court already made is modified in accordance with this opinion, and the cause is remanded to the circuit court for other proceedings not inconsistent with the original opinion as modified herein.

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WHITESIDE v. SUPREME CONCLAVE IMPROVED ORDER OF HEP-  
TASOPHS.

(Circuit Court, E. D. Tennessee, S. D. February 4, 1897.)

INSURANCE ORDER—AGENCY OF SUBORDINATE OFFICERS—EFFECT OF BY-LAW.

An assessment life insurance order having a supreme conclave and subordinate conclaves provided in its constitution and by-laws that the officers of subordinate conclaves "shall at all times be deemed and held to be agents and servants of the members of the conclaves of which they are elected officers, and not, in any sense, the agents or servants of the supreme conclave for any purpose whatever," and that all acts of any such officers relating to a benefit certificate shall be held and deemed to be the act of the person holding such certificate, and shall not be binding on the supreme conclave. In an action on an insurance certificate issued to a member of a subordinate conclave, and payable, in the event of his death and good standing in the order, to plaintiff, his wife, her right to recover depended on the binding effect upon defendant of an extension of time for paying an assessment, granted by the collector of assessments of the subordinate conclave. The collector had been in the habit of granting extensions to plaintiff's husband and other members without objection from any quarter. In reality he was the agent of the supreme conclave, and acted distinctly for it in the matter of collecting and remitting assessments. *Held*, that the provisions above quoted could not override the actual facts, and that defendant was bound by the extension.

The defendant is an assessment life insurance order, chartered in the state of Maryland, and having a supreme conclave in that state and subordinate conclaves located throughout various other states, one of which is in Chattanooga, Tenn.

Plaintiff's husband was a member of the Chattanooga Conclave, and held a certificate for \$5,000, payable, in the event of his death and good standing in the order at the time, to his wife, the plaintiff. The husband was severely wounded by an accidental gunshot, and died, by reason thereof, some 30 days thereafter. When a claim was made by the plaintiff, the defendant denied all liability, assigning as a reason the failure of the husband to pay an assessment call, and that, under the defendant's constitution and by-laws, he thereby sus-

pended himself as a beneficial member, and the certificate was void. A suit was thereupon brought, resulting in a verdict and judgment against the defendant for the amount of the certificate. The defendant entered a motion for a new trial, predicated the motion upon certain parts of the court's charge to the jury. It appeared in evidence that under the constitution and by-laws of the defendant "any member failing to pay his assessment within thirty days from date of notice shall stand suspended," and that the officers of a subordinate conclave "shall at all times be deemed and held to be agents and servants of the members of the conclaves of which they are elected officers, and not, in any sense, the agents or servants of the supreme conclave for any purpose whatever," and that all acts of any such officers relating to a benefit certificate shall be held and deemed to be the act of the person holding such certificate, and shall not be binding upon the supreme conclave. It appeared further from the proof that O'Donohue, who was the collector of the assessments for Chattanooga Conclave, had been in the habit of extending the time in which the assessments were required to be made by the by-laws, and that he had often granted this extension to plaintiff's husband and other members. On the day preceding the gunshot wound, the deceased met O'Donohue on the street, and there was a conflict among the witnesses as to what occurred, but the proof tended to show that O'Donohue said: "You can pay me, judge, any time in the next few days. I am, though, sending the money off to-day." A few days after the accident, plaintiff's husband caused the past-due assessments to be tendered to O'Donohue, who declined to accept the money. Later a tender was made through the mails, and accompanied by a letter from plaintiff's husband, calling O'Donohue's attention to what he had said when the meeting occurred on the street. O'Donohue returned this money by a letter, in which he said merely that under the circumstances he could not accept it. There were other facts bearing upon other issues in the case, but such are not material upon the court's action on the motion for new trial. The court charged the jury that, notwithstanding the provisions of the constitution and by-laws, O'Donohue was the agent of the supreme conclave in the matter of collecting the assessments, and that his acts in extending time of payment were binding on the defendant. The court said, in substance, that it was not competent, by declaration made in advance, to deny the real fact and its effect, and require the court to hold what is known to be contrary to the truth. This would be neither good law nor good morals. When officers of the local order act distinctly for the general order, as in collecting and remitting assessments, the court and jury must not be expected to find directly against the plain truth. Exemption from liability must be claimed otherwise than upon a false statement of fact.

Thomas & Thomas, for plaintiff.

Geo. T. Fry and S. A. Will, for defendant.

CLARK, District Judge (after stating the facts). I have now considered the motion for a new trial in this case. The plaintiff's able and industrious attorneys, in the brief on this motion, have discussed the same questions which were considered on the trial, except that there has been a very full examination of the authorities, as the brief shows. There was, fortunately, but slight difference between the court and the defendant's attorneys as to the law applicable to the case. This difference related solely to the question of the power of O'Donohue, the financial collector and officer of the local order, to extend the time in which members might pay their assessment without exacting a forfeiture in case an assessment should not be paid on the precise date of its maturity. The argument was that the rules and by-laws of the order denied to Mr. O'Donohue this power. The court was of opinion that, applying to these orders the ordinary law of life insurance, Mr. O'Donohue might waive a provision of the kind

named in the constitution and by-laws, and particularly when his action in this regard was supported by a long habit of doing so with members without objection from any quarter; and the jury was instructed accordingly upon this point. I find nothing on this motion which has been sufficient to change my view of this. As was stated on the trial, I find the view which I hold upon this point amply sustained by a recent opinion of the supreme court of Tennessee. The only other disagreement that existed, or now exists, in the case, is a disagreement between the defendant and the jury, and this relates to the facts, and relates to a point in respect of which there was a conflict in the testimony. This conflict was mainly between V. S. Whiteside, a witness for the plaintiff, and O'Donohue, witness for the defendant, and related to assessment No. 156. On January 31, 1896, Hugh Whiteside wrote a letter to Mr. O'Donohue, in which were contained precisely the same statements made by V. S. Whiteside on the witness stand; and in his answer to that communication Mr. O'Donohue did not deny a single statement in the letter. So that in this respect Mr. V. S. Whiteside is strongly corroborated. In addition to that, the proofs made it very plain that Mr. O'Donohue was mistaken about a previous assessment, namely, No. 155, in regard to which he was just as positive as he was in regard to No. 156; and the records of the conclave, as far as any were kept, did not sustain Mr. O'Donohue's testimony. I think the jury were well warranted in believing what Mr. Whiteside said upon this subject. Indeed, I do not well see how they could have found otherwise upon this point of conflict.

There was no objection to the charge of the court as made to the jury, and the attention of one of the defendant's attorneys was called to the fact of the necessity of making such objection at the time, if there existed any. It was within the peculiar province of the jury to pass upon the facts about which there was a conflict, and I do not perceive that there is anything in the case upon which I can disturb the verdict of the jury. Motion for a new trial is consequently overruled.

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COX v. ROBINSON.

(Circuit Court of Appeals, Ninth Circuit. June 7, 1897.)

No. 314

1. BANKS—AUTHORITY OF OFFICER—ESTOPPEL.

When the directors of a bank permit an officer to hold himself out to the public as being invested with absolute power to manage and control its affairs, in such manner and for such length of time as to lead innocent persons to make contracts with him, honestly believing that he has the authority he claims, the bank cannot repudiate such contracts.

2. SAME—ASSIGNMENT OF JUDGMENT.

A national bank, owner of a judgment for the payment of which defendant was bound, through its vice president assigned such judgment to defendant: the consideration being the transfer by defendant to the vice president of another judgment, which the latter had obligated himself individually to pay, but in the interest of the bank. The vice president had no express authority from the directors to make the assignment, but he was the largest stock-



holder, a director, and had long been the principal acting officer, of the bank, and general manager of its business, exercising the power of transferring its property and indorsing its notes, with the knowledge and acquiescence of the directors, and he was generally reputed in the community to be its owner. *Held*, in an action by the receiver of the bank, that the jury were justified in finding that the vice president had authority to make the assignment, and that the bank received a consideration therefor.

In Error to the Circuit Court of the United States for the Southern Division of the District of Washington.

The nature of this action, the general character of the evidence introduced, and the principles of law involved therein, are set forth in the charge of the court to the jury, as follows:

"The plaintiff in this case, Mr. Richard T. Cox, sues, as receiver of the First National Bank of Arlington, Oregon, to recover from the defendant, J. L. Robinson, the amount of a judgment which the bank obtained against a man named N. Cecil. The action is brought against Robinson for the reason that Robinson became surety for the amount that the bank should recover in the action against Cecil, in consideration of discharging a writ of attachment which had been levied on the property of Cecil. The fact that the judgment was recovered by the bank against Cecil is not denied. The fact that Robinson entered into an obligation to pay whatever amount should be recovered in the action is not denied. The suit is resisted on the ground that the bank, which Cox represents as receiver, is not the owner of the judgment; that the judgment has been transferred by an assignment from the bank to the defendant, Mr. Robinson, for good consideration. There has been introduced in evidence a paper which is a certified copy of a purported assignment and transfer of this judgment on the record of the court in which the judgment was entered. This assignment and transfer purport to have been made by the First National Bank of Arlington, Oregon, by J. E. Frick, vice president. The whole case turns upon the question whether or not Mr. Frick had authority to transfer this judgment to Mr. Robinson. That he was vice president of the bank is not disputed, but it is disputed that he had any authority to transfer this judgment. And it is also disputed that the bank received any consideration for the transfer of the judgment. The plaintiff claims that it was illegal on these two grounds: That Frick was not authorized to do that kind of business, and that the bank received no consideration for the transfer of the judgment. On the question as to the consideration for the transfer, I instruct you: First, to constitute a sufficient consideration to give validity to the contract, it is necessary that the bank should have received consideration, or that Robinson should have parted with something that would constitute a consideration. There must have been either something moving to the bank, or something moving from Robinson, to constitute a good consideration to make the transfer legal. And it is immaterial whether it was one or the other. It must be one; but, if Robinson parted with something of value in consideration of this transfer, it has the same effect, in law, whether the bank received it or not, that it would if the bank received something. But further, on that point, the evidence shows that that which Robinson gave as consideration was the assignment of a judgment in his favor against Hoy & Butler. That transfer was made to Frick. Now, if Frick received a valid assignment of the judgment in favor of Robinson, and consideration for that moved from the First National Bank of Arlington to Mr. Robinson,—if the value which Robinson received came from the bank, and not from Mr. Frick,—it would still be a valid consideration moving from Robinson to the bank, because there would be a resulting trust in favor of the bank. And whatever Frick received, when acting for the bank, in consideration of the assets or property of the bank that he transferred, would not be his, although it appeared on the record to be in his name. He would take in trust for the bank, and it would be the property of the bank, in fact and in law. Now, as to the authority which Frick, as vice president of this bank, actually had to do this business: The law providing for creation of national banks does not provide for any such officer, by name, as 'general manager.' It does provide for a president and vice president. The duties and powers of the president and vice president are not defined in the law. In general, the vice president acts in place of the president,—has the power and authority

which belongs to the president,—in the absence of the president; but the law has not defined the powers of either president or vice president. The powers of the corporation are vested in a board of trustees. They possess the power to do the business of the bank; but in the transaction of ordinary business of the bank the depositors and creditors, and all who deal with the bank, seldom deal directly with the board of trustees. But the business of a bank is continuous, and its doors must be open to transact business with the public during business hours, and the business transactions of a bank necessarily have to be performed by agents; and whoever acts for the bank as an agent, with the knowledge and consent of the board of trustees, is to be deemed authorized by the board of trustees to perform the powers which the law vests in the board of trustees. The power of any officer may be limited, or it may be extended. He may have general powers. General powers may be conferred upon him by the by-laws, by resolution of the board of directors, or by the assumption of those powers with the knowledge and acquiescence of the board of trustees. Now, an officer of the bank, acting for it,—transacting its business,—is presumed in the law to have the powers which he assumes publicly with the knowledge and acquiescence of the board of trustees, whether evidence of his powers is contained in the records of the corporation, or in a written instrument or resolution, or whether it simply rests in the fact that the powers are continuously and publicly exercised, and not disaffirmed by the action of the board of trustees. The board of trustees are presumed by the law to see what is made apparent before the eyes of the public in the actions of their agents or officers. They are presumed to see what the public see in the actions of an agent or an official. Now, you have heard the evidence in this case, and it is not pretended that there was a resolution or written instrument giving to Frick whatever powers he had of a general or special character. They are to be determined by the manner in which the business of the bank was done. Such powers as he continually, during the existence of the bank, exercised publicly, must be presumed to have been exercised with the knowledge of the board of trustees; and unless they have disaffirmed or denied, by some public declaration, his right to exercise those powers, they are deemed to have acquiesced and assented that he might continue to exercise those powers, and they are bound by his acts in behalf of the bank. This, being a civil action, is one which the rules of evidence require the jury to decide according to the fair preponderance of the evidence. You should endeavor to harmonize the testimony of the different witnesses as far as it can be. Where there is a conflict in the testimony that is irreconcilable, you must weigh the evidence on one side against that opposed, and decide according to a fair preponderance of the evidence. The defendant comes here asserting the validity of this transfer of the judgment. He has the affirmative, and the burden of proof is upon him to establish that there was a valid transfer of the judgment to him, and he must make it out by at least a fair preponderance of the evidence. If the evidence preponderates against him, or is balanced evenly, so you cannot determine on which side there is a fair preponderance of the evidence, you must decide against the defendant, and in that case the plaintiff would be entitled to a verdict for the amount sued for. If you do find, however, by a fair preponderance of the evidence, facts which, when applied to the case under the rules I have given you, determine that Frick was authorized by the board of trustees to act in a matter of this kind,—to transfer a judgment in behalf of the bank,—and that he did make the transfer— I say, if those facts are established by a fair preponderance of the evidence, then your verdict must be for the defendant. An officer of a national bank, either vice president or other officer, or person who is acting as general manager therefor, has no authority to assign or transfer any claim for money due, in any event, unless expressly authorized to do so, without payment of the amount due on such claim." 70 Fed. 760.

Cox, Cotton, Teal & Minor and B. L. & J. L. Sharpstein, for plaintiff in error.

Thomas H. Brents and Wellington Clark, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

**HAWLEY**, District Judge (after stating the facts as above). About the time the First National Bank of Arlington, Or., sued out the attachment against Cecil, Robinson, the defendant in error, sued out an attachment in the same county against one L. D. Hoy and one Charles Butler, as partners under the firm name of Hoy & Butler, for a sum in excess of the amount for which the bank sued Cecil, and caused a garnishment to be served on the First National Bank of Arlington. Afterwards Hoy & Butler, as principals, and J. E. Frick, as surety, executed a bond or undertaking whereby they agreed to pay to defendant in error the amount of any judgment which he should recover in said action, and thereby procured the discharge of his attachment. The contention of the defendant is that, in the adjustment of these judgments, Frick, on behalf of the bank, and in its name, and as its vice president, assigned to him the bank's judgment against Cecil, and that he assigned to Frick his judgment against Hoy & Butler, taking from Frick his personal note for some \$1,200, and a few dollars in cash to cover the difference in amount between the two judgments; that in executing the bond as surety for Hoy & Butler, and in assigning the judgment of the bank against Cecil, Frick acted for the bank as its managing agent. The contention of the plaintiff in error is that there is no evidence tending to show any authority in Mr. Frick to transfer the Cecil judgment. The argument on behalf of the plaintiff is to the effect that the cashier of a bank is the executive officer of the bank, through whom the entire financial operations of the bank are conducted; that neither the cashier nor any other officer could make any contract involving the payment of money or transfer of property without express authority from the directors; that there was no such officer as "general manager" or "managing agent" of the bank known to the law, or mentioned in the by-laws of the corporation; that the evidence was wholly insufficient to justify a jury in finding that Frick had any authority to bind the bank in the transaction between himself and Robinson; that his acts in attempting to do so were never ratified by the directors; that the bank received no consideration for the transfer of the Cecil judgment, and that the entire transaction was in the personal interest of Frick, and that this fact was known to Robinson at the time of the transfer of the respective judgments; that the clause in the charge of the court, that "Frick's authority to act was to be determined by the manner in which the ordinary business of the bank was transacted," and the clause in the charge, "it is sufficient if Robinson parted with something of value," etc., were erroneous; and that the court erred in not instructing the jury to find a verdict for the plaintiff.

(1) Did Frick have authority to transfer the Cecil judgment to Robinson? (2) Did the bank receive any benefit from the transaction? (3) Did the court err in submitting these questions to the jury? (4) Are the principles of law announced in the charge of the court erroneous?

The correspondence between Frick and Robinson (which is copied in full in the dissenting opinion), considered by itself, tends very strongly to sustain the contention of the plaintiff in error that the assignments of the respective judgments by Frick and Robinson were

transactions between them as individuals. If the case rested upon that testimony alone, it may be that the judgment should be reversed. But the entire testimony must be considered. The record shows that Frick, as vice president, was expressly authorized by a resolution of the board of directors to transact such business "as would be transacted by the president, were he in the county." The assignment of the Cecil judgment purports upon its face to have been made by the bank. It reads as follows:

"Know all men by these presents, that the First National Bank of Arlington, a corporation, for a valuable consideration to it paid by J. L. Robinson, the receipt whereof is hereby acknowledged, has sold, assigned, and transferred, and does by these presents sell, assign, and transfer, to said J. L. Robinson, all its right, title, and interest in and to that certain judgment entered in the circuit court of the state of Oregon for Gilliam county on April 18th, 1893, in favor of said First National Bank, and against N. Cecil, for \$3,833.23, and \$300.00 attorney's fees, and \$149.46 costs, which said judgment is docketed in the Judgment Lien Docket of said county, at page 55 thereof.

"First National Bank, Arlington, Ore.  
"J. E. Frick, Vice Pres."

Robinson testified that he had transacted considerable business with the bank through Frick, that Frick always acted as general manager of the bank, and that Frick made the proposition to him to settle the judgments by transferring the same. "He assigned the judgment of the bank to me, and I assigned the Hoy & Butler judgment to him, and I took his note for the difference. \* \* \* Frick represented the bank. He seemed to be manager of the bank's affairs, and represented himself in that way. He signed the judgment, 'The First National Bank of Arlington, by J. E. Frick, Vice President.' He represented to me that he was doing business for the bank. That was my understanding; it was all done for the bank; he assigning me that judgment." Several other witnesses testified to the effect that Frick was not only the vice president and acting president of the bank, but its managing director, and the active agent in all its business affairs and transactions; that he was the principal stockholder thereof; that the public regarded him as having unlimited power to transact any business in which the bank was interested; that the bank was known in the community as "Frick's Bank"; that the power of transferring the property of the bank had been exercised by Frick in other cases with the knowledge of, and without objection on the part of, the directors of the bank; that he had indorsed the bills and notes of the bank in order to secure loans for the bank, and had disposed of other kinds of property belonging to the bank. J. A. Blakely, who was connected with the bank at different times as director and vice president, testified on behalf of defendant that Frick "was the general manager of the bank, so far as transacting its business was concerned." He gave several instances where, in transacting various kinds of business, Frick acted as agent and manager of the bank, and stated that the directors took no action that he was aware of to prevent Frick "from transacting the business which he did." Dan O'Connor was acquainted with the bank for four years; knew the general repute and understanding in the community as to the authority of Frick to represent the bank. He testified that:

"It was generally called 'Frick's Bank.' I know nothing more as to his authority than that he was regarded, so far as I know, as the manager of the bank, and the owner of it. \* \* \* The general reputation in the community in which I live was to the effect that this bank was Frick's bank. This community took in part Oregon, and all of Kllkitat county [Wash.]"

Several other witnesses testified substantially to the same effect. Mr. Frick testified on behalf of the plaintiff in error that he was the vice president, and acted as such "sometimes with the knowledge of the directors, and sometimes without"; that in transacting the business of the bank he took the title to property for the bank in his own name, or the name of the cashier of the bank—

"And the directors would know nothing about it until they happened to see it in examining the bank. \* \* \* The assignment of the judgment of Robinson in this case against Hoy & Butler was made to me in order to release me from liability for its payment, and from liability assumed by me for the benefit of the bank upon the undertaking already referred to. \* \* \* I had very grave doubts at the time of transacting this business whether I had a legal right to do it or not. \* \* \* I was led in the matter of signing the bond through my relations with the bank, and signed this bond where in no event it could be of any value to me, except benefits arising through the bank."

In reply to the question, "Were you not recognized by the directors of the bank, and by the public and those dealing with the bank, as the general superintendent and manager of its business, and as having full authority to transact any kind of business for it?" he said, "I was recognized by the public as being the main official of the bank in transacting all business, and at the same time only had the authority of a vice president." The books of the bank show that Frick was elected director and vice president of the bank for five successive years, from 1890 to 1894, inclusive, "and that his acts, as such vice president, in the way of indorsing and transferring the notes and other securities belonging to said bank, were at the different times ratified and confirmed by said board of directors." The cashier of the bank testified that the vice president and himself assisted each other in the management of the bank; that—

"During the operation of the bank it became necessary for the bank to borrow or raise money, and for the bank to transfer or pledge security for that purpose. \* \* \* Sometimes the board of directors authorized us to do this, and in other cases they did not. \* \* \* I recollect of several instances of such loans being made and such securities being pledged without the ratification being shown in the minutes. \* \* \* Frick made transactions in the general management of the business of the bank without consulting me."

Did the court err in refusing to instruct the jury to find a verdict for the plaintiff? The national courts have uniformly held that a case should not be withdrawn from the consideration of the jury unless the conclusion follows, as matter of law, that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish. *Beatty v. Association*, 21 C. C. A. 227, 75 Fed. 65, 68, and authorities there cited. In *Railway Co. v. Lowery*, 20 C. C. A. 596, 74 Fed. 463, there is an elaborate review of the English as well as of the American cases, resulting in the conclusion that to justify the court in withdrawing the case from the jury the evidence must be so insufficient in fact as to be insufficient in law, amounting to an absence of any material and substantial

evidence which if credited by the jury would in law justify a verdict in favor of the other party; that it is the duty of the trial court, when a motion is made to direct a verdict, to take that view of the evidence most favorable to the party against whom it is desired that a verdict should be directed, and from that evidence, and the inferences reasonably and justifiably to be drawn therefrom, determine whether or not, under the law, a verdict might be found for that party. In the light of all the evidence, we are of opinion that it was within the exclusive province of the jury to determine whether or not Frick had the authority to transfer the Cecil judgment, and to represent the bank in the transaction with Robinson, and whether or not the business was transacted on his part for the bank or for himself. *Merchants' Bank v. State Bank*, 10 Wall. 604, 644, 649; *Trust Co. v. Howell* (Minn.) 61 N. W. 141; *Kraniger v. Building Soc.*, Id. 904; *Mining Ass'n v. Meredith*, 49 Md. 389, 401; *Reed v. Railroad Co.*, 120 Mass. 43, 46; *Prescott v. Flinn*, 9 Bing. 22; *Collins v. Cooper*, 65 Tex. 460; *Cooper v. Schwartz*, 40 Wis. 54; 2 Mor. Priv. Corp. § 633; 4 Thomp. Corp. § 4644. The jury had the right to fairly infer from all the evidence that Frick had the authority, with the knowledge and consent of the directors of the bank, in relation to the powers usually exercised by the vice president, and the custom and usage of the bank in its general business dealings with its customers in the community, to make the contract with Robinson for the bank. It is unnecessary to attempt any general definition of the duties of the respective officers of banking corporations. The usage is not uniform in different cities, and sometimes not the same in different institutions in the same city. Country banks, and banks in small towns and cities, have different rules from those in large cities. Of course, there are certain general rules as to the duties of the cashier, teller, president, or directors. Courts have oftentimes recognized the fact, and have frequently decided that these officers have or have not either exclusive or concurrent powers to do certain acts of the nature designated in the particular case. Customs have sprung up from the necessity and the convenience of business in certain localities, and have prevailed in duration and extent until they have acquired in such localities the force of law. In the present case it is the exceptional class with which we have to deal. It is now well settled by the weight of reason and authority that whenever, in the usual course of the business of the corporation, the president or other officer has been allowed to manage and control its affairs, his authority to represent and bind the corporation may be implied from the manner in which he has been permitted by the trustees or directors of the corporation to transact its business. The acting head of the corporation, whether it is the president, vice president, cashier, or general manager, through whom and by whom the general and usual affairs of the corporation are transacted which custom or necessity has imposed upon the officer,—such acts being incident to the execution of the trust reposed in him,—may be performed by him without express authority; and in such cases it is immaterial whether such authority exists by virtue of his office, or is imposed by the course of business as conducted by the corporation.

Mining Co. v. Anglo-Californian Bank, 104 U. S. 192, 194; Sparks v. Transfer Co., 104 Mo. 531, 539, 15 S. W. 417; Washington Sav. Bank v. Butchers' & Drovers' Bank, 107 Mo. 134, 144, 17 S. W. 644; Lee v. Mining Co., 56 How. Prac. 373; Bank of Batavia v. New York, L. E. & W. R. Co., 106 N. Y. 195, 199, 12 N. E. 433; Calvert v. Stage Co., 25 Or. 412, 414, 36 Pac. 24; Ceeder v. Lumber Co., 86 Mich. 541, 49 N. W. 575; Davenport v. Stone (Mich.) 62 N. W. 722; Libby v. Bank, 99 Ill. 622, 630; Kraniger v. Building Ass'n (Minn.) 61 N. W. 904; Dougherty v. Hunter, 54 Pa. St. 381; Hamm v. Drew, 83 Tex. 77, 81, 18 S. W. 434; Carrigan v. Improvement Co., 6 Wash. 590, 34 Pac. 148; Bank v. Wintler (Wash.) 45 Pac. 38; 1 Mor. Priv. Corp. § 509; 4 Thomp. Corp. § 4883.

In *Merchants' Bank v. State Bank*, 10 Wall. 604, 644, which was a case involving the power and authority of the cashier of a state bank to buy and sell exchange, coin, and bullion, and to certify checks as being "good," and thereby to bind the bank for the payment thereof, the trial court instructed the jury to find a verdict for defendant. The questions argued by counsel were in several respects similar to the argument of counsel in this case. Referring to the subject of the authority of the cashier to make the purchase of the coin and bullion, the court said:

"(2) It should have been left to the jury to determine whether, from the evidence as to the powers exercised by the cashier with the knowledge and acquiescence of the directors, and the usage of other banks in the same city, it might not be fairly inferred that Smith had authority to bind the defendant by the contract which he made with the Merchants' Bank. (3) Where a party deals with a corporation in good faith, the transaction is not ultra vires, and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists. If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them. The jury should have been instructed to apply this rule to the evidence before them. The principle has become axiomatic in the law of corporations, and by no tribunal has it been applied with more firmness and vigor than by this court. Corporations are liable for every wrong of which they are guilty, and in such cases the doctrine of ultra vires has no application. Corporations are liable for the acts of their servants while engaged in the business of their employment in the same manner and to the same extent that individuals are liable under like circumstances. Estoppel in pais presupposes an error or a fault, and implies an act in itself invalid. The rule proceeds upon the consideration that the author of the misfortune shall not himself escape the consequences, and cast the burden upon another. Smith was the cashier of the State Bank. As such he approached the Merchants' Bank. The bank did not approach him. Upon the faith of his acts and declarations it parted with its property. The misfortune occurred through him, and, as the case appears in the record, upon the plainest principles of justice the loss should fall upon the defendant. The ethics and the law of the case alike require this result. Those who created the trust, appointed the trustee, and clothed him with the powers that enabled him to mislead, if there were any misleading, ought to suffer, rather than the other party."

As to the cashier's powers to certify the checks the court said:

"The questions whether the requisite authority was not inferable, and whether the principle of estoppel in pais did not apply, should in this connection also have been left to the jury."

In *Martin v. Webb*, 110 U. S. 7, 14, 3 Sup. Ct. 428, 433, the court, in considering the power and authority of a cashier to bind the bank in

the transaction of business which is ordinarily solely within the power of the board of directors, said:

"It is quite true, as contended by counsel for appellants, that a cashier of a bank has no power, by virtue of his office, to bind the corporation, except in the discharge of his ordinary duties, and that the ordinary business of a bank does not comprehend a contract made by a cashier—without delegation of power by the board of directors—involving the payment of money not loaned by the bank in the customary way. *Bank v. Dunn*, 6 Pet. 51; *U. S. v. City Bank of Columbus*, 21 How. 356; *Merchants' Bank v. State Bank*, 10 Wall. 604. Ordinarily he has no power to discharge a debtor without payment, nor to surrender the assets or securities of the bank. And, strictly speaking, he may not, in the absence of authority conferred by the directors, cancel its deeds of trust given as security for money loaned,—certainly not unless the debt secured is paid. As the executive officer of the bank, he transacts its business under the orders and supervision of the board of directors. He is their arm in the management of its financial operations. While these propositions are recognized in the adjudged cases as sound, it is clear that a banking corporation may be represented by its cashier,—at least, where its charter does not otherwise provide,—in transactions outside of his ordinary duties, without his authority to do so being in writing, or appearing upon the record of the proceedings of the directors. His authority may be by parol, and collected from circumstances. It may be inferred from the general manner in which, for a period sufficiently long to establish a settled course of business, he has been allowed, without interference, to conduct the affairs of the bank. It may be implied from the conduct or acquiescence of the corporation, as represented by the board of directors. When, during a series of years, or in numerous business transactions, he has been permitted, without objection, and in his official capacity, to pursue a particular course of conduct, it may be presumed, as between the bank and those who in good faith deal with it upon the basis of his authority to represent the corporation, that he has acted in conformity with instructions received from those who have the right to control its operations."

There was some material and substantial testimony to justify the jury in drawing the inference that Frick's undertaking to pay the judgment of Robinson against Hoy & Butler was executed by him on behalf of the bank, and that he took the assignment of that judgment as its trustee, believing the transaction would be beneficial to the bank. The bank had in its possession a draft of Hoy & Butler in the sum of \$8,000 for collection. This was attached by Robinson. Frick supposed at the time that the bank would be liable to the extent of any judgment which Robinson might recover. If he in good faith was acting for the bank in giving the undertaking, it would have been morally, if not legally, bound to indemnify him for any loss he might have sustained. The assignments of the judgments were a benefit to the bank. It placed the bank in a position to obtain a benefit by the collection of the Hoy & Butler draft, and a release of its liability on the undertaking. There is no evidence in the case tending in the slightest degree to show any fraud or collusion between Frick and Robinson. The testimony shows that Robinson acted throughout the entire transaction in perfect good faith, believing, and, as found by the jury, having the right to believe, that Frick had the authority to act for the bank. Under these circumstances he parted with property of value. The protection to the corporation in the management of its affairs rests upon its own course of conduct. If it conducts its business in the manner prescribed by its by-laws, through its board of directors, it will always be protected by the courts from any usurpation of power by any of its officers. *West St. Louis Sav. Bank v. Shawnee Co. Bank*, 95 U. S.



557; *Wardell v. Railroad Co.*, 103 U. S. 651, 657; 4 *Thomp. Corp.* § 4890. But, when the directors of a bank permit an officer to hold himself out to the public as being invested with absolute power to manage and control its affairs in such a manner and for such a length of time as to lead innocent persons to make contracts with its officers in the honest belief that such officer is authorized to make such contracts, the bank cannot repudiate the contract by invoking any by-law of the corporation which the directors themselves have negligently allowed to fall into disuse. In addition to the authorities heretofore cited, see *Crowley v. Mining Co.*, 55 Cal. 273; *McKiernan v. Lenzen*, 56 Cal. 61; *Ditch Co. v. Zellerbach*, 37 Cal. 543; *Railway Co. v. Simons* (Tex. Civ. App.) 25 S. W. 996; *Fifth Ward Sav. Bank v. First Nat. Bank*, 48 N. J. Law, 513, 7 Atl. 318; *Hirschmann v. Railroad Co.*, 97 Mich. 384, 396, 56 N. W. 842; *Greig v. Riordan*, 99 Cal. 316, 322, 33 Pac. 913; *The Vigilancia*, 19 C. C. A. 528, 73 Fed. 452, 456; *Milling Co. v. Kaiser* (Colo. App.) 35 Pac. 677, 679.

We are of opinion that the court did not err in announcing the principles of law applicable to this case. Admitting it to be true that there was considerable testimony which would have justified the jury to find a different verdict, yet it cannot be said that the finding of the jury is wholly unsupported by the evidence. The judgment of the circuit court is affirmed, with costs.

ROSS, Circuit Judge. I dissent. This action was brought by the plaintiff in error, as receiver of the First National Bank of Arlington, Or., to recover from the defendant in error the amount of a money judgment which that bank obtained in one of the state courts of Oregon on the 9th day of April, 1893, against a man named Cecil, in which action a writ of attachment was duly issued, and levied upon the property of Cecil, to release which the defendant in error executed a bond by which he undertook and agreed to pay to the bank the amount of any judgment which might be rendered in its favor against Cecil. There is no controversy respecting the amount of that judgment, or respecting the fact that the defendant in error obligated himself to pay the amount of it. But the contention of the defendant in error, and the ground upon which he resists the present action, is that prior to the commencement of this suit that judgment was assigned by the First National Bank of Arlington to the defendant in error for a sufficient consideration, and that at the time of the bringing of the present action the plaintiff in error was not, therefore, the owner thereof. That assignment was executed in the name of the bank by one J. E. Frick, who was at the time, and for years before had been, and for some time thereafter, and up to the closing of the bank, continued to be, its vice president and acting president. The circumstances under which the assignment was made were these: Prior to the bringing of the action of the bank against Cecil, to wit, November 13, 1888, the defendant in error had commenced an action in the same court of Oregon against one L. D. Hoy and one Charles Butler, as partners under the firm name of Hoy & Butler, for a sum in excess of the amount for which the bank sued Cecil, and in which action the defendant in error caused a garnish-

ment to be served on the First National Bank of Arlington, to release which Hoy & Butler, as principals, and Frick, as surety, executed a bond whereby they undertook and agreed to pay to the defendant in error the amount of any judgment which he should recover in that action, and thereby procured the discharge of his attachment. At the time of the service of the garnishment there was in the hands of the First National Bank of Arlington for collection a draft for \$8,000 drawn by Hoy & Butler on Campbell & Co., of Chicago. After the rendition of the judgment in favor of the bank against Cecil, and on June 11, 1893, the defendant in error recovered judgment in his action against Hoy & Butler for an amount in excess of the amount of the judgment recovered by the bank against Cecil. In this condition of affairs, Frick, who during all of the times mentioned continued vice president and acting president of the bank, and, as the testimony went to show, its real head, proposed, according to the testimony of the defendant in error himself, to make this sort of an exchange:

"The bank got a judgment," said the witness, "and I gave it a bond, and Frick was a surety on this other bond in the case of Robinson against Hoy & Butler; and, after the two judgments were obtained, Frick proposed to me, in May, 1893—Frick made a proposition to me to settle the judgment that way. He assigned the judgment of the bank to me, and I assigned the Hoy & Butler judgment to him, and I took his note for the difference. He wrote me letters to have mine ready; that he would get it fixed up and send pretty soon. Finally he did send them to me to sign and return. His was signed, and I signed mine and returned to him. The judgment I got against Hoy & Butler was the larger judgment. There was something like \$1,200 difference, and Frick gave me his note for the difference. Frick represented the bank. He seemed to be manager of the bank's affairs, and represented himself in that way. He signed the judgment, 'The First National Bank of Arlington, by J. E. Frick, Vice President.' He represented to me that he was doing business for the bank. That was my understanding. It was all done for the bank, he assigning me that judgment. I cannot remember the date, but I have it here in black and white. It was on February 16, 1894, when the judgment and papers reached me. The agreement was made a good while before. February 16, 1894, was when I received it. I sent the judgment which he assigned to me to the clerk's office at Condon. It is on file there now."

Notwithstanding the defendant in error testified that in the transaction Frick represented the bank, and that he represented to him (the witness) that he was doing business for the bank, and that that was the witnesses' understanding, the written correspondence between Frick and the witness altogether fails to bear out that interpretation of the transaction. The record shows that on February 16, 1894, Frick wrote to the defendant in error this letter:

"The First National Bank of Arlington.

"Arlington, Oregon, 2/16, 1894.

"J. L. Robinson, Walla Walla—Dear Sir: Herewith please find judgment against Cecil, assigned, and my note dated at time judgment was taken, bearing interest, 10%, for difference between the two judgments. I made the note payable Aug. 15th, to allow plenty of time, and hope it will meet with your approval. I expect to pay before that time, and stop interest. I made sale of mine at Baker City. My payments are to come in monthly, about \$3,000 a month, commencing April first. Mays, Wilson & Huntington say 'that the assignments, when executed, should be attached to judgment-roll docket at the place where the judgment is entered.' Sign and return my assignment.

"Yours,

J. E. Frick."

On February 23, 1894, Frick wrote to the defendant in error, inclosing him a draft for \$12.40, as the "amount you [Robinson] claim as difference between the amount of my judgment and note and your judgment." February 26, 1894, the defendant in error wrote to Frick, in which letter the defendant in error claimed that after deducting from the amount of his judgment against Hoy & Butler the amount of the Cecil judgment, and the amount of Frick's note to the defendant in error, and the amount of \$12.40 transmitted in Frick's letter of February 23, 1894, there was still a balance due him (Robinson) of \$8.04; and the writer added:

"I have waited a long time on this matter, and have not crowded you in any way; and I think that, if you will figure this matter up, you will see I am right. If I am not, I am ready to make it right.

"Yours, truly,

J. L. Robinson."

March 6, 1894, Frick wrote to the defendant in error this letter:

"The First National Bank of Arlington.

"Arlington, Oregon, Mch. 6, 1894.

"J. L. Robinson, Esq., Walla Walla—Dear Sir: Herewith please find 8.04, amount due you as difference our judgments and note. Please assign and return my judgment. You had better send yours also to Lucas to be filed.

"Yours,

J. E. Frick."

In answer to which the defendant in error replied as follows:

"Walla Walla, Wash., March 19, 1894.

"Mr. J. E. Frick, Arlington, Oregon—Dear Sir: Your letter on receipt of deposit just received. It has been in the office here, but you did not have it directed right, and by chance I got it to-day. Will send you your judgment all signed.

"Yours, truly,

J. L. Robinson."

It is plain, I think, from this correspondence between the parties, that the assignment from the defendant in error to Frick of the judgment against Hoy & Butler, thereby releasing Frick of his obligation to pay it, was an assignment to Frick as an individual, and was not intended by either of the parties for the benefit of the bank. If so, why was it not made to the bank? There was no difficulty in the way. The assignment could have been made to the bank just as easily as to Frick, if it had been intended for the bank, and certainly that would have been the natural and ordinary course in such event. But what removes any doubt that might otherwise attach to the transaction is the written correspondence between the parties. Not only was the difference between the amount of the two judgments covered by the personal note of Frick and two small sums of money paid by him, but in his letter of February 16, 1894, inclosing his personal note for that difference in part, he explained to the defendant in error why he made the note payable August 15th, and from what source he expected to pay it. That source was not the bank, but Frick's mine. "I made the note," said Frick in his letter to the defendant in error, "payable August 15th, to allow plenty of time, and hope it will meet with your approval. I expect to pay it before that time, and stop interest. I made sale of mine at Baker City. My payments are to come in monthly, about \$3,000 a month, commencing April first." This and the other correspondence above quoted between Frick and the defendant in error cannot be reconciled with the

claim that the assignment from the defendant in error of his judgment against Hoy & Butler was to Frick for the benefit of the bank; but, on the contrary, it unmistakably shows, in my opinion, that the assignment by the defendant in error to Frick of the Hoy & Butler judgment was to him as an individual, and was so intended by both parties thereto. Such an assignment to Frick did not constitute any consideration for an assignment by Frick, for the bank and in its name, of its judgment against the defendant in error. The court below therefore erred in instructing the jury as it did that:

"To constitute a sufficient consideration to give validity to the contract, it is necessary that the bank should have received consideration, or that Robinson should have parted with something that would constitute a consideration. There must have been either something moving to the bank, or something moving from Robinson, to constitute a good consideration to make the transfer legal, and it is immaterial whether it is one or the other. It must be one; but, if Robinson parted with something of value in consideration of this transfer, it has the same effect, in law, whether the bank received it or not, that it would if the bank received something."

It is not pretended that Frick was expressly authorized to make the assignment to the defendant in error of the bank's judgment against Cecil. Such authority was attempted to be shown by showing that he had the management of the affairs of the bank, and that he was permitted by the directors to appear to the public as the head of the institution; and, moreover, that the board of directors, by its silence and failure to repudiate the assignment, in effect ratified it. The answer to all of this is that the defendant in error was not an innocent party relying upon ostensible authority in Frick, and in good faith accepting through his hands the bank's judgment, for value given the assignor; but, as has been seen, the very proposition made to the defendant in error by Frick for the exchange of the judgments, and afterwards embodied in the correspondence between the parties, carried notice to the defendant in error not only of the possible want of power in Frick to make the assignment of the bank's judgment, but direct and positive notice of such want of power; for he knew that the assignment he made to Frick of his judgment against Hoy & Butler was to Frick for his own individual benefit, and the law thereupon charged him with notice that such an assignment constituted no consideration for an assignment by Frick of a judgment belonging to the bank, of which he was the vice president and acting president. See, in this connection, *West St. Louis Sav. Bank v. Shawnee Co. Bank*, 95 U. S. 557; *U. S. v. City Bank of Columbus*, 21 How. 356; *Bank v. Dunn*, 6 Pet. 61; *Flannagan v. Bank*, 56 Fed. 959. For the reasons stated, I think the judgment should be reversed, and the cause remanded to the court below for a new trial.

## UNITED STATES v. BRYAN et al.

(Circuit Court, N. D. California. August 23, 1897.)

No. 11,791.

## POSTMASTER — LIABILITY FOR MONEY EMBEZZLED BY CLERK — CIVIL SERVICE LAWS.

It is no defense to an action on the official bond of a postmaster, to recover public funds unaccounted for, that such funds were embezzled by a clerk appointed under the civil service laws.

Suit for the breach of certain conditions of a postmaster's bond, in failing to account for and pay over to the post-office department the sum of \$9,399.88. Answer that the money was embezzled by a clerk who held his office under civil service laws. Demurrer to answer.

H. S. Foote, U. S. Atty., and Samuel Knight, Asst. U. S. Atty.  
John T. Carey and Page, McCutchen & Eells, for defendants.

MORROW, Circuit Judge. This case comes up on a demurrer to the answer filed by the defendants to the complaint. The suit is brought by the United States against William J. Bryan, as principal, and Jesse D. Carr, William Matthews, William W. Stow, and Henry Miller, as sureties, for the alleged breach by said defendants of the conditions of a certain writing obligatory or bond, signed and executed by them on July 14, 1886, a copy of which is annexed to and made a part of the complaint. It is alleged that William J. Bryan was the postmaster of San Francisco, in the state and Northern district of California, from and including the 21st of June, 1886, to and including the 30th of June, 1890; that, as such postmaster, he gave, as principal, with the remaining defendants as sureties, his official bond in the sum of \$300,000, for the faithful discharge of all the duties and trusts imposed upon him either by law or the rules or regulations of the post-office department, and faithfully once in three months, and oftener if thereto required, render accounts of his receipts and expenditures as postmaster to the post-office department, in the manner and form prescribed by the postmaster general, and should pay the balance of all moneys that should come to his hands from money orders issued by him, and should safely keep all the public money collected by him, or otherwise at any time placed in his possession and custody, till the same is ordered by the postmaster general to be transferred or paid out, and should faithfully account with the United States, in the manner directed by the said postmaster general, for all money orders which he as postmaster or as agent and depository, as aforesaid, should receive for the use and benefit of the said post-office department. It is further alleged that said William J. Bryan did not well and faithfully execute and discharge the duties and trusts imposed on him as such postmaster, either by law or the rules and regulations of the post-office department, and did not once in three months, or oftener when required, faithfully or otherwise render an account of his receipts and expenditures as such postmaster to the post-office department in the manner and form prescribed by the postmaster general in his several instructions to postmasters,

and did not pay the balance of all moneys that came into his hands in the manner prescribed by the postmaster general of the United States for the time being, or otherwise. The particular breach of the conditions of the bond alleged is that said William J. Bryan, while he was postmaster, as aforesaid, did from time to time, in his official capacity as such postmaster, collect and receive divers sums of money on his money-order account, for which he neglected to render his account to the post-office department in the manner and form or otherwise as prescribed by law, which sums of money so received on his money-order account, and not accounted for, as aforesaid, on the 30th day of June, 1890, amounted to the sum of \$9,399.88, no part of which sum has been paid. The answer filed to this complaint by the defendants admits the execution and delivery of the bond for a breach of which the United States is suing; admits that William J. Bryan was postmaster, as alleged; denies that he did not well or faithfully exercise or discharge the duties or trusts imposed upon him as such postmaster in the particulars alleged in the complaint; admits, however, that on the 3d day of June, 1890, there was due the United States, upon the money-order account, at the post office of San Francisco, the sum of \$9,399.88, and that at said date, or at any time since, said sum, or any part thereof, has not been paid by said William J. Bryan. It is then averred, by way of defense to the action, that the said sum of \$9,399.88 was collected, embezzled, and converted to his own use by James S. Kennedy, a clerk in the post office at San Francisco, who had taken and held said office under the civil service laws of the United States, and the rules and regulations adopted pursuant to said law governing the appointment, promotion, and tenure of said office; that said Kennedy was subsequently indicted by a United States grand jury, in the district court of the United States for the Northern district of California, for said offense, and was thereafter convicted of said crime. It is further averred that the defendant, William J. Bryan, as postmaster, aforesaid, used all the diligence and supervisory care over said clerk that a prudent, painstaking chief officer could over a subordinate officer, to protect the United States, and to secure the faithful discharge of his duties as such clerk, and had no knowledge or intimation of the misappropriation of said money-order funds by said Kennedy until after said crime had been consummated; nor did said Bryan at any time receive, nor has he yet received, said money-order funds, or any part thereof, so misappropriated, stolen, and embezzled by said Kennedy. Counsel for the United States have demurred to this answer, and our attention is directed to that part of the answer which sets up, by way of defense, that the money which the defendant Bryan failed to account for was received and embezzled by a clerk who had been appointed and held his office under the civil service laws of the United States. In other words, the question to be determined is whether this is good matter of defense to the action brought by the United States for the alleged breach of defendant Bryan's official bond.

The liability of a public officer upon his official bond is governed, to a large extent, by the terms of the bond itself, and the duties imposed upon him by law. The terms of the bond sued on in this case

are absolute. No exceptions are provided for. The condition of the obligation was that he should faithfully discharge all the duties and trusts imposed on him, either by law or the rules and regulations of the post-office department, etc. The law, rules, and regulations required him to account for all the moneys received by him as postmaster. It is admitted by the answer that he did not account for the sum sued for, viz. \$9,399.88, and the defense made is as above stated. Nowhere, either in the law or in the rules and regulations of the post-office department, is there any provision releasing a postmaster from his liability to the government where money-order funds, of which he had the possession, have been embezzled by a clerk who held his office as such under the civil service laws of the United States. The court certainly cannot import such an exception into the conditions of the bond.

The leading case on the general subject of the liability of depositaries of public moneys on their official bonds is *U. S. v. Prescott*, 3 How. 578. In that case, a receiver of public moneys had given a bond conditioned, among other things, that he would "well, truly, and faithfully keep safely all the public moneys collected by him," etc. Suit was brought by the United States against him and the sureties upon his official bond for a breach thereof, in failing to pay certain public moneys, which he had received, as directed by the secretary of the treasury. As a defense to the suit, it was attempted to justify this default by setting up that the money had been stolen from him without his fault. There was a division of opinion among the judges of the circuit court where the suit was instituted, and the case was certified up to the supreme court on this question, viz.:

"Does the felonious stealing, taking, and carrying away the public moneys in the custody of a receiver of public moneys, without any fault or negligence on his part, discharge him and his sureties, and is that a good and valid defense to an action on his official bond?"

The supreme court held that it was not a good defense, and Mr. Justice McLean, in delivering the opinion of the court, states very clearly and forcibly the reasons therefor. The learned justice said:

"This is not a case of bailment, and, consequently, the law of bailment does not apply to it. The liability of the defendant arises out of his official bond and principles which are founded upon public policy. \* \* \* The obligation to keep safely the money is absolute, without any condition, expressed or implied, and nothing but the payment of it, when required, can discharge the bond. \* \* \* Public policy requires that every depositary of the public money should be held to a strict accountability. Not only that he should exercise the highest degree of vigilance, but that 'he should keep safely' the moneys which come to his hands. Any relaxation of this condition would open the door to frauds, which might be practiced with impunity. A depositary would have nothing more to do than to lay his plans and arrange his proofs, so as to establish his loss, without laches on his part. Let such a principle be applied to our postmasters, collectors of the customs, receivers of public moneys, and others who receive more or less of the public funds, and what losses might not be anticipated by the public! No such principle has been recognized or admitted as a legal defense. And it is believed the instances are few, if, indeed, any can be found, where any relief has been given in such cases by the interposition of congress. As every depositary receives the office with a full knowledge of its responsibilities, he cannot, in case of loss, complain of hardship. He must stand by his bond, and meet the hazards which he voluntarily incurs."

The doctrine laid down in this case has been followed in the courts of the United States and in the state courts in a large number of cases, among which may be cited the following: *U. S. v. Morgan*, 11 How. 154; *U. S. v. Dashiell*, 4 Wall. 182; *U. S. v. Keebler*, 9 Wall. 83; *Bevans v. U. S.*, 13 Wall. 56; *Boyden v. U. S.*, 13 Wall. 17; *U. S. v. Thomas*, 15 Wall. 338; *District Tp. v. Morton*, 37 Iowa, 555; *District Tp. v. Smith*, 39 Iowa, 9; *State v. Moore*, 74 Mo. 413; *Jefferson Co. v. Lineberger*, 3 Mont. 231; *Lowry v. Polk Co.*, 51 Iowa, 50, 49 N. W. 1049; *State v. Powell*, 67 Mo. 395; *Ward v. School Dist.*, 10 Neb. 293, 4 N. W. 1001; *State v. Harper*, 6 Ohio St. 610; *State v. Nevin*, 19 Nev. 162, 7 Pac. 650; *State v. Houston*, 78 Ala. 576. See, also, *Mechem*, *Pub. Off.* §§ 297-301, 912, where the general doctrine is well stated, and all the authorities collated. It is true that in *U. S. v. Thomas*, *supra*, Mr. Justice Bradley, in delivering the opinion of the court, questioned the correctness of some of the extreme views stated in some of the authorities referred to in *U. S. v. Prescott*. It was held that the act of a public enemy would be a good defense against a public officer and his sureties upon his official bond. In *U. S. v. Humason*, 6 Sawy. 199, Fed. Cas. No. 15,421, the court permitted the defense that the officer who had possession of the money was on a steamship which was lost at sea, the officer drowned, and the sum of money, while being transported by said officer, without any fault or negligence of his, lost in the Pacific Ocean. The only exceptions, therefore, sanctioned by the authorities, are the act of God or of a public enemy. As the present case does not come within either of the exceptions thus recognized, it is difficult to see how the defendants, though harsh it may seem to be, can escape the exacting measure of liability which the government, based upon principles of sound public policy, requires of those public officials who handle the public moneys. The rules and regulations of the post-office department and various acts of congress indicate to what strict measure of accountability postmasters are held.

Section 4029, Rev. St., providing for the issuing of money orders, declares that:

"The postmaster and his sureties shall, in every case, be held accountable upon his official bond for all moneys received by him or his designated assistants or clerks in charge of stations, from the issue of money-orders, and for all moneys which may come into his or their hands, or be placed in his or their custody by reason of the transaction by them of money-order business."

In the concluding portion of section 4 of the act of March 3, 1883 (22 Stat. 528), it is provided:

"That the salaries of postmasters, as fixed by law, shall be deemed and taken to be full compensation for the responsibility and risk incurred and for the personal services rendered by them as custodians of the money-order and other funds of the post-office department."

In other words, the liability of a postmaster upon his official bond for the safe-keeping and faithful accounting for the public moneys that come into his possession is regarded by law as an absolute one. The mere fact, as is pleaded by way of defense in this case, that the clerk who embezzled the money held his office under the civil service laws, can make no difference. No such exception is made by the



bond, and the court cannot interpret it into the law as it now stands. Though the clerk held his position under the civil service laws, he was nevertheless subject to the immediate supervision of the postmaster, and the latter was none the less responsible for his acts. See Postal Rules and Regulations (Ed. 1887) § 464. Moreover, I am of the opinion that, based upon principles of public policy, the postmaster should be held to an absolute liability for the acts of his subordinates, whether they be under civil service rules or not. A full appreciation of this absolute liability will tend to greater vigilance and scrutiny on the part of postmasters over the acts of their subordinates, and will tend to preserve the efficiency of the postal service. Any other rule would lay the door wide open for frauds, which could be practiced with impunity, to the demoralization of the service.

I am of the opinion that the demurrer to the answer should be sustained, and it is so ordered.

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FEURER v. STEWART.

(Circuit Court, D. Washington, N. D. July 17, 1897.)

ATTACHMENT—CODE OF WASHINGTON—MOTION TO DISSOLVE—APPEARANCE.

Under the Code of the state of Washington (2 Hill's Code, § 318), which provides that "the defendant may, at any time after he has appeared in the action, \* \* \* apply on motion \* \* \* that the writ of attachment be dissolved," a defendant has no right to move to dissolve the attachment, without first entering a general appearance in the action.

This was an action at law by Louis Feurer against Olive J. Stewart, and was commenced by an attachment against the defendant's property. The case is now heard on a motion to dissolve the attachment.

Charles F. Munday, for plaintiff.

Harold Preston, for defendant.

HANFORD, District Judge. On a motion by the defendant to dissolve the attachment of the defendant's property herein, two questions were argued, viz.: (1) Whether, under the Code of this state, a defendant in an attachment suit has a right to move to quash the writ, or dissolve an attachment, without first entering a general appearance in the action. (2) Whether the Code of this state authorizes a writ of attachment to issue in an action to recover unliquidated damages.

On the first question, I hold that, while the primary object of the attachment law is to provide security for the satisfaction of any judgment which the plaintiff may recover in the action, there is also a manifest purpose in the law to coerce the defendant into entering an appearance as a means whereby the court may obtain full jurisdiction of the parties. Section 318, 2 Hill's Code, is as follows:

"Sec. 318. The defendant may at any time after he has appeared in the action, either before or after the release of the attached property, or before any attachment shall have been actually levied, apply on motion, upon reasonable notice to the plaintiff, to the court in which the action is brought, or to the judge thereof, that the writ of attachment be dissolved on the ground that the same was improperly or irregularly issued."

I consider that, according to the spirit and intention, as well as the terms, of the law, the court must refuse to entertain the motion to relieve the defendant from the burden of an attachment, until she places herself within the jurisdiction of the court by a general appearance in the action. Of course, if the court has no jurisdiction to issue the writ, the defendant cannot be coerced into a waiver of the jurisdictional question, but she can be compelled to come in and defend by process against her property within the jurisdiction as well as by service of a summons.

By referring to the record, I find that I am relieved from the necessity of passing upon the second question. It appears by the affidavit for the attachment and the complaint that the plaintiff is proceeding upon the theory that the action is *ex contractu*, and the defendant is indebted to him in a fixed and definite amount for a breach of covenant. If he can recover at all upon the facts alleged, the amount of his recovery can be ascertained by computation, and fixed by the court, without the aid of a jury. Motion denied.

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JONES v. McCORMICK HARVESTING MACH. CO.

(Circuit Court of Appeals, Seventh Circuit. July 17, 1897.)

No. 386.

1. JURISDICTION—AMOUNT IN CONTROVERSY.

Jurisdiction of an action for conversion is not lost by reason of the finding that the goods were worth less than the jurisdictional amount, where there is no reason to believe that the value was overstated in the declaration for the purpose of conferring jurisdiction.

2. CONVERSION—ASSIGNMENT FOR CREDITORS.

An action for conversion is maintainable though the defendant came into possession and disposed of the property as an assignee for the benefit of creditors under the Wisconsin statute, as property in the hands of an assignee under that statute is not in the custody of the law or of a court.

3. SAME—APPEAL—SCOPE OF REVIEW.

Questions involving an inquiry into the correctness of the finding of facts cannot be considered on writ of error.

In Error to the Circuit Court of the United States for the Eastern District of Wisconsin.

J. E. Malone, for plaintiff in error.

T. W. Spence, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. The plaintiff in error was the defendant below. The action was for the conversion of goods alleged to have been of the value of \$2,500. There was a written waiver of trial by jury, and the court, upon a special finding of the facts, gave judgment for the plaintiff for a sum less than \$2,000.

Jurisdiction of the case was not lost by reason of the finding that the goods converted were worth less than the jurisdictional amount, since it does not appear, nor is there shown reason to believe, that the value was overstated in the declaration for the purpose of conferring

jurisdiction. *Pickham v. Manufacturing Co.*, 23 C. C. A. 391, 77 Fed. 663.

The objection that the action was not maintainable because the defendant had come into possession and had disposed of the property as an assignee, by virtue of an assignment for the benefit of creditors under the statute of the state of Wisconsin, is not well taken, and would not have been even if the action had been in replevin. Property in the hands of an assignee for the benefit of creditors under the Wisconsin statute is not in the custody of the law or of a court. *Matthews v. Ott*, 87 Wis. 399, 58 N. W. 774.

Other questions urged upon our attention cannot be considered, because they involve inquiry into the correctness in certain particulars of the finding of facts. The decisions upon the point by this court, commencing with *Jenk's Adm'r v. Stapp*, 9 U. S. App. 34, 3 C. C. A. 244, and 52 Fed. 641, are numerous.

The judgment below is affirmed.

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WASHBURN & MOEN MANUF'G CO. v. RELIANCE MARINE INS. CO.  
RELIANCE MARINE INS. CO. v. WASHBURN & MOEN MANUF'G CO.<sup>1</sup>

(Circuit Court of Appeals, First Circuit. September 7, 1897.)

Nos. 156, 157.

1. MARINE INSURANCE—LIABILITY FOR CONSTRUCTIVE TOTAL LOSS.

Underwriters are not liable for a constructive total loss, except where they consent to an abandonment, under a policy containing a warranty against partial loss.

2. SAME—ACCEPTANCE OF ABANDONMENT.

Underwriters, under the "sue and labor" clause of a policy, cannot be charged with the acceptance of an abandonment, simply because they caused the property to be preserved, and removed from a place where there was no agent of the assured, no adequate means for its protection, and no market, to the place to which it was originally shipped, where were conveniences for its protection, and a good market, and there offering it to the representative of the assured, to whom it had been, in the first instance, consigned; especially where the assured had no right to abandon.

In Error to the Circuit Court of the United States for the District of Massachusetts.

Eugene P. Carver, for Washburn & Moen Manuf'g Co.

Francis C. Lowell, F. J. Stimson, and A. Laurence Lowell, for Reliance Marine Ins. Co.

Before COLT, Circuit Judge, and NELSON and WEBB, District Judges.

WEBB, District Judge. In the course of the disaster a part of the property insured, exceeding in amount 5 per cent. of the whole, was totally lost, and for this a verdict was taken for the plaintiff by consent. As to the rest of the property insured, it is evident that the

<sup>1</sup> Rehearing denied October 30, 1897.

principal question in these cases is the ruling that the insurance company is not liable for a constructive total loss. The Massachusetts court has held that a policy like the one now before us, containing a warranty against partial loss, does cover a constructive total loss. *Kettell v. Insurance Co.*, 10 Gray, 144; *Heebner v. Insurance Co.*, Id. 131; *Greene v. Insurance Co.*, 9 Allen, 217; *Mayo v. Insurance Co.*, 152 Mass. 172, 25 N. E. 80. These decisions of the state court, however, are not conclusive upon this court. "The questions under our consideration are questions of general commercial law, and depend upon the construction of a contract of insurance, which is by no means local in its character, or regulated by any local policy or customs. Whatever respect, therefore, the decisions of state tribunals may have on such a subject,—and they are certainly entitled to great respect,—they cannot conclude the judgment of this court. On the contrary, we are bound to interpret this instrument according to our opinion of its true intent and objects, aided by all the lights which can be obtained from all external sources whatsoever; and, if the result to which we have arrived differs from that of these learned state courts, we may regret it, but it cannot be permitted to alter our judgment." *Carpenter v. Insurance Co.*, 16 Pet. 495, 511. The supreme court, in the exercise of the duty so avowed, has examined this question, and pronounced the judgment that under such a policy as that in these cases a constructive total loss is not covered. *Marcadier v. Insurance Co.*, 8 Cranch, 39; *Morean v. Insurance Co.*, 1 Wheat. 219; *Hugg v. Banking Co.*, 7 How. 595. In *Insurance Co. v. Fogarty*, 19 Wall. 640, that court reviewed these cases without in any way qualifying them. They are imperative authorities here, and, regarding them as controlling us, there will be no advantage in extending this opinion by citation and discussion of the numerous and conflicting decisions of state courts upon the same question. It follows that the plaintiffs had not the right to abandon, and inquiry into the sufficiency of the assumed abandonment is of no use.

It has been urged upon us that insurers may make themselves liable by accepting an abandonment, and their subsequent dealing with the property, even when there is no right to abandon. Allowing this to be so, we agree with the circuit judge that in this case the evidence was not sufficient to authorize the jury to find that the defendant ever accepted the abandonment, or did anything in respect to the property insured that was equivalent to an acceptance. This court does not entertain the view of the circuit court that the underwriters chartered the *Cactus*, and forwarded by her the cargo from Key West to Velasco. Considering the whole evidence upon that point, the sounder opinion is thought to be that, those things, if not done by the immediate action of the captain of the *Benjamin Hale*, they were at least done under his authority, and with his approval. Before he left Key West, but after the *Benjamin Hale* and the cargo had arrived there, he authorized Taylor & Curry, the agents at that port of his vessel, to charter the *Cactus*, if they could. When she was afterwards chartered, the charter party purports to be made and concluded between the agents of the *Cactus*, of the first part, and John Hall, master of the *Benjamin Hale*, of the second part; and it is

signed, "John Hall, Master Sch. Benj. Hale." It is true that the underwriters' agents advised that the cargo be forwarded. But, leaving this question undetermined, the underwriters, under the "sue and labor" clause of the policy, cannot be charged with the acceptance of an abandonment, especially as the insured had no right to abandon, simply because they caused the property to be preserved, and removed from a place where there was no agent of the assured, and where there was no market, and where there was no adequate means for its protection, to the place to which it was originally shipped, where there was a good market and conveniences for its protection, and there offering it to the representatives of the insured, to whom it had been, in the first instance, consigned. Such labor and care for the preservation of the property did not make them liable for a total loss if the property was forwarded by the first available conveyance, and without unnecessary delay, as in this case. The decision of this court in *Monroe v. Insurance Co.*, 3 C. C. A. 280, 52 Fed. 777, disposes of the contention that the sale at Velasco entitles the plaintiff to recover for a total loss.

Finally, no error is found in the court below, and its judgment will be affirmed, but, as both parties have sued out writs of error, and neither has sustained his exceptions, the costs of this court must be equally divided. Judgment affirmed; costs of the circuit court of appeals to be divided equally.

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#### TILLINGHAST v. CARR.

(Circuit Court, D. Washington, W. D. August 7, 1897.)

##### 1. PROMISSORY NOTE—CONSIDERATION.

Defendant received, in trust for a national bank, stock in another bank, executing his note for the same at its par value, in order that the books of the bank might not show that it was the owner of the stock. He afterwards received dividends and securities in liquidation of such stock, and turned over the securities and paid part of the dividends to the bank, taking up his note and executing a new note for the balance of the dividend. *Held*, that he could not defend against such note in the hands of a receiver on the ground that he was an accommodation maker.

##### 2. NOTE PAYABLE TO NATIONAL BANK—OPTION TO PAY IN STOCK OF ANOTHER BANK.

An agreement between the officers of a national bank and the maker of a note payable to the bank that it may be paid by the transfer to the bank of stock of another bank is illegal, and the receiver of the bank is not estopped from denying its validity by reason of having realized on securities transferred to the bank as a part of the transaction; such securities having been received by such maker as trustee for the bank.

This is an action at law by Phillip Tillinghast, as receiver of the Columbia National Bank, against F. L. Carr, upon a promissory note for \$1,750. In his answer the defendant pleads want of consideration as a defense to the action. There was a trial by the court, a jury being waived.

W. H. Pritchard, for plaintiff.

Geo. D. Schofield and T. W. Hammond, for defendant.

HANFORD, District Judge. From the evidence, I find the origin and history of the note sued on to be as follows: In the summer of 1893, W. G. Peters and N. B. Dolson were officers of the Columbia National Bank. Dolson at that time was indebted to the Columbia National Bank in the sum of \$3,800, and he held stock of the First National Bank of Montesano to the amount of \$3,800, par value; and W. G. Peters was indebted to the Columbia National Bank in an amount exceeding \$4,000, and he held stock of the First National Bank of Montesano to the amount of \$4,000, par value. At that time said stock, to the amount of \$5,800, par value, was pledged to the defendant as collateral for a loan from him to the Columbia National Bank of \$5,000. The defendant wished to control the voting of all of said stock, and also, if possible, to induce certain friends of his to purchase the same, and for these purposes made an application to Peters, as the active manager of the Columbia National Bank, for an option on said stock; and, as a result of negotiations, said stock, amounting to \$7,800, par value, was first transferred to the German-American Safe-Deposit & Savings Bank of Tacoma, which bank, in consideration for the transfer of said stock, issued to Peters and Dolson its certificate of deposit for the amount of \$7,800. Then the Columbia National Bank received said certificate of deposit, and, in consideration therefor, canceled the indebtedness of Peters and Dolson, to the amount of \$7,800. Then the stock of the First National Bank of Montesano, to the amount of \$7,800, was transferred to the defendant, the certificate of deposit of the German-American Safe-Deposit & Savings Bank was canceled, and the defendant gave to the Columbia National Bank his promissory note for \$7,800. Afterwards the First National Bank of Montesano went into voluntary liquidation, and after having taken care of all its debts a dividend of 35 per cent. was paid on its capital stock, and the defendant received said cash dividend and also notes, mortgages, and warrants, equal in amount to the par value of the \$7,800 worth of stock which had been transferred to him as aforesaid. Afterwards the defendant changed the form of his obligation to the Columbia National Bank by taking up his note for \$7,800, and giving in lieu thereof two notes, one for \$980 and one for \$1,750, which together represented the amount of the dividend which he had received, and a third note for \$5,070, the remaining 65 per cent. of his original liability. Afterwards the defendant paid cash and delivered notes and mortgages and warrants covering the amount of his notes for \$980 and \$5,070, and received from the Columbia National Bank a surrender of said notes, and a receipt for the money and securities which he had paid and delivered in satisfaction, which receipt contained an agreement on the part of the Columbia National Bank permitting the defendant, at his option, within 5 years from November 3, 1894, to deliver stock of the Bank of Montesano to the amount of \$5,000 in full payment of the remaining note for \$1,750. At the time the defendant gave his original note for \$7,800, it was agreed between him and the Columbia National Bank that the defendant was not to pay interest on said note, but that all dividends on the \$7,800 of bank stock should go to the Columbia National Bank, and that the defendant's note should be

renewed from time to time, upon request; and, at the time of the change of the form of the defendant's liability by the giving of three notes in place of the original note, it was agreed that the note for \$1,750 should not bear interest, and that it should be renewed from time to time, upon request, without the payment of interest; and said note was afterwards taken up, and a new note for \$1,750 given in lieu thereof, and the note sued upon was afterwards given in lieu of the second note for the same amount. Before the commencement of this action the defendant offered to perform his contract, by tendering to the receiver of the Columbia National Bank stock of the bank of Montesano to the amount of \$5,000, and has made the tender good by depositing said stock in the registry of the court at the time of filing his answer.

The defendant represents in his testimony that the \$7,800 worth of stock of the First National Bank of Montesano was not actually sold to him, but was merely placed in his name, partly for the purpose of enabling him to control the voting and disposition of the stock, and partly for the accommodation of the Columbia National Bank, to avoid exposure of an illegal investment of its funds in bank stock, and that his note for \$7,800 was given to bring up the amount of assets of the Columbia National Bank to the proper figure without including the bank stock, so that the transaction and the understanding of the parties made the defendant a holder of stock in the First National Bank of Montesano as a trustee for the Columbia National Bank; and he claims to be merely an accommodation maker, without consideration, of the note for \$7,800. Conceding all that the defendant claims as to his being an accommodation maker of the original note, and holder of stock in the First National Bank of Montesano as trustee for the Columbia National Bank, we must place him in the position of a trustee who has received in dividends upon stock which belonged to the Columbia National Bank \$1,750 in excess of what he has paid to his cestui que trust. Having retained this amount of money, for which he was accountable as trustee, he gave the note in question, and secured an agreement allowing him an option to either pay the money without interest, or deliver stock in the Bank of Montesano to the amount of \$5,000, par value, to clear himself from liability. At the time of entering into this agreement the defendant knew very well that the Columbia National Bank could not lawfully make an investment of its funds in the stock of the Bank of Montesano; and there appears to have been no reason for making the arrangement, except a desire on the part of the officers of the Columbia National Bank and the defendant to be mutually accommodating, and to help each other to unload upon the Columbia National Bank the unmarketable stock which they held, and to obtain therefor its par value in cash. In view of these facts, I hold that the agreement giving to the defendant an option to deliver bank stock in payment of the note sued upon was and is unlawful, and it constitutes no defense to this action, and that the evidence does not sustain the plea of want of consideration in the defendant's answer.

The defendant claims that the plaintiff is estopped to dispute the validity of the agreement made by the bank to accept stock in sat-

isfaction of his obligation upon the note, because he received and retained, and has realized upon, the other notes and securities which were delivered to the bank at the time the agreement was made, as part of the same transaction. But the notes and securities which the defendant delivered to the Columbia National Bank were rightfully the property of the Columbia National Bank, because they were taken by the defendant in liquidation of stock which he held as trustee for the Columbia National Bank. The plaintiff therefore had a right to realize all he could upon said securities, for the benefit of the trust which he represents; and the defendant has no legitimate claim of right to retain the remaining portion of the dividend which he received in money, nor any legal right to pay the note which he gave in consideration of money received in any kind of property other than money. Findings of fact and a judgment in favor of the plaintiff will be made and entered in accordance with this opinion.

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FIRST NAT. BANK OF CONCORD v. HAWKINS.

(Circuit Court of Appeals, First Circuit. July 20, 1897.)

No. 202.

Opinion on Petition for Rehearing. For former opinion, see 24 C. C. A. 444, 79 Fed. 51.

Reargued before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

PUTNAM, Circuit Judge. The plaintiff in error has filed a petition for a rehearing, resting on *Bank v. Kennedy*, 167 U. S. 362, 17 Sup. Ct. 831, which was decided a few weeks after our decision in this case. The issue considered by the supreme court was the liability of a national bank as a stockholder in a state savings bank, while the question before us was as to its liability as a stockholder in another national bank. The question discussed by the supreme court was more largely that of ultra vires than that of the policy of the statutes relating to national banking associations, and its line of decisions which we understood to bind us in the case at bar was not particularly noticed by it. Therefore it does not follow beyond question that *Bank v. Kennedy* is decisive of the case at bar. Inasmuch as the defendant in error has undoubted means of relief by a writ of error, we, under the circumstances, are of the opinion that the petition should be denied. Petition for rehearing denied; mandate to stay until further order.



## UNITED STATES v. DE COURSEY.

(District Court, N. D. New York. August 17, 1897.)

## 1. INDICTMENT — VIOLATION OF INTERSTATE COMMERCE ACT — DESCRIPTION OF OFFENSE.

An indictment under section 2 of the interstate commerce act, which fully and amply alleges all the details of time, place, distance, amount, and kind of freight transported for A., and then charges that the service was for a less compensation than was received from B. "for doing for him a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions," sufficiently describes the services rendered for B.

## 2. RECEIVER OF RAILROAD—CRIMINAL LIABILITY—FAILURE TO OBSERVE JOINT RATE.

A receiver not being bound to continue contracts made before his appointment, is not criminally liable, under section 6 of the interstate commerce act, for the violation of a joint tariff previously established by the railroad company of which he is receiver and another company, and which he has not ratified, adopted, or recognized in any way.

William F. Mackey, Asst. U. S. Atty., and John T. Marchand, for the United States.

John G. Milburn, for defendant.

COXE, District Judge. The indictment contains two counts. The first count alleges that the defendant, being receiver of the Western New York & Pennsylvania Railroad Company and a common carrier, received from one George E. Henry, for transporting his coal, more money than he received from the Fairmount Coal & Coke Company for doing a similar service; that this was accomplished by means of a drawback paid the Fairmount Company of \$485.41; that the payment of this sum was an unlawful and unjust discrimination in favor of the coal company and against said Henry which is prohibited by section 2 of the interstate commerce act. It is argued that this count is defective for the reason that it fails to state facts sufficient to sustain the charge of unjust discrimination. There is no allegation, it is said, stating the kind of merchandise transported for Henry or the points between which it was carried or the amount received from him. In a strict technical sense this is true. But, on the other hand, it will be admitted, that the allegation as to the transaction with the Fairmount Company is ample and concise. All the details of time, place, distance and amount are there clearly stated. The indictment then proceeds, using the language of the statute, to charge that the service was for a less compensation than was received from Henry "for doing for him a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions." This language imports into the averment regarding Henry the statements already made concerning the coal company. For instance, there can be no doubt that the allegation is that the merchandise carried for Henry was coal; that in June, 1894, it was conveyed from Sligo Branch mines and Fairmount, or near these places, to the city of Buffalo, or near that city, in about the same quantities as that shipped by the

coal company and that the defendant charged and collected from Henry a greater sum (inferentially \$485.41) than from the coal company. It is true that these details might have all been repeated in charging the facts as to the service rendered to Henry and, probably, it would have been better pleading, had this course been adopted. In the case of *U. S. v. Hanley*, 71 Fed. 672, cited by the defendant, there was no basis of comparison. A rebate was alleged in several instances, but it was not averred that any shippers, similarly situated had failed to receive the same rebate. There was, in short, a failure to charge any unjust discrimination. Here, on the contrary, the name of the party unfairly treated is given so that there can be no pretense that the defendant can be misled in this regard. The offense charged is a misdemeanor, the indictment follows the language of the statute and the court cannot doubt that the defendant is fully informed of the nature of the accusation against him. It is thought that the demurrer, so far as it relates to the first count, must be overruled.

The second count of the indictment is based upon section 6 of the act as amended March 2, 1889, and charges the defendant with having received from the Fairmount Coal & Coke Company and from the firm of C. N. Shipman & Co. less than the legally established rate for the transportation of their property. The law provides that it shall be unlawful for any common carrier, party to any joint tariff, to receive from any person a less compensation for the transportation of merchandise between any points as to which a joint rate is named than is specified in the schedules filed with the commission in force at the time. The indictment alleges that prior to June 1, 1894, the Western New York & Pennsylvania Railroad Company and the Allegheny Valley Railroad Company had established joint tariff rates and charges for the transportation of coal over their continuous line and had filed a schedule of these rates with the commission. The indictment also alleges that the defendant is, and, at all times therein mentioned, was the receiver of the Western New York & Pennsylvania Railroad Company. The question is whether a receiver can be held criminally liable for departing from the rates named in a schedule adopted by the company before he became receiver and to which he is not a party? It is not obligatory upon carriers operating continuous lines to establish joint tariffs, but if they do establish such tariffs they must be filed with the commission. The appointment of the receiver unquestionably changed the status of the parties. He took possession of the road superseding the corporation, ousting it of control and operating the property as an independent carrier. The corporate franchises were for the time being, suspended, the property sequestrated and the receiver was in charge, under the direction of the court, to preserve the property for the benefit of the creditors. He was not the agent of the corporation and was not bound to continue an unwise or improvident agreement. Whether he could enter into a new joint tariff without leave of the court, is, at least, doubtful. The statute makes it unlawful for any carrier who is a "party to any joint tariff" to charge, etc. The defendant is not a party to the joint tariff in question for it was established be-

fore he was appointed receiver. There is no allegation that he subsequently became a party to the tariff or that he ratified, adopted or recognized it in any way. It may very well be, in such cases, that it is not for the interest of the trust that contracts and conditions before existing shall be continued. In the present instance the defendant is charged with a crime because he received from a shipper less than a rate established before he existed as receiver and with which he had nothing whatever to do. The rate may have been one which he was not justified in maintaining and certainly if he could not have been held to the schedule in a civil action he cannot be in a criminal action. It seems too plain for argument that no man can be convicted of a crime in failing to keep an agreement unless he is under some obligation to keep it. The defendant here was not a party directly or indirectly to the joint tariff agreement. No authority is cited and it is believed none can be found holding a receiver guilty of a crime in such circumstances. The precise question here presented is believed to be novel, but the general proposition that a receiver is not bound to continue a contract entered into before his appointment and that he acts, not as the agent of the insolvent corporation, but as an independent carrier, is established by abundant authority. *Express Co. v. Railroad Co.*, 99 U. S. 191; *Central Trust Co. of New York v. Marietta & N. G. Ry. Co.*, 51 Fed. 15; *Metz v. Railroad Co.*, 58 N. Y. 61; *Davis v. Duncan*, 19 Fed. 477; *Central Trust Co. of New York v. Ohio Cent. R. Co.*, 23 Fed. 306; *Jones, Corp. Bonds*, § 502; *High, Rec.* § 396; *Beach, Rec.* § 363; *Gluck & B. Rec.* p. 316; 20 *Am. & Eng. Enc. Law*, p. 375.

The demurrer, so far as it relates to the second count, is sustained.

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In re THOMAS.

(Circuit Court, S. D. Ohio, W. D. June 30, 1897.)

No. 5,042.

OLEOMARGARINE—USE IN NATIONAL SOLDIERS' HOME—POWER OF STATE TO REGULATE.

The governor of the soldiers' home at Dayton, Ohio, in serving to the inmates, as food, oleomargarine furnished by the government, is not subject to the law of the state prescribing the manner in which oleomargarine shall be used in eating houses, because his act is that of the government of the United States, within its constitutional powers, and wholly beyond the control or regulation of the legislature of the state.

D. W. Bowman and Harmon, Colston, Goldsmith & Hoadly, for petitioner.

D. L. Sleeper and C. H. Bosler, for the State of Ohio.

TAFT, Circuit Judge. In this case J. B. Thomas has filed a petition for a writ of habeas corpus. His petition states that he was on March 2, 1897, and has since continued to be, governor of the Central Branch of the National Military Home for Disabled Volunteer Soldiers, which is located in Montgomery county, Ohio, on certain grounds purchased, held, and used by the United States for the pur-

poses set forth in an act entitled "An act incorporating a national military and naval asylum for the relief of the totally disabled officers and men of the volunteer forces of the United States," approved March 3, 1865, and the act amendatory thereof, approved March 21, 1866, and other acts amendatory and supplementary thereto; that he is unjustly and unlawfully detained and deprived of his liberty at the city of Dayton, in the county aforesaid, by one L. J. Shafer, a constable of said county, by virtue of a certain warrant of commitment issued by one J. R. Thompson, a justice of the peace within and for said county, charging that the petitioner, as governor as aforesaid, did, on March 2, 1897, unlawfully serve and furnish to the inmates of said National Military Home for Disabled Volunteer Soldiers, as food to be then and there eaten by said inmates, certain oleomargarine, in violation of the statutes of the state of Ohio; that petitioner, being brought before said justice of the peace, refused to plead to said charge, and moved to dismiss the same on the ground that the acts upon which said proceeding was founded were done by him in the discharge of his duty as governor of said national home under the authority of the board of managers in charge of said institution by virtue of the acts of congress aforesaid, and by authority of said acts; that they were entirely done and performed on the grounds acquired, used, and controlled by the United States for the purpose of said home, and with respect to the inmates thereof, only in their maintenance and support by the United States, and not otherwise, said acts having consisted merely in distributing to them supplies procured for such use by authority of congress and said board of managers; that the facts averred above as the ground of said motion are true; that, notwithstanding the premises, said justice of the peace proceeded to try petitioner on said charge, found and adjudged him guilty of the offense aforesaid, and sentenced him to pay a fine of \$50, and stand committed until the same should be paid, and thereupon issued the warrant of commitment aforesaid. Petitioner avers that said justice of the peace had no jurisdiction over the lands and territory whereon said acts were done, or over the petitioner, by reason of said acts, and that said proceedings and warrant of commitment are wholly void. A writ of habeas corpus issued upon this petition. The body of the petitioner was produced into court. The constable made a return that he held the said J. B. Thomas under the commitment of a magistrate as averred in the petition. On the hearing in this court it appeared that there was an agreed statement of facts in the cause before the justice of the peace as follows:

"The following facts are agreed upon to support the issues in the above-entitled cause: It is agreed on behalf of the state of Ohio, Charles H. Bosler, its attorney in this action, being present, and consenting thereto, and the defendant, J. B. Thomas, being present, and, with counsel, also agreeing thereto: (1) That on the 2d day of March, 1897, Joseph E. Blackburn was, and now is, the food and dairy commissioner of the state of Ohio. (2) That on the 2d day of March, 1897, J. B. Thomas was, and now is, the duly chosen and acting governor of the Central Branch of the National Home for Disabled Volunteer Soldiers, located in the county of Montgomery, state of Ohio, and as said governor was in charge of the eating house of the said Central Branch of the National Home for Disabled Volunteer Soldiers. (3) Said eating house is used by said J. B. Thomas for serving and furnishing to the inmates of said Central

Branch of the National Home for Disabled Volunteer Soldiers their daily food or rations, and is the only place so provided at said national home, and is known as the mess room of the said Central Branch of the National Home for Disabled Volunteer Soldiers, situate on the grounds purchased, held, and used by the United States therefor; and the acts complained of herein consisted in causing oleomargarine to be served and furnished, on the 2d day of March, 1897, as food and as part of the rations furnished to the inmates thereof under appropriation made by the congress of the United States for the support of said inmates; and that no placard in size not less than 10x14 inches, having printed thereon in black letters not less in size than 1½ inches square the words 'Oleomargarine Sold and Used Here,' was displayed in said eating house. (4) The affidavit in the cause is made in conformity with an act of the general assembly of the state of Ohio (Ohio Laws, vol. 92, page 23) entitled 'An act to amend section 3 of an act entitled "An act to prevent fraud and deception in the manufacture and sale of oleomargarine and promote public health in the state of Ohio," passed May 16, 1894': 'Section 1. Be it enacted by the general assembly of the state of Ohio, that section 3 of an act entitled "An act to prevent fraud and deception in the manufacture and sale of oleomargarine and promote public health in the state of Ohio," be amended to read as follows: "Section 3. Every proprietor, keeper, manager or person in charge of any hotel, boat, railroad car, boarding-house, restaurant, eating-house, lunch-counter or lunch-room, who therein sells, uses, serves, furnishes or disposes of or uses in cooking, any oleomargarine, shall display and keep a white placard in a conspicuous place, where the same may be easily seen and read, in the dining-room, eating-room, restaurant, lunch-room or place where such substance is furnished, served, sold or disposed of, which placard shall be in size not less than ten by fourteen inches, upon which shall be printed in black letters, not less in size than one and a half inches square, the words 'Oleomargarine Sold and Used Here,' and said card shall not contain any other words than the ones above described, and such proprietor, keeper, manager or person in charge shall not sell, serve or dispose of such substance as for butter when butter is asked for or purported to be furnished or served." Sec. 2. Section 3 of the above recited act, passed May 16, 1894, is hereby repealed, and this act shall take effect and be in force from and after its passage.'

By the act of March 3, 1865 (13 Stat. 509), the act of March 21, 1866 (14 Stat. 10), the act of January 23, 1873 (17 Stat. 417), the act of March 3, 1875 (18 Stat. 359), and the act of February 26, 1875 (18 Stat. 524), a national home for disabled volunteer soldiers was established, and the legislation above indicated has been embodied in sections 4825 to 4837, inclusive, of the Revised Statutes of the United States. These sections are now under chapter 3 of title 59 of "Hospitals and Asylums." Section 4825 establishes a board of managers of such home, who are to have perpetual succession, with the power of holding personal and real property, and of suing and being sued. They are also given the power to make rules and by-laws not inconsistent with the law, for the purpose of carrying on the business and government of the home, and to fix penalties thereto. Section 4829 provides that the officers of the home shall consist of a governor, a deputy governor, a secretary, and a treasurer, and such other officers as the managers may deem necessary. Section 4830 provides that the board of managers shall have authority to procure from time to time, at suitable places, sites for military homes for all persons serving in the army of the United States at any time in the War of the Rebellion, not otherwise provided for, who have been or may be disqualified for procuring their own support by reason of wounds received or sickness contracted while in the line of their duty during the Rebellion; and to have the necessary buildings erected,

having due regard to the health of location, facility of access, and capacity to accommodate the persons entitled to the benefits thereof. Section 4831 appropriates all stoppages or fines adjudged against officers and soldiers by sentence of court-martial, or forfeitures on account of desertion, and all moneys due deceased officers and soldiers unclaimed for three years after their death, to the establishment and support of the home. The managers are also authorized to receive donations, money, or property for the benefit of the home, and to hold the same for its exclusive use. Section 4832 provides who of the officers and soldiers of the government of the United States shall be entitled to the benefit of the national home. Section 4834 provides that the board of managers shall make an annual report of the condition of the home to congress. Section 4835 provides that "all inmates of the National Home for Disabled Volunteer Soldiers shall be subject to the rules and articles of war and in the same manner as if they were in the army." Under the laws of 1865-66 the first board of managers purchased real estate in Montgomery county, near Dayton, Ohio, and there erected buildings to constitute a national home. Since that time branches have been established in Augusta, Me., Milwaukee, Wis., and Hampton, Va. On April 13, 1867, the legislature of Ohio passed the following act:

"Section 1. That jurisdiction of the lands and their appurtenances, which may be acquired by donation or purchased by the managers of the National Asylum for Disabled Volunteer Soldiers within the state of Ohio, for the uses and purposes of said asylum, be, and is hereby ceded to the United States of America; provided, however, that all civil and criminal process issued under the authority, of the state of Ohio, or any officer thereof, may be executed on said lands and in the buildings which may be located thereon, in the same way and manner as if jurisdiction had not been ceded as aforesaid; and provided further, that nothing in this act shall be construed to prevent the officers, employes and inmates of said asylum, who are qualified voters of this state, from exercising the right of suffrage to all township, county, and state elections, in the township in which the said national asylum shall be located."

The second section of the same act exempts all the property, real and personal, held by the board of managers for the uses and purposes of the asylum, from taxation and assessment, "so long as the same shall remain the property of the United States, for the uses of the national asylum."

In *Sinks v. Reese*, 19 Ohio St. 306, the question arose whether an inmate of the national home at Dayton had the right of suffrage as a citizen of the state of Ohio, and the supreme court of Ohio held:

"The inmates of the home, resident within such territory, being within the exclusive jurisdiction of a government other than that of the state within whose boundaries such asylum or territory may be situate, are not residents of such state, within the meaning of article 5, § 1, of the constitution of Ohio; and where the constitution of such state confers the elective franchise upon residents thereof alone, the inmates of such asylum resident within such territory are not entitled to vote at any election held within and under the laws of such state."

Thereupon congress, by the act of January 21, 1871 (16 Stat. 399), enacted:

"That the jurisdiction over the place purchased for the location of the 'National Asylum for Disabled Volunteer Soldiers' under and by virtue of the act

of congress of March third, 1865, entitled 'An act to incorporate a national military and naval asylum for the relief of the totally disabled officers and men of the volunteer forces of the United States' and the act of March 21st. 1866, amendatory thereto and upon which said asylum is located, is hereby ceded to the state of Ohio and relinquished by the United States. And the United States shall claim or exercise no jurisdiction over said place after the passage of this act: provided, that nothing contained in this act shall be construed to impair the powers and rights heretofore conferred upon the board of managers of the National Asylum for Disabled Volunteer Soldiers incorporated under said act, in and over said territory."

In *Renner v. Bennett*, 21 Ohio St. 431, the supreme court of Ohio, in construing the act of congress of January 21, 1871, held that its effect was to restore to the state its jurisdiction over the territory, but without the power to violate the charter rights of the corporation, or rather of the United States, claiming and enjoying them through and by the corporation; thus putting the state in the same relation to this corporation that it sustained towards such of its own corporations as had an irrevocable and inviolable charter, and therefore that the territory upon which the home stood was within the jurisdiction of the state, and the inmates of the home were residents of the state, and were legal voters therein.

It is unnecessary, in my view, to consider the question what is the territorial jurisdiction of the state of Ohio over the land occupied by the national home at Dayton. Let it be conceded that the case presented upon the petition and the facts shown at the hearing is not different from what it would have been had the legislature of Ohio never passed any act ceding jurisdiction to the United States over the land acquired for the purpose of a national military home. In such a case, can it be maintained that the legislature of the state of Ohio may pass an act which shall regulate in any way the manner in which federal governmental functions shall be discharged by the board of managers of the national home as agents of the national government? It is very clear to me that the question must be answered in the negative. Nor can there be any doubt that the acts of the petitioner complained of, and made the ground for prosecution under the state law, were acts in pursuance of the authority of the national government reposed in it by the constitution of the United States. By that instrument congress is given power by taxation to provide for the common defense and general welfare of the United States. It is given power to declare war, to raise and support armies, to provide and maintain a navy, to make rules for the government and regulation of the land and naval forces, to provide for calling forth the militia, to suppress insurrections and repel invasions, to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, and to make all laws which shall be necessary and proper for carrying into execution these powers. In the case of *U. S. v. Gettysburg Electric Ry. Co.*, 160 U. S. 668, 16 Sup. Ct. 427, it was held that the act providing for the condemnation of land for the purpose of fencing in and preserving the lines of battle at the battle of Gettysburg, and of making a national park of the same, was within the

power of congress. It was objected that the purpose of the act could not be for "the public use," within the powers of the general government. Upon this subject Mr. Justice Peckham, speaking for the supreme court, said:

"Congress had power to declare war, and to create and equip armies and navies. It has the great power of taxation to be exercised for the common defense and general welfare. Having such powers, it has such other and implied ones as are necessary and appropriate for the purpose of carrying the powers expressly given into effect. Any act of congress which plainly and directly tends to enhance the respect and love of the citizen for the institutions of this country, and to quicken and strengthen his motives to defend them, and which is germane to and intimately connected with and appropriate to the exercise of some one or all of the powers granted by congress, must be valid. \* \* \* Can it be that the government is without power to preserve the land, and properly mark out the various sites upon which this struggle took place? Can it not erect the monuments provided for by these acts of congress, or even take possession of the field of battle in the name and for the benefit of all the citizens of the country for the present and for the future? Such a use seems, necessarily, not only a public use, but one so closely connected with the welfare of the republic itself as to be within the powers granted congress by the constitution for the purpose of protecting and preserving the whole country. It would be a great object lesson to all who looked upon the land thus cared for, and it would show a proper recognition of the great things that were done there on those momentous days. By this use the government manifests for the benefit of all its citizens the value put upon the services and exertions of the citizen soldiers of that period. Their successful effort to preserve the integrity and solidarity of the great republic of modern times is forcibly impressed upon every one who looks over the field. The value of the sacrifices then freely made is rendered plainer and more durable by the fact that the government of the United States, through its representatives in congress assembled, appreciates and endeavors to perpetuate it by this most suitable recognition. \* \* \* The right to take land for cemeteries for the burial of the deceased soldiers of the country rests on the same footing, and is connected with and springs from the same powers of the constitution. It seems very clear that the government has the right to bury its own soldiers, and to see to it that their graves shall not remain unknown or unhonored."

The same power that exists to create national parks and to create national cemeteries is exercised in the erection and maintenance of a national home to care for the defenders of the nation, who, though not killed, were disabled and wounded in the defense. The housing and feeding of such persons are, then, a federal governmental function and duty. When the government of the United States purchases land in a state for the purpose of discharging such a duty, it is not within the power of the state legislature to interfere with or regulate the mode in which it shall be performed. What it does for this purpose is exactly as much within its complete control as when its quartermaster furnishes food to its soldiers, or when its pension agents distribute money to its pensioners. It is entirely immaterial in what place, within the jurisdiction of the government of the United States, the duty is discharged. State lines cannot affect or modify the complete control which the federal government and its agents and officers duly authorized have over the manner of discharging it. The jurisdiction of the state government in such a case is excluded not because of the place where the act is done, but because that which is being done is the business of the United States, and such business is as completely be-



yond the influence and control of the state government as if it were not done within the territory of the state. It is in evidence that in the report made by the board of managers to congress, provided by law, an appropriation was asked for oleomargarine, and that the appropriation was made by congress to cover the proposed expenditure. Would it be contended that, if congress were to pass an act providing that oleomargarine should be served by its quartermaster in the messes of its troops, and a state were to pass a law forbidding the use of it as an unhealthful food, such a law could affect officers obeying the laws of congress in thus furnishing oleomargarine within the state's lines to the military forces of the United States, and would subject them to punishment before a state tribunal for violation of the state law? Clearly not. It seems hardly necessary to me to give illustration, to be found in many decisions of the supreme court of the United States, of cases in which it has been held that no state can pass a law which shall in any manner interfere with or prevent the due exercise of its constitutional functions by the United States government through its officers and agents.

In *Ex parte Siebold*, 100 U. S. 371, 394, Mr. Justice Bradley said:

"It is argued that the preservation of peace and good order in society is not within the powers confided to the government of the United States, but belongs exclusively to the states. Here, again, we are met with the theory that the government of the United States does not rest upon the soil and territory of the country. We think that this theory is founded on an entire misconception of the nature and powers of that government. We hold it to be an incontrovertible principle that the government of the United States may, by means of physical force exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent. This power to enforce its laws and to execute its functions in all places does not derogate from the power of the state to execute its laws at the same time, and in the same place. The one does not exclude the other, except where both cannot be executed at the same time. In that case the words of the constitution itself show which is to yield: 'This constitution, and all laws which shall be made in pursuance thereof, \* \* \* shall be the supreme law of the land.'"

Again, in the case of *Tennessee v. Davis*, 100 U. S. 257, 262, Mr. Justice Strong, quoting from *Martin v. Hunter*, 1 Wheat. 363, said: "The general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers," and then proceeded:

"It can act only through its officers and agents, and they must act with the states. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a state court for an alleged offense against the law of the state, yet warranted by the federal authority they possess, and if the general government is powerless to interfere at once for their protection, if their protection must be left to the action of the state court, the operations of the general government may at any time be arrested at the will of one of its members. The legislation of a state may be unfriendly. It may affix penalties to acts done under the immediate direction of the national government, and in obedience to its laws. It may deny the authority conferred by those laws. The state court may administer not only the laws of the state, but equally federal laws, in such manner as to paralyze the operations of the government. And even if, after trial and final judgment in the state court, the case can be brought into the United States court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecu-

tion, and the exercise of acknowledged federal power arrested. We do not think such an element of weakness is to be found in the constitution. The United States is a government with authority extending over the whole territory of the Union, acting upon the states and upon the people of the states. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No state government can exclude it from the exercise of any authority conferred upon it by the constitution, obstruct its authorized officers against its will, or withhold from it for a moment the cognizance of any subject which that instrument has committed to it."

The same principle was upheld by Mr. Justice Miller in the case of *In re Neagle*, 135 U. S. 1, 10 Sup. Ct. 658.

In my judgment, the governor of the soldiers' home was not subject to the law prescribing the manner in which oleomargarine should be served in eating houses, not because the place in which he was serving the oleomargarine was without the territorial jurisdiction of the state of Ohio, but because that which he was doing was an act of the government of the United States within its constitutional powers, and wholly beyond the control and regulation of the legislature of the state of Ohio. The petitioner is discharged.

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In re SOUTHERN PAC. CO.

(Circuit Court, N. D. California. August 16, 1897.)

Nos. 12,247, 12,248.

CUSTOMS DUTIES—CLASSIFICATION—LIQUID CREOSOTE.

The liquid creosote of commerce is not a "distilled oil," within the meaning of paragraph 60 of the tariff act of August 27, 1894 (28 Stat. 509, 511), but is a "product of coal tar," within the meaning of paragraph 443 of said act, and entitled to free entry, not being otherwise specially provided for in the act.

Applications by the Southern Pacific Company for a review, under section 15 of the customs administrative act (Act June 10, 1890; 26 Stat. 131), of the decision of the board of United States general appraisers relative to the classification for duty of two importations of creosote merchandise. Both petitions were heard together.

John J. De Haven and F. B. Lake, for petitioner.

H. S. Foote, U. S. Atty., and Samuel Knight, Asst. U. S. Atty.

MORROW, Circuit Judge. These are two applications by the Southern Pacific Company for a review by this court, under section 15 of the customs administrative act (Act June 10, 1890; 26 Stat. 131), of the decision of the board of United States general appraisers relative to the classification for duty of two importations of creosote merchandise. Both petitions were argued together, and precisely the same testimony and the same questions apply to each. The merchandise in question was imported in casks, and is described in the invoices as "liquid creosote." It was imported from London, Great Britain, into the United States, at the port of San Francisco. The collector of the port at San Francisco classified this liquid creosote as a "distilled oil," dutiable at the rate of 25 per cent. ad valorem,

under the provisions of paragraph 60 of the tariff act of August 27, 1894, entitled "An act to reduce taxation, to provide revenue for the government, and for other purposes," and popularly known as the "Wilson Tariff Act." 28 Stat. 509, 511. The importer protested against the imposition of this duty, or any duty, on the ground that the creosote in question "is not a distilled oil, but is, at ordinary temperature, a solid, waxy crystal, the chief constituents of which are naphthaline, tar acids, and pitch, and as such should be admitted free of duty, under paragraph 443 of the act of August, 1894, as product of coal tar not specially provided for." Paragraph 60, under which the creosote was classified, provides:

"Products or preparations known as alkalies, alkaloids, distilled oils, essential oils, expressed oils, rendered oils, and all combinations of the foregoing, and all chemical compounds and salts, not specially provided for in this act, twenty-five per centum ad valorem."

Paragraph 443, one of the provisions placing articles on the free list, and under which, the importer contends, the creosote in question should be classified, provides:

"Coal tar, crude, and all preparations except medicinal coal tar preparations and products of coal tar, not colors or dyes, not specially provided for in this act."

The question to be determined is whether the creosote comprising these two importations is a "distilled oil," as found by the board of United States general appraisers, and therefore subject to a duty of 25 per cent. ad valorem, or whether it is a "product of coal tar," within the meaning of paragraph 443, and therefore entitled to free entry. The board of United States general appraisers overruled the protests of the importer, and found that the merchandise in question—

"Is a liquid substance, of a dark-brown color and tarry odor, of the specific gravity of 1.05028, and is known generally in commerce as 'dead oil' and 'creosote oil'; (2) that it is derived from coal tar by distillation, and is a distilled oil. Its chief constituents are naphthaline and its derivatives, along with the basic oils, parvoline, coridine, collidine, and leucoline, and bitumen dissolved therein, together with five per cent. of crude phenol of the carbolic and cresylic acid types."

While the board found that the merchandise comprising these two importations was known generally in commerce as "dead oil" and "creosote oil," it also found that it was derived from coal tar by distillation, and that it was a "distilled oil." Additional testimony was taken at San Francisco, upon an order of reference by the court. The evidence preponderates largely in favor of the proposition that the merchandise in question is known commercially as "creosote oil," or a "dead oil," and that it is the "product of coal tar" by fractional distillation. The testimony introduced on behalf of the government does not show satisfactorily that "creosote" is chemically or commercially, or even commonly, known and described as a "distilled oil." In *Warren Chemical Manuf'g Co. v. U. S.*, 78 Fed. 810, this same question was before the court. In that case the board of United States general appraisers had classified certain coal-tar products as "products known as 'distilled oils,'" under paragraph 60. The importer

protested, claiming that it was simply a "product of coal tar, not a color or dye not specifically provided for," and therefore entitled to free entry under paragraph 443. It was held that inasmuch as it had not been shown that the article involved in that case was an oil in fact, or that it was chemically or commercially or commonly known as "distilled oil," the decision of the board should be reversed, and the article entitled to free entry under paragraph 443, as a "product of coal tar." While creosote may be termed an oil, still it is not known as a "distilled oil." It is true that the terms "distilled oils" and "products of coal tar," found, respectively, in paragraphs 60 and 443, are mere descriptive phrases. No question as to the commercial designation of the merchandise in question can arise, for what is known commercially as "creosote oil," or a "dead oil," is not specifically mentioned in either of these paragraphs, or in the act. The terms used seem to refer to the mode of manufacture, and it would appear that the board held the importations in question to be distilled oils because they were produced by distillation,—fractional distillation. But, while it is true that creosote is produced by distillatory processes, it is nevertheless also true that, according to the preponderance of the evidence, it is not known as a "distilled oil." That it is a "product of coal tar," there can be no doubt. Such being my view of the evidence, it will obviously be unnecessary to consider the other questions discussed by counsel. Even if I were in doubt as to which of these paragraphs applied, such doubt, under the rule of construction relating to tariff acts, would have to be resolved in favor of the importer. *Hartranft v. Wiegmann*, 121 U. S. 609, 7 Sup. Ct. 1240; *Twine Co. v. Worthington*, 141 U. S. 468, 12 Sup. Ct. 55. It may be further observed that, in the tariff act of 1883 (22 Stat. p. 493), congress made a decided distinction between "dead oils," which term is applied to "creosote," and "distilled oils"; thereby indicating and recognizing a difference between the two classes of oils, and precluding the inference that the term "distilled oil" might include "creosote," or a "dead oil." The revenue or tariff laws of the United States are regarded as constituting practically one system. *U. S. v. Collier*, 3 Blatchf. 325, Fed. Cas. No. 14,833. It is a well-settled rule of statutory construction that expired or repealed acts in *pari materia* with the act to be construed may be considered by the court in seeking the correct meaning of words and terms employed in the enactment to be construed. 23 Am. & Eng. Enc. Law, 315, and cases there collated. See, also, *Reiche v. Smythe*, 13 Wall. 162. I am of opinion, therefore, that the creosote comprising the two importations under consideration is not a "distilled oil," within the meaning of paragraph 60, but that, on the contrary, it is a "product of coal tar," within the meaning of paragraph 443, and as such is entitled to free entry, not being otherwise specially provided for in the act.

It is further contended by counsel for the government that under the latter part of section 4 of the act under consideration, which provides that "if two or more rates of duty shall be applicable to any imported article it shall pay duty at the highest of such rates," the creosote in question must be subject to the duty of 25 per cent. *ad valorem* provided for in paragraph 60. It is assumed, of course,

that the merchandise in question is both a "distilled oil" and a "product of coal tar," and that, therefore, the duty provided for "distilled oil," being the higher duty, should apply. The contention is untenable. In the first place, I am unable, as stated, to find from the evidence that the creosote in question is a distilled oil within the meaning of paragraph 60. In the second place, I do not regard the provision applicable to this case, for the simple reason that it cannot be said, strictly speaking, that there are two rates of duty which can apply to the merchandise in question. If I am correct in holding that creosote is a product of coal tar, within the meaning of paragraph 443, it then is not subject to any duty whatever, but is entitled to free entry. Under this condition of affairs, if the creosote be subject to duty at all, there is obviously but one rate of duty which is applicable. As was aptly remarked by the court in *Matheson & Co. v. U. S.*, 18 C. C. A. 144, 71 Fed. 394, 395, "as one [paragraph] imposes duty, and the other exempts from duty, it is obvious that congress did not intend both provisions to apply to the same article." Without discussing the questions any further, I am of opinion, both from the evidence and under the law, that the ruling of the board of United States general appraisers relating to the two importations involved in these two petitions was erroneous, and should be reversed, and it is so ordered.

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**AMBERG FILE & INDEX CO. v. SHEA SMITH & CO.**

(Circuit Court of Appeals, Seventh Circuit. October 4, 1897.)

No. 371.

**COPYRIGHT—SUBJECTS OF COPYRIGHT—LETTER FILES.**

A system of indexes, constituting a letter file, being designed for use, and not for conveying information, is not a proper subject of copyright. 78 Fed. 479, affirmed.

**Appeal from the Circuit Court of the United States for the Northern District of Illinois.**

The Amberg File & Index Company, the appellant, filed its bill in the court below to restrain the alleged infringement of 30 copyrights granted to William A. Amberg for as many so-called index books, styled "Amberg Directory System of Indexing," constituting a complete index for the proper filing of letters and other papers. A demurrer to the bill was sustained and the bill dismissed for want of equity. The bill charges that all of the so-called books, taken together, constitute a series or set of indexes, primarily designed for use by large commercial houses conducting a large correspondence, and wherein letters and other papers or documents may be so filed to be readily accessible, and that no one of the several so-called books, nor any number less than the whole number, can be practically employed as a general index for correspondence or other documents. The letter-file index consists of a number of sheets loosely arranged, and provided with letters in the outer margins, after the manner of an index, so that letters can be slipped in between the sheets and there temporarily held until the space is filled, when the sheets can be removed from the box and permanently filed. The letters on the different loose sheets are arranged in alphabetical order, the spaces between the letters varying to correspond with the supposed volume of correspondence to be arranged thereunder. In order to ascertain the proper space to be allowed, the bill states that Amberg, in preparing the same in such manner as to adapt such copyrighted books for such use,

spent much time and labor in consulting and reading directories of the inhabitants and businesses of numerous large cities of the United States, with a view to preparing such copyrighted books in substantial accordance with the spelling, number, and arrangement of names found in said directories, and that he did so arrange and prepare his said copyrighted books. In other words, he adjusted the spaces between the letters to the supposed average requirements as he ascertained them from different directories.

Bond, Adams, Pickard & Jackson, for appellant.

Banning & Banning, for appellee.

Before WOODS and JENKINS, Circuit Judges.

JENKINS, Circuit Judge, after stating the facts, delivered the opinion of the court.

In *Baker v. Selden*, 101 U. S. 99, the difference between that which may be protected by copyright and that which is the subject of letters patent is stated and illustrated, and the whole matter summed up in the language of the court:

"The object of the one is explanation. The object of the other is use. The former may be secured by copyright. The latter can only be secured, if it can be secured at all, by letters patent."

In that case one Selden had obtained copyright of a book entitled "*Selden's Condensed Ledger, or Bookkeeping Simplified*," the object of which was to exhibit and explain a peculiar system of bookkeeping. There was an introductory essay explaining the system of the author's bookkeeping, and certain forms or blanks, consisting of ruled lines and headings, were employed to illustrate the system, and to show how it could be used and carried out in practice. The court held that no copyright could be obtained, that blank account books are not the subject of copyright, and that the copyright of Selden's book did not confer upon him the exclusive right to make and use account books ruled and arranged as designated by him, and described and illustrated. In this case there is no explanation accompanying the indexes. The arrangement of letters is the thought of the author. These indexes or so-called books are not made for explanation, but for use. They do not convey information. They are of no possible service until subjected to use in the filing of letters. It is, as observed by Judge Showalter in the court below (*Amberg File & Index Co. v. Shea Smith & Co.*, 78 Fed. 479), "a mechanism or device for the storage of letters so that they can be preserved and conveniently found afterwards." The copyright law embraces those things that are printed and published for information, and not for use in themselves. The device of the appellant is not within the law of copyright, and the bill cannot be sustained. Decree affirmed.

## J. L. MOTT IRON WORKS v. CLOW et al.

(Circuit Court of Appeals, Seventh Circuit. October 4, 1897.)

No. 325.

## COPYRIGHT—SUBJECTS OF COPYRIGHT—PRICE CATALOGUES.

A price catalogue, constituting a volume containing illustrations of wares offered for sale, such as washbowls, bath tubs, footbaths, etc., which articles are without ornamentation, and cannot well be the subject of artistic treatment, is not the proper subject of a copyright, the letterpress being confined to a statement of dimensions and price.

## On Appeal from the Circuit Court of the United States for the Northern District of Illinois.

This is an appeal by the J. L. Mott Iron Works from a decree sustaining the demurrer to its amended bill of complaint, and dismissing the bill for want of equity. The bill charges, in substance, that the J. L. Mott Iron Works since the year 1873 has continuously been engaged in the manufacture of various articles and appliances of useful or ornamental character, or both, in iron and other base metals, and for many years has maintained an office and show room in the city of New York and in the city of Chicago, and has conducted a large business in the articles described throughout the United States; that, during the period from the year 1888 to and including the year 1893, the complainant became the proprietor of certain illustrated books or circulars, with respect to each of which, and before publication, a printed copy of the title was duly deposited with the librarian of congress, and within ten days after publication two completed printed copies were deposited in the same office, and notice of the copyright given by inserting on the title page of each printed and published copy of the work the usual notice that the books or circulars were entered according to the act of congress. The titles to these different publications were as follows: "1888. Catalogue G. Illustrating the Plumbing and Sanitary Department of the J. L. Mott Iron Works." "1890. Imperial Porcelain Baths." "1890. Imperial, Newport, Yorkshire, and Hygeia Slop Sinks." "1891. Imperial Porcelain Baths." "1892. Lavatories for Use in Steamships, Yachts, Offices, etc., and All Places Where Economy of Space is Required." "1892. Imperial Porcelain Lined Iron Seat and Foot Baths." "1893. Imperial Porcelain Baths." "1893. Mott's Patent Slop Sinks." "1893. Bath-Room Fitting." Copies of their publications are filed as exhibits to the bill. It is alleged that each and every of such books and publications was designed and adapted to be used, and has constantly been used since their several publications, as books of reference by architects, plumbers, builders, and other persons interested in constructing houses, or requiring articles of the nature described, or information concerning styles, designs, dimensions, and other qualities of articles of the kind described, and for purposes of comparison of such designs with those of other manufacturers of similar goods. The bill further charges that the defendants, who are engaged in the manufacture of similar articles, published certain catalogues, entitled: "1894. Illustrated Catalogues of James N. Clow and Son, Manufacturers in and Dealers in Supplies for Plumbers, Steam and Gas Fitters, Water and Gas Works, Railroads and Contractors;" that such catalogue is composed to a large extent of cuts and designs copied from those in the copyrighted catalogues of the complainant, or in some of them, and such cuts or designs, and the plates from which they were printed, were not taken or made from physical copies of articles manufactured by the defendants, or made by artists or engravers originating them, but they were copied directly from the plates, designs, or cuts in the catalogue or circulars of the complainants, taken by photography, or by some other mechanical process not involving the thought or artistic skill prerequisite to make an original design or cut, or to engrave a plate from a physical object or manufactured article. It is charged that the copying of such designs or cuts, and their publication in the catalogue of the defendants, is a piracy of the copyrighted catalogues of the complainant, and an infringe-

ment of its sole and exclusive right to publish its catalogue for the term of years prescribed by law. The bill specifically states the portions of the defendants' catalogue which have been copied directly, specifying nine plates, pictures, or designs from the defendants' catalogue alleged to be copied from plates, pictures, or designs in the complainant's catalogue. The bill prays for an injunction to restrain the further printing, publishing, selling, or disposing of any catalogues containing copies of the complainant's catalogue, or any portion, or either of them, and from printing, publishing, selling, or otherwise disposing of any cuts or designs copied, taken, or colorably altered from the complainant's catalogues, or either of them, during the respective terms of life of the copyrights of the complainant, and that such copying may be declared to be an unlawful piracy of the complainant's catalogue. The demurrer, so far as it is necessary to be stated, proceeds upon the grounds that the matter contained in the several catalogues of the complainant was not the subject-matter of copyright under the copyright laws of the United States, that such publications were simply trade catalogues or circulars, and that neither the cuts, illustrations, nor text could be legally copyrighted, but were common property, and subject to the use of the defendants for the purpose of issuing circulars and advertising the same kind of wares as the wares represented in the several books or catalogues alleged to have been copyrighted.

John H. Hamline, Frank H. Scott, and Frank E. Lord, for appellant.  
Jacob Newman, George W. Northrup, and S. O. Levinson, for appellees.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

JENKINS, Circuit Judge. The constitution of the United States grants to the congress the "power to promote the progress of science and useful arts by securing for limited times to authors and inventors exclusive right to their respective writings and discoveries." Article 1, § 8. The power thus granted was exercised by the congress sitting first after the adoption of the constitution. 1 Stat. 124. And, in the act, entitled "An act for the encouragement of learning," copyright for the period of 14 years was reserved to the author of any map, chart, book, or books. The congress has since frequently acted with respect to the subject, enlarging and regulating the rights of authors under the constitutional provision. 2 Stat. 171; 4 Stat. 436; 9 Stat. 106; 10 Stat. 685; 11 Stat. 138-380; 14 Stat. 395; 16 Stat. 198; Rev. St. §§ 4948-4971; 18 Stat. 78; 20 Stat. 359; 22 Stat. 181; 26 Stat. 1106. These statutes exhibit the growth in the number of subjects to which the congress of the United States has deemed the constitutional provision to be applicable. The protection originally extended to maps, charts, and books has been enlarged to comprehend books, pamphlets, maps, charts, dramatic or musical composition, engravings, cuts, prints, photographs or negatives thereof, paintings, drawings, chromos, statues, statuary, and models or designs intended to be perfected as works of the fine arts. The act of the year 1874 (18 Stat. 78, c. 301) provides that:

"The words 'engravings,' 'cuts' and 'prints' shall be applied only to pictorial illustrations or works connected with the fine arts, and no prints or labels designed to be used for any other article of manufacture shall be entered under the copyright law but may be registered in the patent office."

The clause of the constitution in question has been under consideration by the supreme court, and its purpose determined. *Grant v. Raymond*, 6 Pet. 218; *Wheaton v. Peters*, 8 Pet. 591; *The Trade-*



Mark Cases, 100 U. S. 82; Baker v. Selden, 101 U. S. 99; Lithographic Co. v. Sarony, 111 U. S. 53, 4 Sup. Ct. 279; Higgins v. Keuffel, 140 U. S. 428, 11 Sup. Ct. 731. The result of these decisions would seem to place this construction upon the constitutional provision under consideration: That only such writings and discoveries are included as are the result of intellectual labor; that the term "writings" may be liberally construed to include designs for engraving and prints that are original, and are founded in the creative powers of the mind,—the fruits of intellectual labor; that prints upon a single sheet might be considered a book, if it otherwise met the spirit of the constitutional provision; that, to be entitled to a copyright, the article must have, by and of itself, some value as a composition, at least to the extent of serving some purpose other than as a mere advertisement or designation of the subject to which it is attached. In the case before us the bound volume or catalogue issued by the appellant contains illustrations of the different wares offered for sale, giving the dimensions and prices of each. The letterpress of the book is confined to a statement of dimensions and price, is of no literary merit, and gives no other information. It is a mere priced catalogue illustrated with pictures of the wares offered for sale. The copyright is sought to be sustained upon the ground that such illustrations are of artistic merit, and so within the protection of the constitutional provision; that any picture possessing artistic merit when connected with advertising matter becomes part of the book, and is within legal protection. The particular illustrations claimed to have been copied are of a washbowl, a slop sink, a bath tub, a footbath, a sponge holder, a brush holder, and a robe hook. With the possible exception of the bath tub, neither subject has ornamentation, or could well be the subject of artistic treatment. There is some attempt at ornamentation with respect to the surroundings of the bath tub, consisting of a representation of the conventional tiled floor and tiled wainscoting. We discover nothing original in the treatment of the subject; it is merely the picture of the bath tub in ordinary use, placed in a room having a tiled floor and tiled wainscoting, with the usual supply fittings in respect of plumbing. It is said that the book may be used as a book of reference by architects and owners with respect to furnishing a house. It is a book of reference, certainly, in the sense that it may be referred to to ascertain the goods the appellant deals in, and the prices asked for them; but no information is imparted with regard to construction, or the special merits of particular construction. The pictures may appeal to the eye as pretty representations of a slop sink or a bath tub, but no one could gather from inspection how to construct them. The only information conveyed has reference to the dimensions and cost price of the article, and the place where they can be obtained. In brief, they are mere advertisements of the appellant's wares, with nice cuts or illustrations of the goods accompanying and forming part of the advertisement, as an allurement to customers. The question, therefore, which confronts us, is, were such things intended to be protected by the constitutional provision in question? The object of that provision was

to promote the dissemination of learning, by inducing intellectual labor in works which would promote the general knowledge in science and useful arts. It is not designed as a protection to traders in the particular manner in which they might shout their wares. It sought to stimulate original investigation, whether in literature, science, or art, for the betterment of the people, that they might be instructed and improved with respect to those subjects. Undoubtedly a large discretion is lodged in the congress with respect to the subjects which could properly be included within the constitutional provision; but that discretion is not unlimited. It is bounded and circumscribed by the lines of the general object sought to be accomplished.

We are referred to several cases in the courts of England in which the subject of copyright of advertisements has been considered. It may be well to briefly examine them.

In *Hotten v. Arthur*, 1 Hem. & M. 603, decided in 1863, the copyright was of a catalogue of curious books offered for sale by a bookseller. The court ruled in favor of the copyright,—not, however, sustaining the copyright of any advertisement, but upon the ground that it contained original matter, the product of intellectual labor on the part of the author,—observing:

"This is not a mere dry list of names, like a postal directory, court guide, or anything of that sort, which must be substantially the same, by whatever number of persons issued, and however independently compiled. This is a case of a bookseller who issues an account of his stock, containing short descriptions of the contents of the books, calculated to interest either the general public, or the persons who may take an interest in the questions treated by any particular books."

This case we do not consider to be pertinent to the matter in hand.

In *Cobbett v. Woodward*, L. R. 14 Eq. 407, decided in 1872, an upholsterer published an illustrated catalogue containing engravings of the articles of furniture he offered for sale, with remarks of description. The injunction was denied, Lord Romilly asserting:

"I know of no law which, while it would not prevent the second advertiser from selling the same article, would prevent him from using the same advertisement, provided he did not in such advertisement, by any device, suggest that he was selling the works and designs of the first advertiser."

In *Grace v. Newman*, L. R. 19 Eq. 623, decided in 1875, the plaintiff was engaged in the business of a stone and marble mason. He published a volume of lithographic sketches of monumental designs from cemeteries and churchyards. The court ruled in favor of the injunction, observing that under the decisions in *Hotten v. Arthur*, *supra*, a catalogue may, under certain circumstances, be protected by injunction; that, while the work in question had little letterpress, it was full of interesting matter, which would often be referred to and consulted as well by persons who contemplated their own deaths, as by others in reference to those who have died. In other words, it was a collection of designs of artistic merit, tending to the cultivation of artistic taste; it was not a catalogue of wares which the publisher of the catalogue had on hand and for sale, nor of things which he had manufactured, but it contained designs of artistic monuments

throughout England, duplicates of which the publisher proposed to make when ordered. The injunction seems to have been sustained upon the ground that it was a book of reference or of art. In *Maple & Co. v. Junior Army & Navy Stores*, 21 Ch. Div. 369, decided in 1882, the court flatly overruled *Cobbett v. Woodward*, and held that such a book or catalogue as is in question here was the subject of protection under the laws of England. It is to be observed in this case that it was ruled largely upon the language of the act of parliament. That act had for a preamble the following:

"Whereas it is expedient to amend the law relating to copyright and to afford greater encouragement to the production of literary works of lasting benefit to the world."

This was followed by an enacting clause, as follows:

"The word 'book' shall be construed to mean and include every volume, part or division of a volume, pamphlet, sheet or letter-press, sheet of music, map, chart or plan separately published." And "the word 'copyright' shall be construed to mean the sole and exclusive right of printing or otherwise multiplying copies of any subject to which the said work is herein applied."

The court ruled that the act does not say "that it is expedient to afford greater encouragement to the production of literary works of lasting benefit to the world and to amend the law of copyright relating thereto," but that it is expedient to amend the law of copyright generally, merely adding the principal reason of doing so; that there was nothing in the preamble to cut down the enacting part, even if the enacting part had not been clear; and that there was nothing in the act to exclude a book consisting of pictures only, or to restrict the act to books containing letterpress. It is to be here remarked that the parliament of Great Britain, unlike the congress of the United States, is unlimited in power; and, with the construction and effect placed upon the preamble of the act by the court, there would seem to be little escape from the conclusion to which the court arrived. In this country, under the constitution, the power lodged with congress is not unlimited, but is restricted to the promotion of the progress of science and useful arts. The ruling of the English court is therefore not pertinent, except as it illustrates the subject. It is further to be said that the case of *Cobbett v. Woodward*, overruled by the case of *Maple & Co. v. Junior Army & Navy Stores*, has been expressly approved and quoted at length by the supreme court of the United States. *Baker v. Selden*, 101 U. S. 99, 105, in which case the court also cited approvingly the remarks of Mr. Justice Thompson in *Clayton v. Stone*, 2 Paine, 382, Fed. Cas. No. 2,872, in which it was said that the acts of congress in respect to copyright were intended for the encouragement of learning, and were not intended for the encouragement of mere industry, unconnected with learning and the sciences. In this latter case a daily price current was held not to be within the purview of the copyright law, and it was said that:

"The act in question was passed in execution of the power here given [by the constitution], and the object, therefore, was the promotion of science; and it would certainly be a pretty extraordinary view of the sciences to consider a daily or weekly publication of the state of the market as falling within any

class of them. They are of a more fixed, permanent, and durable character. The term 'science' cannot with any propriety be applied to a work of so fluctuating and fugitive a form as that of a newspaper or price current, the subject-matter of which is daily changing, and is of mere temporary use. Although great praise may be due to the plaintiffs for their industry and enterprise in publishing this paper, yet the law does not contemplate their being rewarded in this way. It must seek patronage and protection from its utility to the public, and not as a work of science."

In the *Sarony Photograph Case* (4 Sup. Ct. 279), the court ruled that it was within the constitutional power of congress to confer upon the inventor, designer, or proprietor of a photograph a copyright, so far as the photograph is an interpretation of original, intellectual conception. The court declined to decide whether the copyright law is applicable to the ordinary production of a photograph, but, with respect to the particular photograph then before the court, held that it was entitled to protection as a work of art originating in the mental conception of the author, which was given visible form and expression by the selection and arrangement of various accessories; and upon that ground alone, as we read the opinion, the copyright was sustained. In the later case of *Higgins v. Keuffel*, 140 U. S. 428, 11 Sup. Ct. 731, the court observes that the provision of the constitution "evidently has reference only to such writings and discoveries as are the result of intellectual labor"; and, "to be entitled to a copyright, the article must have by itself some value as a composition, at least to the extent of serving some useful purpose other than as a mere advertisement or designation of the subject to which it is attached." So far as the decisions of the supreme court have gone, we think they hold to the proposition that mere advertisements, whether by letterpress or by picture, are not within the protection of the copyright law. It is possibly not beyond comprehension that pictures of slop sinks, washbowls, and bath tubs, with or without letterpress statement of dimensions and prices, though intended mainly for advertisement, may, in localities where such conveniences are not in common use, be the means of instruction and of advancement in knowledge of the arts, and, when they are the product of original, intellectual thought, may possibly come within the scope of the constitutional provision. It is enough for the present purpose to say that, in our judgment, congress has not seen fit to enact a law which can reasonably be given so broad a construction. The decree will be affirmed.

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KATHREINER'S MALZKAFFEE FABRIKEN MIT BESCHRAENKTER  
HAFTUNG et al. v. PASTOR KNEIPP MEDICINE CO.

(Circuit Court of Appeals, Seventh Circuit. October 4, 1897.)

No. 393.

1. TRADE-MARKS—INFRINGEMENT—DECEPTION OF PUBLIC.

Where the name, portrait, and fac simile signature of another are employed without his consent and against his will, and are so assumed with a view to deceive the public into the belief that the product marketed and sold was prepared under his supervision, and offered to the public with his sanction, an injunction will be granted.

2. SAME—HOW ACQUIRED—PERIOD OF USE.

It is not essential to a valid trade-mark that its use shall have been long continued, or that the article on which it is used should be widely known, or should have attained great reputation. It is sufficient if the article with the mark upon it has become actually a vendible article in the market, with intent by the proprietor to continue its production and sale.

3. SAME—BURDEN OF PROOF.

Where an alleged infringer in America, who used marks unquestionably belonging to another in foreign countries, claims to have anticipated him in the use of the mark in the American market, such alleged infringer should show with accuracy and detail the times of its earlier sales, and in the absence of such proof the court will not be overcritical in respect to the date of the first occupancy of the American market by the proprietor of the genuine article.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

A bill in equity was filed in the court below by the appellants, Kathreiner's Malzkaffee Fabriken mit Beschränkter Haftung and Kneipp Malt-Food Company, complainants, against the Pastor Kneipp Medicine Company, the appellee, to restrain the use of certain trade-marks or trade-names, "Kneipp Malt Coffee," "Kneipp Coffee," and "Kneipp Malzkaffee," and to restrain the use of the picture and signature of Rev. Father Sebastian Kneipp in connection with malt coffee, either upon packages containing the goods, or in advertisements or announcements in relation thereto. The motion for the injunction was heard in the court below upon the bill and answer, and upon certain affidavits; and the motion for injunction was denied, and an appeal to this court taken from such ruling.

For some years prior to the year 1891, Sebastian Kneipp, a resident of Worishofen, Bavaria, and a priest of the Roman Catholic Church, and known throughout the continent of Europe as the "Reverend Father Kneipp," "Father Kneipp," "Pastor Kneipp," or "Pfarrer Kneipp," had interested himself in the subject of health, and had devised and formulated a system of dietetics, health preservatives, hygienic food, and sanatives, which he also had explained and expounded through addresses, lectures, pamphlets, and books written and published by him, and particularly through a book entitled "Meine Wasser Kur," published in 1886, and a book entitled "Thus Shalt Thou Live," published in 1889 (which latter work had passed through 19 German editions), both of which works had been translated and published in the English language, and extensively circulated in the United States of America, prior to the year 1891. Among other things, he deprecated the use of coffee, asserting it to be a deleterious beverage, and advocated as a substitute a drink prepared from roasted malt; stating that the malt must be roasted brown, and then finally ground and used like ordinary coffee. The use of malt as a substitute for coffee was not, however, original with Father Kneipp, but it had been in use for many years among the poorer classes of Europe. He also established in Bavaria a sanitarium where he put into practice his peculiar methods of treatment and of diet, and his name and works and sanitarium became known throughout the continent of Europe. His peculiar views with respect to the manner of living were widely adopted and practiced, and his sanitarium was resorted to from all parts of the continent, and by all classes of people seeking cure of their maladies. The firm of Franz Kathreiner Nachfolger, of Munich, with the knowledge and approval of Father Kneipp, and under his supervision, direction, and control, devised and employed certain formulas and processes for treating and preparing malted grain with a view to obtaining a cheap, wholesome, and nutritious food drink, and prepared a malt coffee possessing in considerable degree the aroma and taste of coffee, separating by some secret process the caffeine, which is the aromatic principle of coffee, from the caffeine, its stimulating base, and infusing the roasted malt with the caffeine; so that, as it is claimed, the preparation is strengthening, healthful, and agreeable, retaining the aroma of coffee, but discarding its injurious properties. This firm placed this product upon the market with the knowledge, consent, and approval of the Reverend Sebastian Kneipp, and after submission to him, and obtaining his

approval of the methods, formulas, and processes employed in its preparation. The firm designated this product as "Kathreiner's Kneipp Malzkaffee." The firm obtained from Father Kneipp, for themselves, their successors and licensees, the right and privilege of so designating the product, and of the use of Father Kneipp's name in connection therewith, and the right to place upon each package the portrait and fac simile signature of Father Kneipp; he granting them the sole and exclusive right, license, and privilege so to do. So marked, identified, and approved by Father Kneipp, the product became widely and favorably known throughout the continent of Europe, and acquired a great reputation and sale. In 1892 the firm, with the approval of Father Kneipp, sold and transferred all rights and privileges with respect to the production and sale of the product, and the use of the trade-names and trade-marks mentioned, to a firm styled "Kathreiner's Malzkaffee Fabriken Wilhelm and Brougier," which thereafter continued the business under like conditions, and increased and extended the market for the product. In July, 1893, all rights were transferred to the appellant the Kathreiner Malzkaffee Fabriken mit Beschränkter Haftung, a corporation then created, and which acquired all the rights and privileges of the former proprietors, with the consent and approval of the Reverend Sebastian Kneipp, and succeeded to the property, good will, processes, inventions, trade-marks, and trade-names used in connection with the product, and has since continued to own, control, conduct, and operate the business, and to manufacture and sell the product in wrappers or labels substantially identical with the former labels, but with its corporate name imposed thereon as the manufacturer, in lieu of the names of the former manufacturers when the product was sold in Germany, and, when sold in other countries, bearing words which are translations or equivalents of the German phrases employed, the word "Kneipp" being always included as a material and characteristic part of the label, and the packages always had thereon the portrait and fac simile signature of Father Sebastian Kneipp. The product has become widely known in many countries as "Kneipp Malt Coffee," and registration of the name "Kneipp," and of such picture and signature, in connection with malt coffee, has been allowed in the United States of America, England, Russia, Germany, France, Austria, Italy, Belgium, Holland, Denmark, Greece, Luxembourg, Norway, Sweden, Finland, Switzerland, Roumania, Servia, Canada, Argentine Republic, Brazil, South Australia, and the Cape of Good Hope. In 1891 the proprietors commenced to send this malt coffee, in packages so identified, to the United States. On September 12, 1891, a shipment was made to Seigfried Gruner & Co., of New York; on May 5, 1892, to Ignatz Fuhro, West Hoboken, N. J.; on November 23, 1892, to John A. Stocker, Detroit, Mich.; on February 3, 1893, to E. Lohmen, Sheboygan, Wis.; and on April 11, 1893, to Langier & Sons, New York, and to other persons. These shipments were made as forerunners to establish a demand and market therefor in the United States; and since October, 1891, this malt coffee has been continuously for sale in the United States in packages exhibiting the name, portrait, and fac simile signature of Sebastian Kneipp, the business developing in all countries with remarkable rapidity. No proceedings to register the trade-mark under the act of congress were had until 1894, although in 1891 an attorney was employed to procure such registration (which was not obtained until the year 1895), and for the name, portrait, and fac simile signature of Father Sebastian Kneipp. In 1893 the German proprietors, through their agent, entered into contract with Reinhart Rahr, of Manitowoc, Wis., for the manufacture and sale of malt coffee by this process in the United States and under the auspices of a contemplated American corporation. This resulted finally, in the spring of 1895, in a contract for the exclusive control of Kneipp malt coffee, under the stated trade-mark and trade-name, in the territory of the United States and Canada; and this contract, with the consent of all parties, was transferred to the Kneipp Malt-Food Company, one of the appellants, in December, 1895, which corporation has since that date succeeded to and conducted the business of manufacturing and selling malt coffee, under the trade-mark and trade-name stated, throughout the United States and Canada, in compliance with the method and process employed by the German proprietors.

In April, 1892, John Blocki and Edward Heller, of Chicago, who had for a short time theretofore conducted a drug business at Chicago under the name of John Blocki Drug Company, incorporated themselves, under the laws of

the state of Illinois, as Pastor Kneipp Medicine Company. In 1891 these men entertained the thought of entering upon the manufacture of some of the articles mentioned in the works of Father Kneipp, and Blocki had written to him of his intention, and asked for the terms of the secret formula of beneficial oil. He subsequently wrote stating that it was proposed to use the name, picture, and signature of Father Kneipp as trade-marks. No reply was received from Father Kneipp directly to this letter, but Blocki received from a German lawyer a letter, addressed in behalf of Father Kneipp, refusing to permit it. Subsequently they formed the corporation stated, using the corporate name, Pastor Kneipp Medicine Company, and commenced the manufacture and sale of different medicines and articles recommended by Father Kneipp, and selling translations of the books written by him, and this without his consent or license. This corporation also manufacture and sell a malt coffee in packages labeled "Kneipp Coffee" and "Pf. Kneipp's Malzkaffee," and which contain the portrait, and the fac simile of the signature, of the Reverend Sebastian Kneipp, and upon which is stated that "Reverend Father Kneipp recommends this substitute for coffee to all persons of nervous temperament, impaired digestion, and children." Upon one side of the package is printed in large letters, both in English and in German text, "Do not Fail to Try Father Kneipp's Strength-Giving Food." The appellee also issued, by way of advertisement, and for display in stores where its product should be for sale, a large picture of Sebastian Kneipp, with the fac simile of his signature, and with the words printed thereon: "For Sale Here. Mgr. Seb. Kneipp's Medicines. Pastor Kneipp Medicine Co., Importers, Chicago." This preparation so sold is in fact made from Dakota malt, and by the appellee. It also issued circulars to the trade, stating, "Our malt coffee is prepared according to Reverend Father Kneipp's directions," and it is sold by "Pastor Kneipp Medicine Co., importers of Kneipp articles, Chicago, U. S. A. Every package has our trade-mark (Father Kneipp's portrait and signature)." On the 9th day of January, 1893, the appellee deposited in the office of the commissioner of patents, for registration, and on the 11th day of April, 1893, procured registration of, a trade-mark, the essential features of which are the portrait and fac simile signature of Rev. Sebastian Kneipp, the accompanying statement of the appellee being that "the class of merchandise to which this trade-mark is appropriated is medicine, and the peculiar description of goods comprised in such class is medicinal preparation of roots and herbs, to wit." Here follow a large number of well-known medicinal roots and herbs, and concluding with the following: "Cherry, valerian, violet, water mint, wild angelica, wormwood, Kneipp's laxative tonic, rhubarb pills, headache and fever powder, malt coffee, invigorating food." This statement is accompanied by the affidavit of the president of the corporation, stating, among other things, "that the said corporation has at this time a right to the use of the trade-mark therein described; that no other person, firm, or corporation has the right to such use, either in the identical form, or in any such near resemblance thereto as might be calculated to deceive." The evidence presented by the appellee left quite indefinite the date when it first commenced the manufacture and sale of malt coffee, although the general business of the corporation would seem to be the dealing in the articles recommended by Rev. Father Kneipp. There was evidence tending to show that at first the appellee imported the malt coffee prepared by the German proprietor, but afterwards prepared malt coffee from American malt, discovering that it could be produced in that way at a less price. The fact of such importation by the appellee of the malt coffee of the German proprietor was not denied.

Frank F. Reed, for appellants.

Louis K. Gillson, for appellee.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

JENKINS, Circuit Judge (after stating the facts as above). Upon the record, we are constrained to believe that the Pastor Kneipp Medicine Company, the appellee, was "conceived in sin and brought forth in iniquity," that wrong attended at its birth, and that fraud

stood sponsor at its christening, imposing upon the corporate child a name to which it was not entitled, and which it had no right to bear. The name of an eminent philanthropist was taken without his consent and against his protest. This assumption of name was a wrong which we cannot doubt a court of equity would, upon his application, have restrained, even if the purpose of the corporation had been wholly innocent and praiseworthy; but here, it is clear, the name, the portrait, and the fac simile signature of Rev. Sebastian Kneipp were employed, not only without his consent and against his will, but were so assumed with a view to deceive the public, and to induce the belief that the product marketed and sold was prepared under his supervision, and offered to the public with his sanction. Under such circumstances, equity will not hesitate to extend its preventive arm. *Pillsbury v. Mills Co.*, 24 U. S. App. 395, 12 C. C. A. 432, and 64 Fed. 841. It is true that the Reverend Sebastian Kneipp is not a party to this suit, nor here complaining of the unauthorized use of his name. The appellants cannot therefore be heard in censure, unless they have acquired a right to the employment of this name, portrait, and fac simile signature in connection with the sale of malt coffee. If they have no property right therein, they have no standing in equity; but if they possess such property right, and it has been invaded, the wrong will be restrained. Without dispute, the present German proprietor, one of the appellants, has the exclusive right, so far as the Reverend Father Kneipp could grant it, to the use of his name, portrait, and fac simile signature in connection with the sale of malt coffee. It is clear, also, that its right to such exclusive use is sanctioned by the law of Germany, and of all other countries where the trade has been established. It is claimed that no such exclusive right exists in this country, for the reason that, as is asserted, at the time of the assumption of the particular designations complained of, no trade or established market for the goods existed in the United States, and that only sporadic importations are shown. It goes without saying that a trade-mark or trade-name can be acquired only by adoption accompanied with actual use. Whether user in one country confers the exclusive right to the use of the trade-mark or trade-name in another, as against a piratical use of it in such other country, we are not called upon to say. It would appear to have been so held in *Collins Co. v. Oliver Ames & Sons Corp.*, 20 Blatchf. 542, 18 Fed. 561. The principle of that decision would seem to be that while the owner of a trade-mark may not be entitled to its exclusive use everywhere and under all circumstances, and may not enjoin its innocent use, yet where the public is, by the use of it, deceived and injured, equity will interpose, although the complainant may not have applied the trade-mark to the particular article, but to articles of the same class of merchandise. See, also, *In re Munch*, 50 Law T. (N. S.) 12; *In re Riviere's Trade-Mark*, 32 Wkly. Rep. 390; *Paine v. Daniell & Sons' Breweries*, 10 Rep. Pat. Cas. 217. It may be suggested whether, in these days of rapid and constant intercommunication and extended commerce between nations, any narrow line of demarkation should be established, on the one side of which should stand moral wrong with legal liability, and upon the other moral wrong with legal



immunity. If, however, the courts of a particular government can, with respect to the subject in hand, take cognizance only of wrongs committed within the geographical boundaries of the country, it is still not necessary, in our judgment, that a trade in an article should be fully established, in the sense that the article be widely known, before the proprietor of its trade-mark or trade-name may be entitled to the protection of equity for the preservation of his rights. Otherwise it might be impossible, with respect to a valuable and desirable article or product of manufacture, designated by a particular brand or in a particular manner, ever to establish a trade. Craft and cunning, discerning the value of the product, and the profit to be acquired, would, at the inception of the business, flood the market with spurious and cheaper articles or preparations of the similitude of the genuine, and strangle the trade in the genuine at its birth. It is enough, we think, if the article with the adopted brand upon it is actually a vendible article in the market, with intent by the proprietor to continue its production and sale. It is not essential that its use has been long continued, or that the article should be widely known, or should have attained great reputation. The wrong done by piracy of the trade-mark is the same in such case as in that of an article of high and general reputation, and of long-continued use. The difference is but one of degree, and in the quantum of injury. A proprietor is entitled to protection from the time of commencing the user of the trade-mark. *McAndrew v. Bassett*, 4 De Gex, J. & S. 380; *Jackson v. Napper*, 4 Rep. Pat. Cas. 45; *Cope v. Evans*, L. R. 18 Eq. 138; *Hall v. Barrows*, 32 Law J. Ch. 548. In the latter case it is well observed, in language which we do not hesitate to adopt:

"It has sometimes been supposed that a manufacturer can only acquire such a property in a trade-mark as will enable him to maintain an injunction against the piracy of it by others by means of long-continued use of it, or at least such a use of it as is sufficient to give it a reputation in the market where such goods are sold. But I entertain great doubt as to the correctness of this view of the case. The interference of a court of equity cannot depend on the length of time the manufacturer has user of it. If the mark or brand be an old one, formerly used, but since discontinued, the former proprietor of the mark undoubtedly cannot retain such a property in it, or prevent others from using it; but provided it has been originally adopted by a manufacturer, and continuously and still used by him to denote his own goods when brought into the market and offered for sale, then, I apprehend, although the mark may not have been adopted a week, and may not have acquired any reputation in the market, his neighbor cannot use that mark. Were it otherwise, and were the question to depend entirely on the time the mark had been used, or the reputation it had acquired, a very difficult, if not an insoluble, inquiry would have to be opened in every case, namely, whether the mark had acquired in the market a distinctive character, denoting the goods of the person who first used it. The adoption of it by another is proof that he considers that at that time it is likely to become beneficial; and, if the manufacturer who first used it were not protected from the earliest moment, it is obvious that malicious and pertinacious rivals might prevent him from ever acquiring any distinctive mark or brand to denote his goods in the market by adopting his mark, however varied, immediately after its adoption or change by the original user of it."

The evidence here is satisfactory that the product in question was marketed in the United States first in the year 1891, and followed during the years 1892 and 1893 by other importations, not

numerous, indeed, but so many and in such quantities as one would look for during the first years of the growth of an infant industry, and indicating the intention of the proprietor to actively occupy the market. We are satisfied, also, that the appellee, at the outset of its enterprise, imported some of the genuine packages, and thereafter adopted and placed upon packages of its own manufacture the indicia pertaining to the genuine, and which no one but the parent company and its licensees had authority from the Reverend Sebastian Kneipp to employ, and which none other had the right to use. By reason of the circulation of the works of Pastor Kneipp in this country, faith in his theories of life and his remedies for the ills of life was growing, creating a good will in the sale of this malt coffee, thus authenticated with his name, picture, and fac simile signature, that was valuable to its owner. The date at which the appellee first undertook to impose upon the public its spurious article is left uncertain. Claiming to have anticipated the appellants in the American market, it should have, with accuracy and detail, exhibited the times of its sales. This has not been done. In the absence of such proof, we are not inclined to be overcritical with respect to the date of the first occupancy of the American market by the proprietor of the genuine article. We cannot but conclude that the appellee was not, as is claimed, the first to occupy the market, and that it sought to aggrandize to itself unlawfully, by the name assumed, and by the indicia placed upon its packages, the good will of a trade which belonged to another, and to deceive the public into the belief that its goods were the goods of the appellant foreign corporation, or its predecessors in right, prepared with the knowledge and under the sanction of the Reverend Sebastian Kneipp, and that it sought to create the impression in the public mind that it was the importer of the genuine article. Upon the whole record, we think it clear that the appellants were entitled to the equitable relief demanded. The order or decree appealed from is reversed, and the cause remanded to the court below, with directions to issue the writ of injunction as prayed for.

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MAST, FOOS & CO. v. DEMPSTER MILL MANUF'G CO.<sup>1</sup>  
(Circuit Court of Appeals, Eighth Circuit. August 2, 1897.)

No. 799.

**1. PATENTS—ABANDONMENT OF INVENTION—USE AND SALE BEFORE APPLICATION.**

The use or sale of an invention by the inventor within two years before application is no just ground to presume its abandonment, unless accompanied by other acts or declarations clearly evincing an intention to dedicate the invention to the public. Hence abandonment will not be presumed merely from a statement contained in the patent itself that "the invention is in practical operation, and on the market in considerable numbers, and the facts here stated with regard to its operation are such as have been ascertained from commercial experience."

**2. SAME—PRIOR USE—EVIDENCE.**

The defense of prior use should be supported by evidence beyond a reasonable doubt, and the unsupported statement of a single witness that a machine embodying the invention was constructed and put in operation

<sup>1</sup> Rehearing denied October 18, 1897.

before the application is insufficient, when unaccompanied by any drawings or exhibits thereof.

8. SAME—INFRINGEMENT—COMBINATIONS.

One using the essential elements of a combination as enumerated in one claim cannot escape infringement because he does not use subordinate or unimportant elements of combinations described in other claims, and which were manifestly omitted from the claim in question that the inventor might more perfectly secure the essential elements of his invention.

4. SAME—NOVELTY AND INVENTION—WINDMILLS.

The substitution of an internal toothed spur-wheel for external toothed spur-gear in the machinery of windmills, by combining the same with the pinion, pitman, and pump, *held* to involve patentable invention, in view of the difficulties thereby overcome, and the fact that the improvement immediately went into general use, though internal tooth spur-wheels had long been used in many other machines.

5. SAME.

The Martin patent, No. 433,531, for improvements in windmills, shows patentable novelty and invention, and is valid. 71 Fed. 701, reversed.

Thayer, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the District of Nebraska.

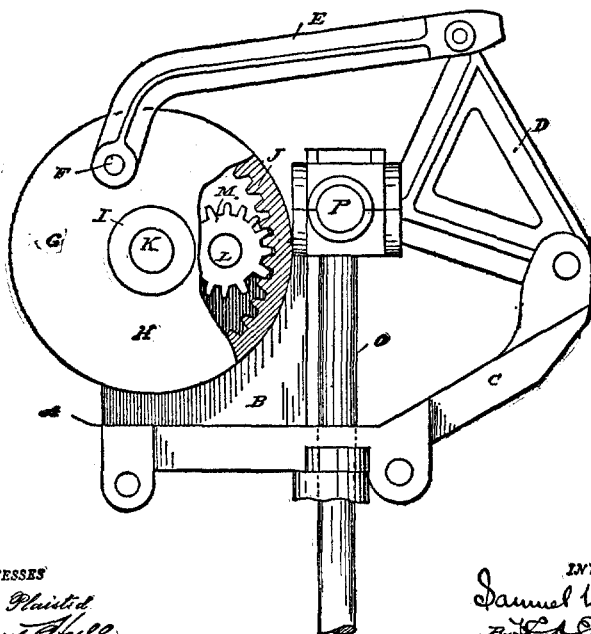
This is an appeal from a decree which dismissed a bill brought by Mast, Foos & Co., a corporation, for the infringement by the appellee, the Dempster Mill Manufacturing Company, a corporation, of letters patent No. 433,531, issued on August 5, 1890, to the appellant, as the assignee of Samuel W. Martin, for improvements in windmills. 71 Fed. 701. Here are copies of the drawings and specification of this patent:

"(No Model.)

S. W. Martin.  
"Windmill.

"No. 433,531.

Patented Aug. 5, 1890.



WITNESSES

*H. H. Plaut*  
*Warren Hill*

INVENTOR

*Samuel W. Martin*  
*E. F. A. Tinkins*  
Attorneys

"United States Patent Office.

"Samuel W. Martin, of Springfield, Ohio, Assignor to the Mast, Foos & Company, of Same Place.

"Windmill.

"Specification Forming Part of Letters Patent No. 433,531, Dated August 5, 1890.

"Application Filed May 2, 1890. Serial No. 350,281. (No Model.)

"To All Whom it May Concern: Be it known that I, Samuel W. Martin, a citizen of the United States, residing at Springfield, in the county of Clark and state of Ohio, have invented certain new and useful improvements in windmills, of which the following is a specification, reference being had therein to the accompanying drawings: This invention relates to improvements in windmills. The invention consists, essentially, of an improved back-gear organization involving an external-toothed pinion and an internal-toothed spur-gear, the pinion being mounted on the wheel-shaft, and the gear having formed on or connected with it the wrist-pin, to which the operating-pitman is attached, whereby the speed of the main shaft as applied to the wrist-pin and pitman is reduced, and whereby, also, all pounding and lost motion is prevented as the pitman-connection passes over the center and changes from a pushing to a pulling action. This object is accomplished by the fact that a plurality of the pinion-teeth are always engaged with the internal spur-gear, resulting in giving a perfectly uniform and smooth and noiseless reciprocating motion to the actuating-rod, thereby prolonging the life of the machine by saving it from constant jarring and preventing wear and tear. In the accompanying drawing, forming a part of this specification, and on which like reference letters indicate corresponding parts, the figure represents a side elevation of my improved organization, with some of the parts in section, showing the same applied to any approved type of windmill structure. The letter A designates a cast frame or structure carried by the upper part of the turntable of a windmill, of which B refers to one of the bearing-blocks, and C to an arm, to which is pivoted the pitman, D. This pitman is triangular, and of the type on the market in windmills manufactured by my assignees of this invention. To one extremity of this pitman is attached a pitman-bar, E, the other end of which bar is fitted upon a wrist-pin, F, carried by the internal gear, G. This gear may be of any approved type, so long as it is provided with internal teeth. In the present case it is constructed with a disk, H, having a hub, I, and a rim, J. It is mounted upon a stud or shaft, K, carried by the bearing-block, B. On the main shaft, L, is placed an external-toothed pinion, M. It will be observed from the drawing that the pinion is within the circumference of the rim, J, and is intermeshed with the teeth of said rim. It will also be noticed that a plurality—three in the present instance—of the teeth of the pinion are engaged with the teeth of the gear-rim. This is due to the fact that the rim encircles the pinion. Thus it will be seen that when the main shaft is rotated with its pinion the internal gear-wheel, G, will also be rotated, though at a reduced speed, and, as several of the teeth of the pinion are always engaged with the teeth of the rim, no lost motion will occur as the wrist-pin passes the center, and the strains are changed from a pull to a push upon the pitman-bar, E. The actuating-rod, O, connects with the pitman, D, in any approved manner, at P, and extends down from the tower to the appliances to be operated; say a pump. The freedom of the organization from lost motion and sudden jerks as the wrist-pin passes over the center renders the operation of the pump smooth and regular. This increases the effectiveness of the pump, and prevents undue wear and tear. The invention is in practical operation, and on the market in considerable numbers, and the facts here stated with regard to its operation are such as have been ascertained from commercial experience with it.

"Having thus fully described my invention, what I claim as new, and desire to secure by letters patent, is: (1) The combination, with a windmill-driving shaft and a pinion thereon, of an internal-toothed spur-wheel mounted adjacent to the said shaft, and meshing with said pinion, a pitman connected with the spur-wheel, and an actuating-rod connected with the pitman. (2) The combination, with a windmill-driving shaft and a pinion mounted thereon, of

an internal-toothed spur-wheel, mounted adjacent to said shaft, and meshing with said pinion, a pitman-bar connected to the spur-wheel, a pivoted pitman connected to the said bar, and an actuating-rod connected to said pitman. (3) The combination, with the upper part of a windmill turntable, the main shaft mounted thereon, and a pitman pivoted thereto, an actuating-rod carried by the pitman, and a pinion mounted on said shaft, of a shaft or stud adjacent to the main shaft, an internal spur-gear mounted on said shaft or stud and having a wrist-pin, and a pitman-bar connected to the wrist-pin and to said pitman.

"In testimony whereof I affix my signature in presence of two witnesses.

"Samuel W. Martin.

"Witnesses:

"Warren Hull.

"H. W. Plaisted."

The first claim of this patent is the only one that is now said to be infringed by the appellee. The infringing device may be described from Martin's drawings. Discard Martin's triangular pitman, D, carry his pump-rod, O, to the left until it stands in the same vertical plane as the shaft, K, straighten the pitman-bar, E, swing its right end downward, and pivot it directly to the pump-rod, O, and we have the device used by the appellee. The defenses were that there was no novelty or utility in the combination of the appellant, and that the appellee did not infringe it. In support of these defenses the mill company introduced in evidence letters patent No. 182,394, dated September 19, 1876, to Edward Williams, for a new and improved windmill which shows the pitman for driving the pump-rod actuated by two eccentric external-toothed gear-wheels, so that the wind-wheel will have an increased leverage, and on the up-stroke of the pump-rod will draw it slowly, while it will return it more quickly upon the down-stroke. This was the only patent on a windmill offered as anticipating Martin's invention. A number of other letters patent were introduced, from which it appears that internal-toothed gearing had been used, long before Martin made his invention, to drive pinions which actuated wood-saws, cutters of harvesting and mowing machines, and like parts of similar machinery. One witness testified that a windmill whose pump-rod was driven by an external-toothed pitman and an internal-toothed spur-gear was constructed and operated by the Spencer Manufacturing Company at Blue Springs, Neb., about November 1, 1889, but convincing evidence was produced by the appellant that Martin's first mill was constructed and sold as early as July, 1889.

H. A. Toulmin, for appellant.

H. W. Pennock and L. L. Morrison, for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The court below dismissed the bill in this case on the ground that the statement contained in the letters patent upon which this suit is based, that "the invention is in practical operation, and on the market in considerable numbers, and the facts here stated with regard to its operation are such as have been ascertained from commercial experience with it," proved that the appellant had abandoned the invention. The acts of congress provide that one who has invented and discovered a new and useful improvement, "not in public use or on sale for more than two years prior to his application unless the same is proved to have been abandoned, may, upon payment of the fees required by law, and other due proceedings had, obtain a patent therefor." 16 Stat. c. 230, p. 201, § 24 (Rev. St. § 4886). The issue of the patent is, therefore, *prima facie* evidence that the invention it

protects was not in public use or on sale for more than two years prior to the filing of the application on which it is based, and that it was not proved to be abandoned. The utmost effect of the recital in the patent which we have quoted could not carry it further than to show that within two years prior to the application the improvements described in it had been used and sold. But the use and sale of the invention within two years before the application for the patent was filed was not sufficient to establish an abandonment of the invention, because the act of congress expressly authorizes the issue of a patent notwithstanding such use and sale. An abandonment may undoubtedly be proved within two years prior to the filing of the application, but it ought not to be presumed, and it should be established by convincing evidence of the intention of the owner of the invention to dedicate it to the public. An abandonment is a dedication, and, like any other dedication, it should be clearly proved. It rests upon the intention of the inventor. If he expressly declares, or by his acts clearly shows, his intention to dedicate his invention to the public, a finding of abandonment would be warranted. But such a dedication should not be lightly presumed, because it surrenders a vested right of property as much as the dedication of land for a public park or a public road. The evidence in this case does not satisfy us that the appellant, or the inventor, Martin, its assignor, ever had any intention to dedicate this improvement to the public. Under the acts of congress, they were authorized to use and sell the invention for two years, and to apply for and receive their patent, so that their failure to apply during that time was not inconsistent with an intention to preserve and protect their rights. There is no evidence in the record of a use or sale of the invention more than two years before the application was made. There is no evidence of an express declaration that the inventor or the appellant would not, or did not intend to, apply for a patent for it, and there is no evidence of any acts inconsistent with such an intention. On the other hand, the application for the patent within two years after the invention was made was presumptive evidence of an intention not to dedicate it to the public, and the issue of the patent was *prima facie* proof that it had not been abandoned. Moreover, the defense of abandonment was not pleaded, and the appellant had no opportunity to meet it by evidence. It was discovered by the court below at the final hearing, and it rested on the statement in the patent which we have quoted, and on that alone. That statement was insufficient to support it. Mere forbearance to apply for a patent until one has perfected his invention, and tested it by actual practice, affords no just ground to presume its abandonment; nor will the use or sale of it within two years before the application is filed afford such ground, unless such use or sale is accompanied by other acts or by declarations which clearly evidence an intention to dedicate the improvement to the public. *Agawam Co. v. Jordan*, 7 Wall. 583, 607; *Adams v. Jones*, 1 Fed. Cas. 126, 127 (No. 57); *Babcock v. Degener*, 2 Fed. Cas. 293, 297 (No. 698); *Jones v. Sewall*, 13 Fed. Cas. 1017, 1027 (No. 7,495); *M'Millin v. Barclay*, 16 Fed. Cas.

302, 306 (No. 8,902); *Pitts v. Edmonds*, 19 Fed. Cas. 751, 757 (No. 11,191).

In considering the merits of the case, the defenses of prior use and no utility may be dismissed without extended consideration. All the witnesses on both sides of the case testify that the combination of the internal-toothed spur-wheel with the pinion and the other usual machinery of a windmill and pump is more useful and more valuable than any other combination of elements in a windmill and pump yet discovered. The evidence of prior use is the testimony of a single witness, who was once in the employ of another infringer of the device of the appellant, but has since been employed by the appellee. He produces no part of the old windmill which he testifies was set up and put in operation before Martin filed his application, and his evidence is without the support of any patents or exhibits, and without the support of the testimony of any other witness. The unsupported oral testimony which will warrant a finding of prior use should be clear and satisfactory. It is always open to suspicion. It ought to be sufficient to establish such a use beyond a reasonable doubt. *The Barbed-Wire Patent*, 143 U. S. 275, 12 Sup. Ct. 443, 450; *Deering v. Harvester Works*, 155 U. S. 286, 300, 15 Sup. Ct. 118. The testimony for the appellee on this issue is not of this character, and it will be dismissed without further comment.

But the appellee denies infringement. The essential element of the combination which the inventor sought to protect by the first claim of the patent in suit was the internal-toothed spur-wheel or spur-gear meshing with and driving the pinion which actuated the pitman and pump-rod. Prior to his invention, all windmills had been driven by external-toothed spur-wheels. As the cogs on the spur-wheel and pinion and the other parts of the machinery wore away, the spur-wheel and the pinion drew apart, and as the pitman-connection passed over the center, and the motion changed from a pulling to a pushing one, or vice versa, a pounding and racking of the machinery arose, which shortened its life, and sometimes stripped the cogs from the pinion. The object of Martin's invention was to do away with this pounding, and to prevent this wear and strain of the machinery. He accomplished this by throwing aside the external-toothed spur-gear, and combining an internal-toothed spur-wheel with the pinion and the other necessary elements of the windmill, so that, as he says, "a plurality of the pinion-teeth are always engaged with the internal spur-gear, resulting in giving a perfectly uniform and smooth and noiseless reciprocating motion to the actuating-rod, thereby prolonging the life of the machine by saving it from constant jarring, and preventing wear and tear." The evidence is undisputed that this invention completely accomplished its purpose. In the year 1893 or 1894 the appellee discarded the external-toothed spur-gear, with which it had previously driven its windmills, and substituted in its mills the internal-toothed spur-wheel described and claimed by Martin. The record discloses the fact that the president of the appellee had previously seen one of the mills of the appellant in operation, and that he was advised to make this change by his pat-

tern-maker, who had been in the employ of an infringer upon the appellant, against whom it had procured a decree, because the pattern-maker thought that the internal-toothed wheel was a good thing. The appellee seeks to escape from the inevitable conclusion to which these facts lead on the plea that it does not use the pitman-bar, the wrist-pin, or the pivoted pitman described in the specification and in the second and third claims of Martin's patent. Its counsel invokes the principle that there can be no infringement of a combination if any element of the combination is absent from the infringing device, and insists that the absence of the pivoted pitman and of the pitman-bar is fatal to the appellant's claim of infringement. The answer is that this invention consists essentially, as the inventor declares at the beginning of his specification, in the combination of the internal-toothed spur-gear with any suitable pinion, wind-shaft, wrist-pin, pitman, and pump-rod of a windmill, and that he has broadly claimed this combination in the first claim of his patent. That claim is:

"(1) The combination, with a windmill-driving shaft and a pinion thereon, of an internal-toothed spur-wheel mounted adjacent to the said shaft, and meshing with said pinion, a pitman connected with the spur-wheel, and an actuating-rod connected with the pitman."

There is not an element in this combination which is not found in the windmill of the appellee, and it cannot be permitted to read other elements into this claim, and then to defeat it, because it does not use the elements it interpolates. The pitman-bar and the pivoted pitman were omitted from this claim, we think, for the express purpose of securing the essential element of the invention in combination with any pinion, pitman, and pump-rod that might be used. In our opinion, the special office of the second and third claims was to secure combinations containing the pivoted pitman and the pitman-rod described in the specification and omitted from the first claim, and the fact that these claims were added is a very persuasive argument that the additional elements they protect were not secured by the first claim. Any construction which would read into the first claim these additional elements renders it useless and unmeaning, because it gives it the same effect as the claims which follow it, and in this way shows that neither the patentee nor the patent office contemplated such an interpretation. The appellee has appropriated the essential feature of this invention,—the internal-toothed spur-gear in combination with the pinion, pitman, wind-shaft, and pump-rod of a windmill. The terms of the first claim of the patent are plain and unambiguous. They need no construction, and, when taken in their ordinary signification, they fully describe and clearly claim the combination which the appellee is using. It ought not to escape here, because it does not use subordinate or unimportant elements of combinations described in other claims, which were undoubtedly omitted from this claim that the inventor might more perfectly secure the essential element of his invention. *Manufacturing Co. v. Wharton*, 28 Fed. 189, 190; *Tondeur v. Stewart*, Id. 561, 564; *Coupler Co. v. Pratt*, 70 Fed. 622, 629.

Finally, the counsel for the appellee argue that there is no patentable novelty in the combination described in this claim, because in-



ternal-toothed spur-wheels were old and well known, and the substitution of them for external-toothed spur-gear in the machinery of windmills was nothing but a double use. This argument is always plausible and persuasive where old elements have been combined to produce a new or better result. Each element, taken by itself, has its old effect, and it is always difficult to understand how it was that the practiced eyes of skilled mechanics did not at once see and apply the necessary remedy to the troublesome evil which the invention removes. The fact, however, that such an evil long existed, and that no mechanic perceived or applied the remedy, is the most conclusive evidence that something more than his eyes and skill was required to discover and apply the requisite device. It is true that internal-toothed spur-wheels, their effect and their relative advantages over external-toothed wheels had been familiar to mechanics time out of mind. They had been used on mowing machines and harvesting machines, on machines for sawing wood, and doubtless upon hundreds of other machines, but no one had ever combined one of these internal-toothed wheels with the pinion, pitman, and pump of a windmill until Martin made his invention in the year 1889. Windmills were old, and their operation was familiar to mechanics, but until that year they went on pounding their wheels with every stroke of the pump-rod, wearing themselves out prematurely, and occasionally stripping their pinions of cogs for the lack of the combination of this internal-toothed spur-wheel with the other essential elements of their machinery. If naught but the skill of the mechanic was required to make this improvement, it is passing strange that no mechanic ever made it until after Martin discovered and described it. In *Electric Co. v. La Rue*, 139 U. S. 601, 11 Sup. Ct. 670, the supreme court sustained a patent to one who took a torsional spring, such as had been used in clocks, doors, and other articles of domestic furniture, and applied it to telegraph instruments. In *Crane v. Price*, Webst. Pat. Cas. 409, the use of anthracite coal where bituminous coal had previously been used for smelting iron was held to be an invention, because it produced better iron at less expense. It is not infrequently a difficult and delicate task to determine whether or not the application of an old device to the production of a new or better result rises to the dignity of an invention. Mr. Justice Brown says in *C. & A. Potts & Co. v. Creager*, 155 U. S. 597, 608, 15 Sup. Ct. 194, 198, that the result of the authorities upon this subject is that, "if the new use be so nearly analogous to the former one that the applicability of the device to its new use would occur to a person of ordinary mechanical skill, it is only a case of double use; but if the relations between them be remote, and especially if the use of the old device produce a new result, it may at least involve an exercise of the inventive faculty." The best evidence that the application of the internal-toothed spur-wheel to the new use of propelling the machinery of a windmill would not occur to a person of ordinary mechanical skill is that it did not occur to any of them in all the years in which windmills had been in use before Martin discovered and applied it. *Thomson v. Bank*, 10 U. S. App. 500, 512, 513, 3 C. C. A. 518, 522, 523, 53 Fed. 250, 255; *Loom Co. v. Higgins*, 105 U. S. 580, 591; *Consolidated Safety-Valve*

Co. v. Crosby Steam-Gauge & Valve Co., 113 U. S. 157, 179, 5 Sup. Ct. 513; Magowan v. Packing Co., 141 U. S. 332, 341, 342, 12 Sup. Ct. 71; The Barbed-Wire Patent, 143 U. S. 275, 281, 283, 12 Sup. Ct. 443, 450. Moreover, the combination of Martin immediately went into general use. More than 3,000 windmills which contain his combination have been manufactured and sold since 1890. All the witnesses testify to its advantages over the old combination which contained the external-toothed gear, and the fact that the appellee discarded the latter, and substituted the former, demonstrates its utility and its advantages. Where the question of novelty is in doubt, the fact that the device has gone into general use, and has displaced other devices previously employed for a similar purpose, is sufficient to turn the scale in favor of the invention. C. & A. Potts & Co. v. Creager, 155 U. S. 597, 609, 15 Sup. Ct. 194; Smith v. Vulcanite Co., 93 U. S. 486; Magowan v. Packing Co., 141 U. S. 332, 343, 12 Sup. Ct. 71.

The probative force of the patent, and of the facts to which we have adverted, constrain us to hold that the combination described in its first claim rose to the dignity of an invention, and was properly secured by the patent. The decree below must be reversed, with costs, and the case must be remanded to the court below, with directions to enter a decree to the effect that the first claim of the patent is valid, and is infringed by the appellee; that the latter be enjoined from making, using, or selling any machine containing the combination described in that claim; and that it account for the profits which it has derived from the manufacture and sale of any such machines; and it is so ordered. •

THAYER, Circuit Judge (dissenting). I am not able to concur in that part of the foregoing opinion which deals with the question of patentable novelty. In my judgment, the combination covered by the first claim of Martin's patent, No. 433,531, is destitute of patentable novelty, unless the word "pitman," as used in that claim, is understood to include the triangular pitman mentioned in the specification, as well as the pitman, E, which is termed in the specification the "pitman-bar." If the claim is construed as covering both of these parts, which together operate as a pitman, it might be upheld; but in that event the defendant would not be guilty of infringement, because he does not use the triangular pitman, or any equivalent device. The majority of the court have construed the word "pitman" as meaning simply the "pitman-bar," which is immediately attached to the spur-wheel, and, as thus construed, it admits of no doubt that the exact combination covered by the first claim is disclosed by a multitude of machines, such as mowers, reapers, churns, machines for sawing wood, and others of a similar character. A pinion mounted on a shaft, the teeth of which engage with the teeth of a spur or drive wheel, for the purpose of communicating a reciprocating motion to a pitman, or, vice versa, of communicating motion to a revolving shaft, is one of the oldest mechanical devices, which has been in use time out of mind; and, judging by the state of the art when the Martin patent was granted, it was sometimes a matter of choice

whether the teeth of both wheels were set on the exterior surface of the rims of the wheels, forming an exterior gearing, or whether the teeth of one wheel were set on the exterior surface, and the teeth of the other wheel on the interior surface of the rim, so as to form what is termed an "interior gearing." Very frequently it was necessary to adopt the latter mode of construction to render the machine more compact, or to accomplish some other special object. In view of the state of the art, as illustrated by the various kinds of machines above mentioned, it is manifest that the advantages to be gained by either method of engagement were well understood, and that, if called upon to construct a machine for a given purpose, an experienced mechanic would have had no difficulty in deciding which form of gearing was preferable. In my judgment, the majority of the court attach undue importance to the fact that Martin was the first to employ the interior gearing in constructing a windmill. I also think that they exaggerate the defects in that class of windmills which are constructed with an exterior gearing. It may be that a windmill constructed according to Martin's patent makes a little less noise than a windmill which employs the exterior gearing, and possibly the wear on the cogs is somewhat less, but the old-fashioned windmill had proved to be very serviceable, and the defects therein were not so serious as to require an exercise of the inventive faculty to overcome them. Martin simply applied to a windmill a method of gearing which was well known, and had been employed for many years in constructing other machines, and by so doing he displayed no more than ordinary mechanical skill. The new use to which he applied the interior gearing was clearly analogous to the use to which it had been applied in other machines, notably in churns, mowing machines, and reapers. Nor were the results which he attained by the application of the old device to windmills so highly beneficial as to justify the inference that the faculty of invention was involved in conceiving the new use. In my judgment, the patent laws ought not to be so construed as to give to the complainant a monopoly of an old and well-known mechanical combination in the construction of windmills. The decree below being for the right party, I think it should be affirmed.

## CROWN COTTON MILLS v. TURNER.

(Circuit Court, S. D. New York. August 26, 1897.)

**FEDERAL JURISDICTION—SUIT IN WRONG DISTRICT—GENERAL APPEARANCE—MOTION TO DISMISS.**

The filing of a general appearance in a federal court in an action commenced by service of summons alone is no waiver of defendant's right to move to dismiss for want of jurisdiction, when, on the subsequent service of the complaint, it for the first time appears that the only ground of federal jurisdiction is diverse citizenship, and that the action is brought in the wrong district.

This was an action at law by the Crown Cotton Mills against J. Spencer Turner. The case was heard on a motion to dismiss for want of jurisdiction.

James McKeen, for the motion.

Howard A. Taylor, opposed.

LACOMBE, Circuit Judge. The plaintiff is a Georgia corporation; defendant, a resident of the Eastern district of New York. The action was begun by the service of a summons, without complaint or any statement of the cause of action; nor was the complaint filed. Defendant entered a general appearance, demanding a copy of the complaint. It subsequently appeared, when the complaint was served, that complainant was a resident of Georgia, and the cause of action one of which the federal courts take jurisdiction solely because it involves a controversy between citizens of different states. Under the statute the action could properly be brought only in one of the districts of Georgia or in the Eastern district of New York, and the remedy of a defendant sued elsewhere is by motion to dismiss for lack of jurisdiction, which is the motion now made. It is urged in opposition that the general appearance served by defendant is a bar to his obtaining the relief asked for. It is abundantly settled that in such cases a general appearance is a waiver of the right to object that the action is not brought in the proper district, but the case at bar appears to be of novel impression, since, by reason of the fact that action was begun solely by service of the summons, there was nothing to indicate to defendant, at the time he appeared, that the Southern district of New York was not the proper one. There seems to be manifest unfairness in holding that defendant has waived rights of which he was not advised, when his ignorance is the necessary consequence of plaintiff's own act. There is nothing to the suggestion that defendant must have known that plaintiff was a Georgia corporation, because he had transacted business and carried on a correspondence with it; sending letters to, and receiving them from, Dalton, Ga. But that was no indication that plaintiff had not been incorporated in the state of New York, nor that its principal office was not in the city of New York. And, even as a Georgia corporation, it would, under recent amendments, have the right in certain cases to bring suit here for alleged infringement of patent. It was not till the cause of action was disclosed by the complaint that defendant could know positively that it was one not properly cognizable in this court. Motion granted.

## BRAGDON v. PERKINS-CAMPBELL CO.

(Circuit Court, W. D. Pennsylvania. July 7, 1897.)

## 1. PROCESS—SERVICE ON FOREIGN CORPORATION—RETURN AS EVIDENCE.

A return on a summons against a nonresident corporation, showing service upon a person stated therein to be agent of such corporation, is prima facie evidence of a good service under the statutes of Pennsylvania.

## 2. REMOVAL OF CAUSES — STATUS OF CAUSE AFTER REMOVAL — RULINGS OF STATE COURT.

Where a nonresident defendant, sued in a state court, invokes the judgment of that court by a motion to set aside the service of the summons, he is concluded by the court's decision, and cannot renew the motion in the federal court, after removing the cause, on substantially the same evidence.

Shiras & Dickey, for plaintiff.

H. & G. C. Burgwin and Geo. N. Chalfant, for defendant.

ACHESON, Circuit Judge. This suit was begun in the court of common pleas No. 2 of Allegheny county. In the præcipe for the writ of summons and in the writ the defendant was described as "a foreign corporation doing business in the commonwealth of Pennsylvania." The return of the sheriff was: "Served Jan'y 25th, 1897, by delivering a true and attested copy of this writ to J. W. Crider, agent for the Perkins-Campbell Company, and made known to him the contents thereof." Thereupon the defendant presented to the court of common pleas a petition setting forth that it was a foreign corporation of the state of Ohio, transacting its business therein; that it did no business in the state of Pennsylvania, except to ship goods into the state from its place of business in Ohio; that J. W. Crider was not, and never had been, an agent of the defendant company, and that he had no connection with the company except as a traveling salesman, on commission; and praying for a rule on the plaintiff to show cause why the sheriff's return of service of the writ of summons should not be set aside. Accordingly, the court granted such a rule. The plaintiff filed an answer to the rule, denying the material averments of the petition, and alleging that the defendant was and had been engaged in transacting its business in the state of Pennsylvania, and that J. W. Crider was and had been the defendant's general agent for the state of Pennsylvania in charge of and conducting its business therein. Depositions on both sides were taken, and, after a hearing upon the merits, the court discharged the rule. The cause was then removed to this court by the defendant. Here the defendant obtained a rule upon the plaintiff to show cause why the service of the writ of summons should not be set aside, and the case dismissed, upon the ground that J. W. Crider was not such an agent of the defendant that service on him bound the defendant, and for want of jurisdiction over the defendant. At the hearing of this rule the case made by the defendant was the same as that upon which the state court had already passed, except that the defendant produced a new deposition containing cumulative evidence in support of its allegations. What, then, should be the action of this court? It is to be observed, first, that this record does not, on its face, disclose

a want of jurisdiction. The return of the sheriff, while not conclusive, is *prima facie* evidence of a good service. *Hagerman v. Slate Co.*, 97 Pa. St. 534; *Fulton v. Association*, 172 Pa. St. 117, 33 Atl. 324. Now, undoubtedly, it was open to the defendant, by promptly filing a petition for the removal of the case, to have obtained the judgment of this court upon the question of the validity of the service. *Railway Co. v. Brow*, 164 U. S. 271, 17 Sup. Ct. 126. But the defendant did not pursue the course, it was at liberty to take, of declining to subject itself in any way to the jurisdiction of the state court. It invoked the judgment of that court upon the question of the validity of the service. Certainly, so long as the cause remained in the state court, that question was within its cognizance. The proper determination of the question depended upon what the facts were. At the defendant's instance an issue of fact was raised in the state court, and submitted to its determination. The decision was against the defendant. Is the same question to be retried here upon substantially the same evidence? That, I think, is not permissible. This is not a court of review. The general rule is that, upon the removal of a cause, the circuit court takes the case as it finds it, accepting the decrees and orders made by the state court as adjudications in the cause. *Loomis v. Carrington*, 18 Fed. 97. As was said by Chief Justice Waite in *Duncan v. Gegan*, 101 U. S. 810, 812, the circuit court "takes the case up where the state court left it off." The present case, I think, falls within this general rule. In *Allmark v. Steamship Co.*, 76 Fed. 615, where the defendant removed the cause after denial by the state court of the defendant's motion to set aside the service of the summons, Judge Benedict held that the defendant was concluded by the decision of the state court. And now, July 7, 1897, the rule to show cause why the service of the writ of summons should not be set aside, etc., is discharged, with leave to the defendant to plead within 30 days.

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CLARK v. BERNHARD MATTRESS CO.

(Circuit Court, N. D. California. August 31, 1897.)

No. 12.416.

DECREE DISMISSING BILL IN EQUITY—WHEN NOT A BAR TO NEW SUIT.

A decree dismissing a suit without a hearing, or determination of the merits, whether made with or without the consent of the complainant, is not a bar to a new suit.

J. J. Scrivner, for plaintiff.

John L. Boone, for defendant.

MORROW, Circuit Judge. The plaintiff in this case claims to be the owner, by assignment, of all the right, title, and interest in and to a certain invention and letters patent numbered 217,704, for an improvement in wire-coiling machines, for the territory of the city and county of San Francisco, state of California, and alleges that the defendant, without the consent or allowance and against the will

of plaintiff and his assigns, has made and used a large number, to wit, 100, wire-coiling machines containing the inventions and improvements described and claimed in said letters patent, whereby plaintiff has been damaged in the sum of \$50,000. To this complaint the defendant has interposed a plea in bar, in which it is alleged that the plaintiff, on the 16th day of July, 1896, filed in this court a bill of complaint wherein and whereby he charged the defendant with the same infringement upon the same letters patent referred to and charged to have been infringed in the complaint filed in this action; that the bill was in equity, and was for the same subject-matter, and between the same parties, and demanded the same relief as in the complaint filed herein; that on the 12th day of July, 1897, the plaintiff, by his attorney, without the knowledge or consent of the defendant, and of his own free will and volition, dismissed the suit, and caused a judgment of dismissal to be entered therein; and the defendant pleads that dismissal and judgment of dismissal as a bar to this action. Plaintiff moves to strike out this plea on the ground that it constitutes no defense to this action. The effect of the dismissal of a bill in equity is well established. The rule, in general terms, is that a decree or order of the court by which the rights of the parties have been determined, or another bill for the same cause has been dismissed, may be pleaded in bar to a new bill for the same matter. But an order of dismissal is a bar only where the court has determined that the plaintiff had no title to the relief sought by his bill, and therefore an order dismissing a bill for want of prosecution is not a bar to another suit. Whenever a bill of complaint is dismissed without a hearing, and without any consideration of the merits, whether with or without the consent of the complainant, the order of dismissal is in the nature of a nonsuit at law, and cannot be considered a bar to a new suit, because the matters in controversy are not thereby judicially determined. *Carrington v. Holly*, 1 Dickens, 280; *Curtis v. Lloyd*, 4 Mylne & C. 194; *Badger v. Badger*, 1 Cliff. 237, 2 Fed. Cas. 327 (No. 717); *Freem. Judgm.* 270, and cases there cited. The motion to strike out the plea in bar must, therefore, be granted, and it is so ordered.

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#### HECHT v. METZLER.

(Circuit Court, D. Utah. August 16, 1897.)

No. 195.

#### ADMISSION OF STATES—TRANSFER OF PENDING CASES—WAIVER OF RIGHT.

The Utah enabling act authorized the constitutional convention to provide for the transfer of pending cases to the proper state and federal courts. Accordingly it was provided in the state constitution that, in cases of concurrent state and federal jurisdiction, a transfer to the federal court should be made upon motion and bond, in default whereof the case should proceed in the proper state court. *Held*, that where neither party sought a transfer, but after final judgment in a territorial court one of them took an appeal to the state supreme court, and the other joined in submitting it there for decision, this constituted an election to proceed in the state courts, and

precluded the defendant from transferring the case to the federal court after a reversal and remand for a new trial.

W. L. Maginnis, for plaintiff.

Williams, Van Cott & Sutherland and E. M. Allison, Jr., for defendant.

MARSHALL, District Judge. This action was instituted on December 29, 1893, in a district court of Utah territory. A trial was had, and judgment in favor of the defendant rendered on May 15, 1895. Thereafter a motion for a new trial was duly made, argued, and submitted for decision. This motion had not been decided when Utah became a state, on January 4, 1896. The records and files in the case were, in pursuance of the state constitution, and without any act of the parties, transferred to the district court of the Second judicial district of the state of Utah, the judge of which had, as judge of the territorial court, heard the motion for a new trial. On January 17, 1896, without any new submission of the motion, it was denied. On February 21, 1896, the plaintiff appealed to the supreme court of the state of Utah from the judgment and order denying his motion for a new trial. The latter court, on March 6, 1897, reversed the judgment, and remanded the cause to the district court of the state, with direction to grant a new trial. On the coming down of the remittitur the defendant filed in the said district court his petition averring the necessary diversity of citizenship of the parties, and the jurisdictional value of the matter in controversy, and a bond in due form for a removal of the case to the circuit court of the United States. The state court ordered the removal. After the entering of a copy of the record in the circuit court, the plaintiff moved to remand, alleging, among others, the following reasons: (1) That the action was pending in the supreme court of the territory when Utah became a state, was thence transferred to the supreme court of the state, and was therein argued and decided without objection by the defendant; (2) that at the time of the admission into the Union of the state of Utah the cause was not pending in any district court of the territory.

The case was never pending in the supreme court of the territory. The appeal was taken on February 21, 1896, after the admission of Utah to the Union, and was to the supreme court of the state. Before January 4, 1896, the date of statehood, although a judgment had been rendered in the district court of the territory, a motion for a new trial was therein pending and undetermined. It depended upon the decision of this motion whether further proceedings would be had in the district court, and the action must be deemed to have been then pending in that court. *Hoadley v. San Francisco*, 12 Fed. Cas. 250; *Wegman v. Childs*, 41 N. Y. 159; *Andrews v. Cassidy*, 142 Mass. 96, 7 N. E. 545; *Howell v. Bowers*, 2 Crompt. M. & R. 621. But the question remains whether the appeal by the plaintiff to the supreme court of the state, the appearance of defendant in said court, and the submission of the cause to it without objection, preclude the defendant from transferring the case to this court, when, on its reversal by the supreme court, it was again pending in the district court of the state. This question depends on a construction



of section 17 of the act of congress enabling the people of Utah to form a constitution and state government, and of section 7 of article 24 of the constitution so adopted. In section 17 of the act of congress it was enacted that the convention therein provided for should "have the power to provide, by ordinance, for the transfer of actions, cases, proceedings, and matters pending in the supreme or district courts of the territory of Utah at the time of the admission of the said state into the Union, to such courts as shall be established under the constitution to be thus formed, or to the circuit or district court of the United States for the district of Utah; and no indictment, action, or proceeding shall abate by reason of any change in the courts, but shall be proceeded with in the state or United States courts according to the laws thereof respectively." By section 7 of article 24, the convention ordained that all actions, cases, proceedings, and matters pending in the supreme and district courts of the territory of Utah when it was admitted as a state should be appropriately transferred to the supreme and district courts of the state respectively, except that "all actions, cases, proceedings and matters which shall be pending in the district courts of the territory of Utah at the time of the admission of the state into the Union, whereof the United States circuit or district courts might have had jurisdiction had there been a state government at the time of the commencement thereof respectively, shall be transferred to the proper United States circuit and district courts respectively; and all files, records, indictments and proceedings relating thereto shall be transferred to said United States courts: provided, that no civil actions, other than causes and proceedings of which the said United States courts shall have exclusive jurisdiction, shall be transferred to either of said United States courts, except upon motion or petition by one of the parties thereto made under and in accordance with the act or acts of the congress of the United States, and such motion and petitions not being made, all such cases shall be proceeded with in the proper state courts." It will be seen that, whereas section 17 of the enabling act gave the constitutional convention the power to provide for the transfer of certain cases pending in the supreme or district courts of the territory to the circuit or district court of the United States, congress did not itself undertake to make such transfer, or to authorize it, except as it might be provided for by the convention. This delegation of authority to the convention was valid. In *McCornick v. Telegraph Co.*, 25 C. C. A. 38, 79 Fed. 449-451, the circuit court of appeals for the Eighth circuit, speaking by Judge Lochren, said:

"The constitutional convention of Utah was a governmental body, which congress could properly provide for to aid in preparing for the change from the territorial existence to statehood, and could properly invest it with authority to provide for all the details incident to such change. One of these unavoidable details was the proper distribution and placing of the causes depending in the territorial courts, which would go out of existence with the change."

That the convention did not exercise the full power conferred on it by congress by providing for any transfer to a United States court of actions pending in the supreme court of the territory at the time

Utah became a state is immaterial. This action was then pending in a district court of the territory, and as to it full provision was made. The status of the action being so fixed, and it falling within the concurrent jurisdiction of the United States circuit court, either party had a right to remove it to that court. The ordinance of the constitutional convention did not prescribe any time within which this right of transfer should be exercised. But an election of forum once made would be binding and irrevocable. So long as no proceeding in the action was had in the state courts, it could not be contended that an election had been made. When the plaintiff appealed to the supreme court of the state, he elected to further prosecute the case in the state courts. The defendant was then required to make his election. A failure to then remove the case must be taken as a waiver of the right. He could not silently stand by and see the plaintiff incurring expense, and altering his position on the faith of a continued exercise of jurisdiction by the state courts, without losing his right to so change the forum as to render such expense nugatory. When the defendant appeared without objection, and united with the plaintiff in asking a decision of the cause by the supreme court of the state, he but emphasized an election that his failure to act had already made irrevocable. It is no answer to this to say that without any act of defendant the cause was carried to the supreme court of the state, and that the ordinance of the convention did not provide for a removal of causes from that court to the circuit court of the United States. The ordinance did not provide for the removal of any cause from any specified state court to the United States courts. It did provide for the transfer of certain cases which should be pending in a district court of the territory at the time Utah became a state to the proper United States court, upon condition that a prescribed petition and bond should be presented to the state court in which the record was lodged, when the right was exercised. The transfer was from the territorial court; the state court having custody of the record was but the channel through which it came. And, if the case was of the class permitted to be transferred, the mere fact that the record was in the supreme court of the state at the time the right to transfer was asserted would be no objection to its exercise, provided that the election of the party seeking the transfer to remain in the state courts had not theretofore been indicated. The United States court, by a transfer, became the successor of the territorial court. It was to complete whatever was left undone in that court. *Koenigsberger v. Mining Co.*, 158 U. S. 51, 15 Sup. Ct. 751; *Bates v. Payson*, 4 Dill. 265, Fed. Cas. No. 1,103. But no statute applicable to this case made it the successor of the state court, nor authorized it to take up the litigation where the action of the state court, invoked by both of the parties, had left it. The motion to remand will be sustained, at the cost of the defendant, who removed the cause to this court.

**FARMERS' LOAN & TRUST CO. v. CAPE FEAR & Y. V. RY. CO. et al.**

(Circuit Court, E. D. North Carolina. March 31, 1897.)

**RAILROADS—FORECLOSURE—METHOD OF SALE — APPORTIONMENT OF PROCEEDS.**

A railroad company, whose road consisted of three divisions, by a single instrument mortgaged the entire road, with all its property and franchises, to secure three series of bonds. Each series was declared to be a first lien on one of the three divisions respectively, and a subordinate lien on the two others. In case of default the trustee was authorized to take possession of and operate the entire road, and pay interest on all the bonds without distinction. In case of sale the property was to be offered first as a whole, and, if no satisfactory bid was received, then the divisions were to be sold separately. *Held*, that on foreclosure every effort should be made to preserve the road intact by selling it as a whole, rather than by divisions, including in the sale also a leased road, which had been practically merged in the system; and, as this would involve the difficulty of apportioning the proceeds to the different series of bonds, the cause should be referred to a master to ascertain the relative value and earning capacity of the different divisions, in order to reach a basis for apportionment.

This was a foreclosure suit, instituted by the Farmers' Loan & Trust Company, as trustee, against the Cape Fear & Yadkin Valley Railway Company and others.

Turner, McClure & Rolston, for Farmers' Loan & Trust Co.

George Rountree, for Cape Fear & Y. V. Ry. Co.

Watson & Buxton and Robert O. Burton, for North State Imp. Co.

Seward, Guthrie, Morawetz & Steele, for New York bondholders' committee.

Cowen, Cross & Bond, for Baltimore bondholders' committee.

SIMONTON, Circuit Judge. The case is now ripe for a final decree. Before reaching this point, a question has been made, how shall the property be sold? The purpose of these proceedings is to secure the rights of creditors and of shareholders by realizing the value of the property, and by distributing this among those entitled to it. Before such distribution can be made, this value must be ascertained. How such ascertainment can be had is, therefore, the paramount question, preceding all others. The court has been aided by arguments of unusual ability from counsel who represent plans adopted by the Baltimore committee and by the New York committee of bondholders. Each of these presents a different plan of reorganization. The presentation of the plans gave an opportunity for a discussion from which the court has derived great benefit, information, and assistance. But it would be as improper as it is impossible for the court to adopt either of these plans. They fulfill their office when they have satisfied the court—as in fact they do satisfy it—that there are persons able and willing to purchase the property, and that, therefore, it can safely be brought to a sale. That sale must be at public auction, open to the world. It must not be chilled or impeded by the adoption in advance of any plan of reorganization. The sale and purchase, in point of time as well as in point of law, must precede any attempt at reorganization. In order, also, to promote a favorable sale, it is important to know in

advance how the proceeds of sale should be distributed among the classes of bonds proved. With this knowledge holders of bonds could determine what course to pursue at the sale. The circumstances of this case are peculiar. We have not to deal with bonds having priority and lien over the whole road. But we deal with bonds of three classes, each of which has a lien of its own on an aliquot part of the railroad property, and a subordinate interest on the other parts of it.

The Cape Fear & Yadkin Valley Railroad Company is the result of earnest and persistent effort upon the part of the citizens of North Carolina to secure a railroad from tide water to the mountains, aided by liberal appropriations and material assistance of the legislature and of the counties interested in the project. The enterprise first took form in the enactment of an act to incorporate a company to construct a railroad from some point on the Cape Fear river at or near Fayetteville to some point in the coal regions hereafter to be determined, ratified 24th December, 1852. Various other acts were passed from time to time having the same object in view. The railroad was first called the Western Railroad Company, but, after consolidation with one or more companies, the name of the company was changed to that of the Cape Fear & Yadkin Valley Railroad Company, and on 14th March, 1881, an act was ratified looking to the completion of the road with Wilmington as one of its termini. In 1883 there was a complete reorganization of the enterprise, by which authority was given to the said railroad company to extend its main line to the city of Wilmington and to the Virginia line. By section 5 of this act of 1883, it is enacted as follows:

"Sec. 5. That the said company so reorganized, shall have full power and authority to make a mortgage upon all of its property, effects and franchises of every kind whatsoever, to secure the payment of its bonds, and to issue bonds in such sums as it may deem proper, bearing interest at the rate of six per cent. per annum, and to run for the period of thirty years from the date thereof, to the amount of fifteen thousand dollars per mile upon each mile of said road already constructed, or which may hereafter be constructed, and of any branch or branches of said road, and that said mortgage and the bonds issued thereunder shall be a first lien, and have priority over every other claim against the company. The said mortgage, when duly executed, shall be registered in the register's office of the county of Cumberland, and registration in said county shall be deemed an effectual and sufficient registration for all purposes, and it shall not be necessary to register the same in any other county, any law to the contrary notwithstanding."

At this time the road consisted of three divisions, known respectively as Divisions A, B, and C. Division A extended from the city of Greensboro to Fayetteville, and thence to the South Carolina line, and was fully built and equipped. Division B was in the course of construction, and extended from Greensboro westward to Mt. Airy. Division C was in contemplation, and extended from Fayetteville to the city of Wilmington. There were outstanding liens on the Divisions A and B. The company resolved to exercise the power given it by this act of 1883 by the execution of two mortgages upon the entire property and franchises of the company owned or thereafter to be acquired; one of them to be a first mortgage to secure bonds to the amount of \$10,000 per mile upon the road then constructed or to

be thereafter constructed, and to be divided into such series, and to attach as liens in such manner, as the board of directors may determine; and also a second income mortgage on the same property at \$5,000 per mile,—thus exhausting the power of mortgage given in section 5. On 1st June, 1886, this resolution was carried into action by the execution of a mortgage to the Farmers' Loan & Trust Company of New York by said railway company. This mortgage recited the fact that two other mortgages had been theretofore created in June and October, 1883, securing certain bonds, and covering the property thereafter conveyed, which bonds, in order that the present mortgage should be made, had been surrendered for cancellation. It then, after other recitals, proceeds to mortgage that certain railroad extending from the city of Greensboro to Fayetteville, and from Fayetteville to the boundary line between the states of North Carolina and South Carolina, where it intersects the same; and also that certain line of railroad extending from Fayetteville aforesaid to Wilmington, when the same shall be constructed; and also that certain line of railroad now being constructed, extending from Greensboro aforesaid to the boundary line between the state of North Carolina and the state of Virginia, at a point near Mt. Airy, together with the right of way for said railroad, and also all depots and station grounds and buildings thereon, and also all shops, engine houses, turntables, water stations, warehouses, and lots, gravel pits, stone quarries, and other real estate used in operating said road, or in connection therewith, with all side tracks and any other lands or buildings connected therewith, or which may hereafter be acquired, all rolling stock, equipments, machinery, etc., then owned or afterwards to be acquired, together with all corporate rights, privileges, and franchises then possessed or thereafter to be acquired by the railway company, including all tolls, income, rents, etc., then owned or thereafter to be acquired by the railway company. All of these to be held in trust for the holders of the bonds issued thereunder, without preference as to priority in the time of issuing the same, but with a preference and distinction of lien as regards the several series of bonds as thereinbefore specifically set forth. The distinction as to lien herein referred to is as follows: The said bonds shall be divided into three series of bonds,—that is to say, series A bonds, series B bonds, and series C bonds,—and they shall attach as liens upon the property hereby mortgaged in the following manner; that is to say: Series A bonds shall be a first lien on that portion of the railroad which lies between Greensboro and Fayetteville and Fayetteville and the South Carolina line, together with all station houses, sidings, and other property of whatever nature appurtenant thereto, and a lien in common with series C bonds, but subordinate to series B. bonds, upon that portion of the road which is now being constructed between Greensboro and the Virginia line via Mt. Airy, together with the property appurtenant thereto; and also a lien in common with series B bonds, but subordinate to series C bonds, on that portion of the road between Fayetteville and Wilmington, when the same shall be constructed, together with the property appurtenant thereto. Series B bonds shall be a first lien upon that portion of the road which is now being constructed

between Greensboro and the Virginia line via Mt. Airy, together with all station houses, sidings, and other property of whatever nature appurtenant thereto, and a lien in common with series C bonds, but subordinate to series A bonds, upon that portion of the road which lies between Greensboro and Fayetteville and Fayetteville and the South Carolina line, together with the property appurtenant thereto; and also a lien in common with series A bonds, but subordinate to series C bonds, on that portion of the road between Fayetteville and Wilmington, when the same shall be constructed, together with the property appurtenant thereto. Series C bonds shall be a first lien upon that portion of the road between Fayetteville and Wilmington when the same shall be constructed, together with all station houses, sidings, and other property of whatever nature appurtenant thereto, and a lien in common with series B bonds, but subordinate to series A bonds, on that portion of the road which lies between Greensboro and Fayetteville and Fayetteville and the South Carolina line, together with the property appurtenant thereto; and a lien in common with series A bonds, but subordinate to series B bonds, on that portion of the road which is now being constructed between Greensboro and the Virginia line via Mt. Airy, together with the property appurtenant thereto. There are the usual provisions in case default be made in paying interest on the bonds, making no distinction whatever between them, and permission is given to the trustee, in case of default, to enter and take possession of the property, operate the same, pay expenses of operation, and then interest on the bonds without distinction, or to sell the property at the request of one-tenth of the holders of bonds, again without distinction between the bonds. The article as to the mode of sale is in these words:

"Sell and dispose of at public sale all and singular the said railroad, estate, real and personal, corporate rights, franchises, and premises hereby mortgaged, or agreed or intended so to be, to the highest bidder, offering the same first as an entirety, and, in case no acceptable bidder is forthcoming for the said property as an entirety, then the said trustee shall proceed to sell separately the three divisions of the road hereinbefore made, and upon which the several series of bonds are hereby made, or intended to be made, first liens."

The proceedings for foreclosure having been instituted in this court, and a receiver having been appointed, and the time having arrived for a final decree, the first question which is met at the threshold is: How shall the road be sold, in divisions, or as an entirety? How shall the proceeds of sale be apportioned among the several classes of bonds in case, as is more than probable, a sum sufficient to pay the entire sum due, with expenses, be not realized from the sale? This railway company derives all of its powers and privileges from the state which created it, and the bondholders enjoy the security of the mortgage because the act of the legislature granted this power to the railway company. The purpose and intent of the state was to secure an entire line of railway from its principal seaport to the Virginia line. It granted the franchise to the company as an entirety,—one indivisible franchise,—granted for the purpose of constructing and continuing an entire continuous line of road. The mortgage is also a single instrument of an entire line, intended to secure inter-

est of all bonds and then the principal, giving to each of them as part of its security the franchise of the whole line, and an interest in the entire road and its property. Over the action of the trustee each bond, without any distinction, has an equal voice with every other bond. The trustee must see to it that the interest on every bond is paid. One-tenth of all the bonds, without distinction, can secure a declaration that all of the bonds are payable at once, and can require the trustee to enter and take possession of the whole mortgaged property. Every part of the railway property is dependent upon and connected with the others, and this interdependence constitutes a part of the value of each of its several parts. Division B, for instance, has a value in its bed, iron, cross-ties, stations, etc. Besides all these, it has a clearly recognized value, because it is a part of a continuous line operated by one set of agents from its western terminus to the sea. The same intrinsic and incidental value exists in each division. If, therefore, the property were offered for sale at auction in separate divisions, it could—probably would—result in a disruption of the entire system, against the purpose of, and defeating the ends sought by the state, for which the corporation was created, and to which it owes its existence and its powers. This will be inconsistent with the general tenor of the mortgage itself, and will utterly destroy an important incident in the value of each division. Besides this, during the operation of this railway as a whole system it has become possessed of certain property rights secured for the benefit of the whole system. These are the lease of the South Carolina Pacific, connecting at the South Carolina line, and extending to Bennettsville, S. C.,—a valuable feeder. If the road be sold in divisions, this connection would be valuable to and could be purchased by the purchaser of Division A only, at his own price. From time to time branch roads have been constructed, connected with Division A and with Division B. They are valuable because of this connection,—because of this connection only,—and are only valuable to the purchaser of the division with which they are respectively connected, who will get each of them at his own price. The franchise cannot be divided. A sale by divisions would destroy it entirely. It is true that under the statute law of North Carolina (section 1936 of the Code of North Carolina) the purchasers of any railroad can form a new corporation, and, if the divisions are sold separately, each set of purchasers can do this. But the present franchise for a line continuous from the northwestern boundary of the state to the sea would be absolutely lost, unless the road and its property be sold as an entirety. In that case only could the purchasers organize a corporation with this franchise. The rolling stock is used on the whole system. It is not needed by any division separated from the whole. A sale by divisions would greatly impair its value. Every bond is entitled to its share of the value of each of these items of value. It would be unjust—it could almost be said it would impair the obligation of a contract—to deprive any of them of this incident of value. It would, perhaps, be improper—at least premature—to say that this railroad property could not or should not, under any circumstances, be sold except as an entirety; not in

divisions. But this course—a sale of the property as a whole—should not be abandoned, if abandoned at all, except as a last resort, after it has been demonstrated that it is not practicable, due regard being had to the rights of the bondholders of each or any class. For the present, under the stress of the reasons given, it is best to exhaust the effort to sell the whole property as an entirety. But, if the property be sold as a whole, we are met by a grave problem,—how shall the proceeds be apportioned? There is a marked difference in the value of the bonds on each division, and of the real value of each division. Division A meets at Greensboro, one of its termini, the Southern Railway. At Fayetteville it crosses the Atlantic Coast Line. At its other terminus it meets a valuable feeder, the South Carolina Pacific. Division B has fewer advantages, and is less valuable. So with Division C still less. This difference must be ascertained, and the proceeds of sale apportioned. Ordinarily putting up property at auction in open market is the best test of value. This, however, is not the case with railroad property under mortgage. The holders of the bonds control the sale, and can make the price bid suit their views. This is almost the universal experience. The South Carolina Railway Company, at the end of a foreclosure suit involving questions of liens of five orders of priority, was put up for sale, and was purchased by a controlling syndicate of first consolidated mortgage bonds at the upset price of \$1,000,000. The purchasers resold it within two weeks for over five millions of dollars. It has been suggested that the separate divisions could be put up at an upset price regulated by the money value of their respective bonds as indicated by recent sales. But as there is and has not been any great demand for these bonds, their value cannot be fixed by any casual or isolated sales. If this be a safe guide, why adopt the form of a sale, when the proportionate value could be fixed by the market value of the bonds? If an upset price cannot be fixed in this way, there is no way of fixing it without some further information. The practice of this court furnishes a mode of getting such information. Let the special master, E. S. Martin, take testimony, and report facts proved before him as follows:

(1) What has been the relative earning capacity of these separate divisions for a period of five years; that is to say, what is the value of the aggregate of freight going over each division between its termini, and the value of its passenger traffic, and what are the necessary operation expenses?

(2) What is the cost of repair of its roadbed and track?

(3) What is the comparative estimate of the value of the respective divisions by disinterested persons, who have had experience in railroads, furnishing such estimate under oath under cross-examination, and giving the grounds for the estimate?

(4) Any other facts bearing on this question of actual and relative value.

Let the report contain only the facts given in evidence, so that the court can reach its own conclusion.



### On Rehearing.

(June 15, 1897.)

A decree for the sale of the railroad property was entered on the 31st day of March, 1897. By that decree it was ordered that the property be sold as a whole. The mode of sale—whether in divisions or as an entirety—is wholly within the discretion of the court. Among the reasons given by the court for this mode of sale was the passage of an act by the legislature of North Carolina at its last session annulling section 698 of the Code. The effect of this act would be that, if a sale were made by the road in separate divisions, doubt would exist as to the right of the purchaser to obtain a charter of incorporation. The counsel for the New York bondholders asked a rehearing of the decree upon the weight of this reason. Their request was granted, and the case reheard. After an exhaustive argument, the apprehension existing in the mind of the court has not been relieved. On the contrary, the difficulty in obtaining, under the law of North Carolina, a charter for a division of this road, were it sold in this way, and separate purchasers had, seems more manifest. It is not a question what would be the ultimate decision of a court of last resort as to the right of such a purchaser; but it is the existence of a doubt on this point, and the necessity for the solution of the doubt by judicial proceedings. It is urged with great force that each division, if the divisions were put up separately, would be subjected to the same disadvantage, and that it would operate equally upon all; that, under these circumstances, the mode of ascertaining the relative value of each division would not be impaired. But this is not the case. Those interested in one division may not feel the force of the doubt, and they would be willing to go up to the full extent of the value of their division. On the other hand, those interested in the other divisions, and the general public, who are invited to sales of this character, may feel the full force of the doubt, and be deterred from bidding the value of these other divisions. In such case the bids would form no comparison of value. Giving careful reconsideration of the whole matter, the conclusion heretofore reached has not been changed.

At this hearing another matter has been presented by way of petition, showing the relation of the South Carolina Pacific to the Cape Fear & Yadkin Valley Railroad. It appears that this first-named road, by contract between the two corporations, was practically merged into and made a part of the latter road; that by way of fortifying this agreement, and of providing for casualties, a lease for 30 years of all its property and franchises was made by the South Carolina Pacific Railroad Company to the Cape Fear & Yadkin Valley Railroad Company; and that certain shares of stock in the former company were assigned to the latter company. It also appears that these shares are the property of the North State Construction Company. All of this merger and lease antedated the mortgage in this case. Under these circumstances, all the right, title, and interest of the Cape Fear & Yadkin Valley Railroad Company and of the parties to this suit should be sold at the same time, and as a

part of the property of the Cape Fear & Yadkin Valley Railroad Company, and the decree must be modified to meet this result.

It has been suggested that the provision that any purchaser at the sale ordered, when the property is struck off to him, shall at once pay to the master commissioners, on account of his purchase, a sufficient sum to make up, together with the amount already deposited by him as aforesaid, "twenty per cent. of his accepted bid," may be too onerous. Let the decree in this particular be so amended as to strike out the words "twenty per cent. of his accepted bid," and to insert in lieu thereof the words "the sum of two hundred thousand dollars." Let the decree also be amended so as to require that the cash portions of the moneys arising from the sale be deposited in solvent national banks in the state of North Carolina, in such amounts, as to each bank, as will render the deposit perfectly safe. In all other respects the decree of March 31, 1897, is hereby reaffirmed and decreed.

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BROWN et al. v. CRANBERRY IRON & COAL CO.

CRANBERRY IRON & COAL CO. v. BROWN et al.

(Circuit Court, W. D. North Carolina. August 2, 1897.)

**REFORMATION OF DEED—MUTUAL MISTAKE.**

The owners of a tract of mineral land negotiated an advantageous sale of the same, but, before it was concluded, the negotiations were suspended, in consequence of notice given the purchasers by two other persons that they claimed an interest in the mineral. The vendors, in order to clear their title and consummate the sale, procured deeds from the claimants, paying therefor a sum approximating \$40,000. Formerly the two claimants had held their interests in common, but prior to the execution of such deeds they had partitioned the same by agreement, and then held in severalty. The deed of one of the claimants described the entire tract, purporting to convey an undivided one-half of the mineral therein, with a warranty of title. Twenty years afterwards such grantor brought suit for partition, claiming to still be the owner of an undivided half interest in the mineral in the portion held by him in severalty when the deed was made. *Held*, that the circumstances inducing the purchase, and under which it was made, clearly evidence that it was the intention of the parties to purchase and to sell the entire interest of the claimants, and that the holders under such deed were entitled to its reformation on the ground of mutual mistake.

Moore & Moore, for Brown.

R. H. Battle and Merrimon & Merrimon, for Cranberry Iron & Coal Co.

SIMONTON, Circuit Judge. The original bill in this case was filed on August 16, 1887, seeking partition of certain undivided mineral interests in a tract of land in Mitchell county, N. C. The defendant denied the title of the complainants. Thereupon this court ordered an action at law to establish title. After a trial by jury, in which the denial of title was not pressed by the defendant, and the issues rested only on estoppel by pais and by deed, a verdict was rendered for the defendant. The judgment on this verdict was set aside by the circuit court of appeals, and the case remanded, with

leave to the defendant, if so advised, to file a cross bill, with the view of establishing a mistake in the deeds under which the defendant held, and correcting it if established. 18 C. C. A. 444, 72 Fed. 96. The cross bill has been filed, testimony taken, and the cause is now at issue.

The defendant holds by intermediate mesne conveyance under Hoke, Sumner, and Hutchinson. In the year 1867, these gentlemen, holding lands in North Carolina, commonly known as the "Cranberry Lands," negotiated the sale of them to parties in New York, for the sum of \$200,000. Just before the sale was consummated, Hon. A. C. Avery heard of it, and at once notified the proposed purchasers that he and Brown had claims on the minerals in the land proposed to be sold by Hoke and his associates. This at once interrupted the negotiations. Hoke and his associates, hearing of this claim, concluded that it was shorter and better to purchase the adverse interests, and so remove the cloud on their title. They reached this conclusion notwithstanding that they were advised that the claim was not valid. Negotiations to this end were opened with A. C. Avery, as executor of his father, I. T. Avery, and with the attorneys in fact of John Evans Brown, the other claimant. Brown himself resided in Australia. The negotiations with Avery were concluded first, and his interest in the minerals in the land was purchased for the sum of \$17,000. Some days afterwards the negotiations with Brown's attorneys in fact were concluded, after long haggling over the price to be paid. This seemed to occupy their attention, and it was fixed finally at \$22,000. The purchasers, in this negotiation with Brown, were represented by Col. Gaither, a lawyer of reputation and experience, and he drew the deed conveying the interest of Brown; both the deed of Avery, dated May 27, 1867, and that of Brown, dated June 7, 1867, conveyed an interest in precisely the same tract of land. This tract is delineated on a plat in the record, and is contained within the lines A, B, C, D, E, F, G, H, I, J, K, and L. Avery conveys "all the right, title and interest belonging to the estate of I. T. Avery, and which said Avery has power to convey as executor, and to that tract or parcel of land lying in the county of Mitchell, state of North Carolina." Then comes a full description by courses, distances, and metes, and continuing: "The said interest hereby conveyed being one-half the mineral interest in said land conveyed by agreement by William Drigger to William J. Brown, and conveyed by said Brown to said I. T. Avery, and also all the tracts of land held by conveyance from T. D. Carter and William Drigger, said lands containing about 4,000 underacres, and known as the 'Cranberry Ore Lands,'"—with warranty of title as against the heirs of Avery. The Brown deed, executed by Z. B. Vance and William J. Brown, attorneys in fact of John Evans Brown, conveys "the following tract of land, situated and being in the county of Mitchell, in the state of North Carolina; that is, the one-half of the mineral interest in said lands." Then follows a full description of the same tract as in the Avery deed, and ending: "Containing some 3,000 acres, and being the same lands condemned for the use of the Cranberry Iron Works, known as the 'Bounty Lands.'" The habendum is: "To have and

to hold the one-half of the mines and minerals and mineral interests in said lands,"—with a general warranty of the title "to the one-half of the mines, minerals, ore bank and mineral interests within the boundaries of said lands."

It seems that there had been a dispute between I. T. Avery and William J. Brown as to the ownership of these lands, and others, perhaps. In 1853 these differences were adjusted by articles of agreement entered into 8th March, 1853, and carried out by deeds. That by Isaac T. Avery to William J. Brown is dated 18th June, 1853, recorded 25th December, 1866. That by Brown to Avery was recorded 6th August, 1873. These deeds divided the lands between these two parties by a compromise line, which appears in the plat. All the lands on the east side of this line were conveyed to Brown; all on the west side to Avery. On 22d August, 1860, I. T. Avery executed a deed to John Evans Brown (to whom, in the meantime, William J. Brown had to convey his interests), by which he gave Brown the one-half interest in "my mineral interest in the iron ore bank known as the 'Cranberry Ore Bank'" (this was on the west of the compromise line), and the entire interest in all the lands outside of the compromise line. This deed is recorded in the same book as the deed from Avery to Brown, above spoken of. These deeds relate to the same land covered by the deeds to Hoke and his associates. It thus appears that when Avery (executor) and Brown's attorneys in fact made these deeds the land conveyed was not held in common by these parties, but that Avery's estate and Brown each owned an undivided half of the Cranberry ore bed, and that Brown owned the entire mineral interest in so much of the land as was east of the compromise line. The deed of Brown in terms conveys the one-half interest in the minerals, and by these terms he conveys to Hoke his one-half in the Cranberry ore bed, and the one-half of the minerals in the land east of the compromise line. It is this interest of which he seeks the partition. The defendant says that Hoke and his associates desired and intended to purchase the whole of the mineral interest of Brown in the whole tract; that they negotiated for, and in fact purchased and paid for, the whole of this interest; that both parties intended it to be conveyed; that, if the deed did not convey it, it was a mistake,—a mutual mistake,—an error of the draftsman who drew the deed. This is the question to be decided: Did the deed carry out the intent of both parties? Did it convey all that Brown had agreed to convey, and all that Hoke and his associates had contracted and expected that he would convey? Unhappily, we are without the testimony of all the actors in this transaction. We have full testimony of Hoke and his associates. We have the testimony of Z. B. Vance, but William J. Brown's evidence is not in the record. Perhaps he was not alive when the testimony was taken. A declaration of his appears. This, perhaps, under strict rules of evidence, cannot be taken into account.

Looking at the case *a priori*, the conclusion is almost irresistible that both parties supposed that the entire interest of Brown was being purchased. Hoke and his associates had made a most advan-

tageous sale of these same lands. The sale was interrupted by notice of the claim of Avery's estate and of Brown. The proposed purchasers, about to invest a very large sum of money, would be satisfied with nothing but a clean title. The lands to be purchased were mining lands. Their only use was in working them. Every day's work diminished their value. Every care, therefore, had to be taken, that no outstanding interest should exist to which at some future time they might be called upon to account, and which could share the benefits of their expenditure of capital, labor, and time. Hoke and his associates had to furnish them such a title. Avery and Brown knew of their situation and its requirements. When they were approached for the purchase of their interests, they knew what Hoke and his associates were obliged to get. We are not left to conjecture on this point. Judge Avery, the executor of I. T. Avery, who made the deed, swears that he knew that a clean title was needed. The answer of Sumner and Hutchinson to the suit of Vance and Brown on one of the notes given for this same purchase, put in evidence for one purpose, and so in evidence for all purposes, distinctly declares that the negotiations were for the purchase of the whole of the mineral interests of Brown. This being the case, it is clear that the purchasers negotiated for, and supposed that they were purchasing, the entire mineral interest of Brown, and that the vendors knew this, and consented and agreed to such purchase. Gov. Vance, one of Brown's attorneys in fact, says that the impression on his mind is that they were conveying the entire interest of Brown, although he adds the lapse of time has been so great that he cannot give the grounds for that impression. It is not difficult to see these grounds. He knew that Hoke and his associates were bound to get an absolutely clear title; that they could negotiate for nothing less; that they were paying for nothing less; and as an honorable man, with this knowledge, he was bound to convey them nothing less than an absolutely clear title. This being the understanding, intent, and purpose of both parties, Col. Gaither was instructed to draw the deed carrying out this intent. He drew the deed in question. He had been Brown's counsel when the compromise between him and Avery was made and concluded. Professionally, he knew of this compromise. But, notwithstanding this knowledge, he drew this Brown deed precisely as if no partition had been made between Avery and Brown. This must have wholly escaped his memory. Here was the mistake, and into that mistake the attorneys in fact of Brown also fell, because, under their hands and seals, they acted upon and confirmed it. It cannot be supposed for a moment that, with the knowledge they had of the necessity imposed upon Hoke and his associates of getting a clean title, they could believe that the latter could take less. Fraud will not be presumed, nor will it be lightly charged. It seems clear that this deed was executed by both parties under a mistake of facts, and that it should be reformed. It is so ordered.

## VANDERVEER v. ASBURY PARK &amp; B. ST. RY. CO. et al.

(Circuit Court, D. New Jersey. July 16, 1897.)

## 1. STREET RAILROADS—NEW JERSEY STATUTES — ILLEGAL BONDS — INNOCENT HOLDER—CLAIM FILED WITH RECEIVER.

Under the New Jersey statute providing for the incorporation and regulation of street-railway companies, approved April 6, 1886, which provides, among other things, that no company incorporated under the act can begin to build its road until the whole amount of its capital stock has been subscribed for by responsible parties, and 50 per cent. of each share has been paid in cash, that bonds secured by mortgage can only be issued to the amount of the capital stock, and for the purpose of aiding in the construction of the road, such bonds issued before the whole amount of the capital stock of the company has been paid in cash, and expended in the construction of the road, are illegal, and are void, except so far as they are held by bona fide purchasers for value without notice, but, where so held, constitute a valid claim against the property, in the hands of a receiver, for the amount actually received therefor by the company.

## 2. SAME—ILLEGAL CONSTRUCTION CONTRACT.

A contract by which certain directors of a street-railway company, acting in the name of a third person, who is a mere dummy, are to construct the road, and divide between them the balance of the stock and bonds not required therefor, is fraudulent, and bonds issued pursuant thereto are void.

## 3. SAME—ULTRA VIRES CONTRACTS.

A contract by which a street-railway company, in order to procure a right of way over streets running through lands owned by a land company, guaranteed that certain lots of the land company would become worth a certain price, and agreed to pay the difference between such price and what the lots would bring at auction, is not ultra vires.

## 4. INSOLVENT CORPORATION—RIGHT TO AN ACCOUNTING — GENERAL CREDITOR.

General creditors of an insolvent corporation, who have proved their claims, have an equitable lien on the assets in the hands of a receiver, and, on the refusal of the receiver to enforce the lien, they have the same right as the receiver to require an accounting of the amount due on the mortgage bonds.

Arthur D. Vinton and William B. Guild, for complainant.

Charles L. Corbin and Acton C. Hartshorne, for Avon by the Sea Land & Imp. Co.

G. D. W. Vroom, for receiver.

Samuel A. Patterson, for Asbury Park & Belmar St. Ry. Co.

KIRKPATRICK, District Judge. The Asbury Park & Belmar Street-Railway Company was organized under an act of the legislature of the state of New Jersey entitled "An act to provide for the incorporation of street-railway companies, and to regulate the same," approved April 6, 1886, which provided, among other things, that "seven or more persons may associate themselves together by articles in writing for the purpose of forming a corporation to construct, maintain and operate a street railway for the transportation of passengers," with a capital stock of not less than \$10,000 per mile, and that, when at least \$2,000 of stock of each mile of railroad, and a proportionate sum for every fraction of a mile thereof, proposed to be constructed, shall have been subscribed and paid for in good faith and in cash to the directors named in said articles of association, and by them deposited with the treasurer of New Jersey, the articles of association might be filed with the secretary of state, and

thereupon become a body corporate, possessed of the usual corporate powers. The length of the road was approximately two miles. The amount named as its capital stock was \$75,000. Four thousand dollars was deposited with the treasurer of the state, and the certificate filed with the secretary of state January 6, 1893, together with an affidavit that all the requirements of the law had been complied with. The ninth section of the legislative act provides that:

"No street-railway company incorporated under this act shall begin to build its road until it has filed in the office of the secretary of state a certificate signed and sworn to by its president and treasurer and secretary and a majority of directors, stating that the full amount of its capital stock has been unconditionally subscribed for by responsible parties and that fifty per cent. of the par value of each share thereof has been actually paid in cash."

Such certificate, dated June 1, 1893, was filed in the office of the secretary of state July 7, 1893. The facts that seemed to warrant the officers and directors in making oath to the requisites of the act are set forth in the testimony of George A. Aldrich, on pages 260 and 261 of the record, as follows:

"Q. What evidence was there before now that 50 per cent. of that [the stock] had been paid in cash? A. The evidence of a tender, when stock was demanded, for the payment of it,—the tender for the payment of the stock. Q. What do you mean by that? A. I mean that money was offered for the payment of the stock. Q. You mean that the money was there at the time the board signed the certificate? A. Not particularly at that time; it had been offered. Q. By whom? A. By Mr. Potts and myself. Q. Had it been paid to the treasurer? A. It had been offered to the treasurer, who held the matter until the delivery of the certificate of stock could be furnished him. Q. Was there not laid before the board at that time a check, either certified or otherwise, for about half the amount of the capital stock? A. Yes, sir; there was a check. Q. Whose check was that? A. I think it was my own check. Q. On what bank? A. It was on the Camden bank; but whether it was on the State Bank or the National State Bank of Camden I don't remember. Q. To whose order was it? A. To the order of the treasurer. Q. H. E. Aldrich? A. Yes, sir. Q. For how much money? A. I think it was for \$30,000. Q. Was it not for as much as \$37,500? A. No; there had been good and sufficient money put up besides that. There was some \$5,500 at Trenton, and there were other moneys put up, which reached the \$37,500. Q. What became of that check? A. The check was returned for want of delivery of certificates of ownership. Q. Was it never presented to the bank for payment? A. Never presented. The money was never collected. Q. And the company never received anything on that check, then? A. They never entered it on their account. Q. Did they receive anything on that check? A. No, sir. Q. And the check was returned to you? A. Yes, sir. \* \* \* Q. It was handed back to you by the treasurer of the company, when? A. Some time in July, I think it was, of 1893. Q. Has the treasurer of the company ever received any cash for any of its stock? A. No; I think not."

This account of the way the law was complied with is uncontradicted, and must be assumed to be true. By the certificate of incorporation and the accompanying affidavits it was made to appear that the whole \$75,000 of stock had been subscribed for in good faith by responsible parties, and yet not one dollar in cash reached the treasurer of the company; and now, on June 1, 1893, an affidavit is filed that 50 per cent. of the stock has been actually paid in cash on each share, and still again not a dollar is paid. That the tender of the check was a mere fraudulent pretense, intended as a salve for the consciences of the affiants, and that it was never intended that

any stock should be delivered for the same, is apparent; and that the directors knew this to be the case is evidenced by the fact that they ratified a contract dated June 1, 1893, with one T. B. Wilson, to build the road, and give him in payment therefor \$75,000 in bonds and 690 shares of stock out of a total authorized issue of 750 shares. We are not at this time concerned with the validity of the several issues of stock, further than to determine whether the whole amount was paid for in cash. Not only does that part of the record which has been quoted negative the assertion, but in no part of it is there found any claim to the contrary. The seventeenth section of the act provides:

"That any company incorporated under this act shall have power to borrow such sum or sums of money from time to time not to exceed in the whole its capital stock as shall be necessary to build, construct or repair its road and branches and furnish all necessary property and equipment for the use and objects of said company, and to secure the payment thereof by the execution, negotiation and sale of any bond or bonds secured by mortgages on its property, appurtenances, privileges and franchises, \* \* \* and the proceeds of such bond or bonds shall be used only for the purpose of aiding in the construction, repair, or equipment of the road, its branches and appurtenances."

It appears from this section that bonds secured by mortgage can only be issued to raise money for the purpose of aiding in the construction of a road, and then not to exceed, in the whole, its capital stock. That by the limitation of the bond issue to the whole of the capital stock, the legislative intent was to require the expenditure of the whole of the capital stock in the road-building, is apparent from a reading of the several provisions of the act: The capital stock must not be less than \$10,000 per mile of road projected; certificate of incorporation will not be issued until \$2,000 per mile has been deposited with the treasurer of the state; work on the road cannot be begun until 50 per cent. of the capital has been paid in on each share in cash. Why these precautions, if the authority to issue bonds is to be limited only by the amount which the incorporators see fit to name in the certificate of incorporation as the capital stock of the road? I am clearly of the opinion that, until the whole amount of its capital stock has been actually paid in cash, and expended in building the road, the company has no authority under the act to borrow any money, by sale or negotiation of bonds secured by a mortgage on its property and franchises, the proceeds of which are to be used only in aid of the construction or repair of the road. It appears from the evidence that the entire cost of the road has not equaled the amount of its capital stock, and, therefore, no aid by issue of bonds was necessary for its completion.

The issuance of the \$75,000 of bonds by the directors was unauthorized by law and illegal, and the bonds are void, except so far as they are in the hands of bona fide holders for value without notice. If this were not so, the fraudulent nature of the contract for building the road would, of itself, be sufficient to invalidate the bonds issued under it. The evidence shows that the original contract was made with one Wilson, who was the representative of Potts and Aldrich, directors of the company, a mere dummy set up to represent a contractor, while in fact the work was to be done by the directors, and



the balance of stock and bonds not required for the building of the road was to be divided between them. Mr. Aldrich, it would seem from the evidence of Watson, was unable to carry out his part of the agreement, and furnish the money to buy rails and ties and other necessities for the building of the road, so Mr. Bullock, in February, 1894, was substituted. Bullock took an assignment of the Wilson contract, in which he agreed to do the work, and pay to Wilson one-half of his profits. While this agreement was made nominally with Wilson, it is apparent from the evidence that the real parties to the contract were Bullock and Potts, the president of the company. Watson testifies that, in a conversation had with Bullock in regard to the matters relating to the road, Bullock stated to him that his (Bullock's) agreement with Potts was that, after building and equipping the road, the balance of the bonds were to be divided between him and Potts. Bullock, while admitting the conversation with Watson, denied that he said Potts was to receive one-half of the profits; but it appears from the testimony of Potts that he actually received from Bullock \$15,000 in bonds, and it is not pretended by any one that one dollar of bonds was ever paid to Wilson as his part of the profits of the contract. Bullock knew, as the evidence clearly shows, that the use of Wilson's name in the contract for building the road was a mere form, and that Potts and Watson, directors, were the real parties in interest. This, of itself, would vitiate the contract, and made invalid the bonds representing the profits made thereunder. *Guild v. Parker*, 43 N. J. Law, 430; *Gardner v. Butler*, 30 N. J. Eq. 702; *Thomas v. Railway Co.*, 2 Fed. 877. None of the bonds have been produced for inspection, and it does not appear that in other respects they are valid obligations of the company. I have no doubt it is clearly within the power of the board of directors of a street-railway company to make a contract for purchase of their right of way, or the purchase of any rights which may be necessary for the use and enjoyment of their franchise, and to secure the payment of the purchase price by a mortgage upon their plant. It was within the discretion of the board of directors to pay a lump sum in cash, to pay a percentage of the gross or net receipts, to abide the award of arbitrators, or resort to any other legal method of ascertaining the value of the privilege of laying their tracks over and upon certain specified streets and roads. The situation in this case was that the Avon by the Sea Land & Improvement Company were the owners of a majority of the lineal feet fronting on the proposed route of the railroad company. The courts of New Jersey had decided that the railroad could not be legally built or operated without the consent of the Avon Company, and an injunction had been granted, restraining the railroad company, not only from operating, but maintaining their railroad in front of the Avon Company's lands. It was a matter of necessity with the railroad company to come to some agreement with the Avon Company. Their existence depended upon it. The railroad company offered to construct branches to its road, which it said would be of advantage to the Avon Company. Whether they would or not was a matter in dispute between the parties. The guaranty that certain lots would bring a certain price, or an

agreement to pay the difference between an agreed price and what the lots would fetch at public auction, was a legal way to ascertain the value of the privilege bought by the railroad company.

After the injunction restraining the maintenance and operation of the railroad in front of the land company's premises has, with the consent of the Avon Company, been dissolved, and the suits discontinued, and the railroad company has been granted and entered upon the enjoyment of the privileges which had been the subject-matter of dispute; after the Avon Company has parted with the title to its land in the way provided by the terms of the agreement,—the railroad company is estopped from challenging the propriety of the action of its board of directors in making the contract. The plea of *ultra vires* in this case, if good, is inadmissible, because the Avon Company, who has performed its part of the agreement, cannot, upon recession, be restored to its former status. *Camden & A. R. Co. v. Mays' Landing, etc., R. Co.*, 48 N. J. Law, 530, 7 Atl. 523; *Railroad Co. v. Dow*, 19 Fed. 388; *Fritts v. Palmer*, 132 U. S. 282, 10 Sup. Ct. 93.

The amount ascertained to be due the Avon Company by the railroad company is the sum of \$70,000, which is secured by mortgage. The Avon Company has also proved its claim before the receiver appointed by this court for this same amount. Another claim (that of George A. Aldrich) has also been proved before the receiver. The filing of these claims with the receiver renders it unnecessary to pass upon the question whether the Avon Company is estopped by the recitals in its mortgage from denying the validity of the bonds which are secured by the complainant's mortgage; and the amount due thereon, under the corporation act of the state of New Jersey, the adjudication of insolvency, and the appointment of a receiver fastens the debts of the corporation upon its property, which is from that time appropriated exclusively and irrevocably to the payment of its debts. *Button Co. v. Spielmann*, 50 N. J. Eq. 120, 24 Atl. 571; *Haston v. Castner*, 31 N. J. Eq. 697. Aldrich and the Avon Company, having filed their claims as general creditors with the receiver of the railroad company, acquired an equitable lien upon its assets; and, upon the receiver's refusal to act in the enforcement of that lien, have the same rights as he to require an accounting of the amount legally due upon the bonds issued by the company, and secured by the mortgage, in order that the assets may be equally distributed among the creditors. The court's finding that the bonds have been illegally issued will not deprive bona fide holders for value without notice of relief. The rule is that the corporation must return the amount which it has actually received. The exact amount so received, and by whom it was paid, whether for the stock or bonds of the company, the evidence submitted does not warrant the court in finding at this time. The validity of particular bonds must be decided "when proof is made, or attempted to be made, of bonds in the hands of holders presenting them." *Phinizy v. Railroad Co.*, 62 Fed. 685.

There should be a reference to a master, to ascertain the cost of the road, and the amount which has been paid for bonds by parties acting bona fide, and without notice of the fraudulent character of the

contract under which the bonds were issued, together with the names of such holders, and the amount held by each. Upon the coming in of this report, a decree will be made, determining the amount each party is entitled to out of the proceeds of sale, together with their respective priorities.

### MERCANTILE TRUST CO. v. BALTIMORE & O. R. CO. et al.

(Circuit Court, D. Maryland. July 29, 1897.)

#### 1. RAILROADS—RECEIVERS—APPLICATION OF EARNINGS.

A court of equity does not take possession of a railroad for the purpose of performing the contracts of the company, but solely to preserve and protect the property, and to keep the company a going concern, pending the settlement of claims against it; and where the earnings are not sufficient to pay all its creditors after paying operating expenses, and keeping the property in safe condition for operation, they will be applied to the payment of creditors who hold liens or contracts which, if unpaid, they are entitled to enforce, and the enforcement of which will endanger the integrity of the property.

#### 2. SAME—RIGHTS OF PREFERRED STOCKHOLDERS.

Act June 4, 1836 (Laws Md. 1835, c. 395), providing for subscriptions by the state to the stock of various corporations, authorized a subscription of \$3,000,000 to the capital stock of the Baltimore & Ohio Railroad Company. Section 9 provided that, before such subscription should be made, the stockholders of the company, in general meeting, should stipulate, agree, and bind the company, by a proper instrument of writing, to guaranty to the state the payment, after three years, "out of the profits of the work," of 6 per centum per annum on the amount subscribed, until such time as the clear annual profits of the road were sufficient to enable it to pay a dividend of 6 per cent. on all its stock, after which the state should be entitled to a perpetual dividend of 6 per cent., and no more. The act also gave the state the right to six directors in the company, on account of such subscription. The instrument was given by the company in the exact language of the act. The charter of the company authorized it to incur indebtedness, and to pledge its property and revenues therefor. *Held* that, the interest and dividends of the state being payable from "profits," it did not become a creditor of the company, but a preferred stockholder, having no equitable lien on the property of the company which entitled the holders of the stock to dividends from the earnings of the road in the hands of receivers in preference to the payment of interest on mortgage indebtedness subsequently contracted.

In the matter of the petition of the Johns Hopkins University in reference to the status of the preferred stock of the Baltimore & Ohio Railroad Company, issued under the Maryland act of 1835 (chapter 395).

James C. Carter, Bernard Carter, Arthur George Brown, and John J. Donaldson, for petitioner, Johns Hopkins University.

E. J. D. Cross, for Baltimore & Ohio R. Co.

Hugh L. Bond, Jr., for receivers of Baltimore & Ohio R. Co.

John G. Johnson, Wm. A. Fisher, Wm. Pinkney Whyte, and C. C. Deming, for trustees of mortgages to secure bondholders.

Before GOFF, Circuit Judge, and MORRIS, District Judge.

PER CURIAM. This court, on February 29, 1896, upon an application contained in a bill filed by a judgment creditor, appointed receivers of the railroads owned, operated, or controlled by the Baltimore & Ohio Railroad Company, and of all its franchises and effects.

The bill alleged, and the fact was, that the railroad company was then largely in arrears for wages, supplies, and operating expenses, and had a large floating debt for money borrowed for a great variety of uses, and was about to make default in the payment of interest on its mortgage bonds and other fixed charges. It had exhausted its means and its credit, and its property was in immediate danger of being seized, and the system of railroads controlled by it liable to be dismembered, and its value dissipated, by attacks from creditors all along its routes. The receivers then appointed took possession, and have since been operating the Baltimore & Ohio System, comprising railroads owned, leased, or controlled by the Baltimore & Ohio Railroad Company in Maryland, Pennsylvania, Delaware, Virginia, West Virginia, Ohio, Indiana, and Illinois, and in the District of Columbia. The property thus came into the custody of this court, and while it so remains, it becomes the duty of the court to direct the disposition of its revenue. It is for the reason that the court must determine how the revenue of this property derived during its temporary custody shall be disposed of, and for this reason alone, that the court has at this time jurisdiction of the controversy now to be considered.

The receivers, upon taking possession, reported to the court the physical condition of the property, and from their report it appeared that the engines and cars were so out of repair and unserviceable that extensive expenditures on the existing equipment, and large additions thereto, were necessary to enable the road to transport its passengers and freight, and to perform its duty to the public under its charter. The large indebtedness due for wages and other operating expenses was of that class to which is given a priority superior to mortgages and other liens, especially when current earnings, which should have been appropriated to the payment of the operating expenses, have been diverted to the payment of mortgage interest. Money to meet this emergency was raised by issuing receivers' certificates, because, as to the wages and supply claims, they had an equity superior to that of the mortgages and other liens, and as to the new equipment, because it was required in order to avoid a great loss to all those who, either as mortgage bondholders, creditors, or stockholders, are interested in the ultimate value of the railroad as a whole, and because without the equipment the railroad could not perform its duty to the public. The receivers' certificates, which for these and similar reasons have been issued, are in the nature of anticipations of revenue, and are primarily to be paid out of the earnings of the railroad which come to the hands of the receivers. The receivers were also, out of the earnings of the road, authorized, to the extent to which the earnings are adequate, to pay the rentals of leased lines, the interest on mortgage bonds, and the installments on car-trust and equipment contracts, so far as may be necessary to prevent defaults and forfeitures which would imperil the integrity of the system of railroads, and the retention of the equipment required for its operation. A court of equity takes temporary possession of a railroad only in order to keep it a going concern, and preserve it pending the efforts of its creditors and stockholders to extricate it from the paraly-

sis of financial embarrassment, or during the litigation which may result from the foreclosure of mortgages. During this period, if the earnings of the property are not sufficient to pay all its creditors, the court directs only those to be paid who, if left unpaid, would have the right to demand that they be allowed to enforce some specific lien, or to assert some title, which would result in surrendering the property, or some necessary part of it, to them. The railroad company has contracted to pay all its creditors, and its obligation as debtor is no greater to pay one than another; but the court, when it takes possession of its property by receivers, does not do so for the purpose of performing the company's contracts, but to protect and preserve the property. Beach, Rec. 331. Therefore, those properties the retention of which impose a burden greater than the present or ultimate benefit to be derived from holding them are discarded, and, if the income is inadequate to pay all, those debts and liabilities are postponed a default in which does not involve the surrender of properties essential to the integrity of the road which the receivers are appointed to preserve.

It is not denied in the present case that the payment of the interest on receivers' certificates, the rentals, the interest on mortgage bonds, and the payment of car-trust and equipment contracts, which the receivers must pay in order to preserve the valuable parts of the Baltimore & Ohio System, together with the current expenses of operating and maintaining the road, exhausts the receipts, and leaves nothing for payment to the holders of the first preferred stock; and it would seem apparent, therefore, that unless the holders of the first preferred stock have a specific lien or security of some kind, which has been imposed upon the property, or some part of it, or upon its revenues, which gives them a right to demand possession of some specific property or fund because of default in the payment of their demand, then it is in the discretion of the court to say that, while the property remains in its custody, it is for the advantage of all concerned that the property shall be preserved, by paying those only who have a lien which clearly gives them such a right.

The petition of the Johns Hopkins University, upon which we are now called to act, filed by it on its own behalf, and on behalf of all other holders of the first preferred 6 per cent. stock of the Baltimore & Ohio Railroad Company, does not deny the inadequacy of the income earned by the receivers to pay the current debts of the class above mentioned, and the inadequacy is admitted by the agreed statement of facts; but the petition claims, and it is admitted, that there would be earnings sufficient to pay the semiannual sums claimed by the first preferred stockholders, if the earnings, after paying operating expenses, were not applied to paying interest on the company's mortgage debts, and the interest on mortgages of connecting lines guaranteed by the company, rentals of other lines, and current debts and liabilities; and the prayer of the petition and the relief asked for is that the payments claimed by the first preferred stockholders be declared to be a charge upon the gross profits of the company, to be paid before the interest or principal of any incumbrances or debts later in date than the original subscription of the state of Maryland

to this stock under the act of 1835 (chapter 395), and also be declared to be a first charge or lien, not only on the gross profits of the company, but also a first charge or lien on all the property, real and personal, and the franchises of the company, and on its lateral branches.

It is manifest that the receivers' certificates, issued to pay debts of a preferential character, must be paid, that the expenditures necessary to put and keep the property in a safe condition for operating must be provided for, and that the receivers' operating expenses must also be paid. These expenses must be paid while the court has possession, no matter what liens there are upon the property, or what charges there are upon its income. Next after these come, in the order of their priorities, the claims which have behind them some conveyance or contract which gives them a right of possession or of foreclosure and sale if default is made in payment, and which the court must direct to be paid, in order that it may hold possession without violating clear legal rights.

It is evident, we think, that unless the petitioners, as holders of the stock subscribed for by the state of Maryland, have a lien or charge superior to the liens of the mortgage bondholders, and superior to the rights of the lessors of properties held under leases, and of holders of equipment contracts giving a right of possession upon default, the prayer of the petition cannot be granted. If the petitioners have a right of this paramount nature, it must be because, by the terms of the transaction by which the state of Maryland subscribed to the company's capital stock, the company incurred an obligation which gives to the holders of the stock a perpetual claim upon the income of its property, which cannot be affected by the foreclosure of any of the mortgages executed subsequent to that stock subscription, upon the security of which mortgages there are now outstanding over \$40,000,000 of the company's bonds. In fact, as the claim is not for any principal sum of money, but for a perpetual payment of \$6 a year for every share of stock, it can never, without the stockholders' consent, be paid off or redeemed, and must remain in the nature of a perpetual rent charge upon the property, and any foreclosure must be made subject to this paramount incumbrance. It will not be denied that such a claim and such rights in a railroad property are exceptional, and at variance with the ordinary rights of a stockholder, and that they cannot be built up on implications and supposed intentions, but must be based upon a contract which fairly requires that interpretation. *Tompkins v. Railway Co.*, 125 U. S. 109, 8 Sup. Ct. 762; *Cincinnati v. Morgan*, 3 Wall. 275-291.

The act of the general assembly of Maryland of 1835 (chapter 395), passed June 4, 1836, entitled "An act for the promotion of internal improvement," provided for subscription by the state to the capital stock of the Chesapeake & Ohio Canal Company of \$3,000,000, and of a like sum to the capital stock of the Baltimore & Ohio Railroad Company; also for a subscription of \$1,000,000 to the capital stock of the Eastern Shore Railroad Company, and \$500,000 to the capital stock of the Annapolis & Potomac Canal Company, and \$500,000 to the capital stock of the Maryland Canal Company. The act was prepared with elaborate care, and no one reading it can doubt that it was drawn

by persons entirely capable of expressing, in apt language, whatever was intended to be incorporated in the law, and who were familiar with the words proper to be put into the law to guard the rights intended to be reserved to the state. The state having already had dealings with the Chesapeake & Ohio Canal Company and the Baltimore & Ohio Railroad Company, the act was carefully framed to provide:

"That the said several subscriptions and payments for the said stock of each of said companies are hereby authorized and directed only upon the condition that none of the rights and remedies of this state under any contract between the state and either of said companies shall be in any wise impaired, waived, relinquished, or affected, by reason of this act, or of anything that may be done by either of said companies in consequence thereof."

With regard to the subscriptions to the stock of the Chesapeake & Ohio Canal Company, it was provided by section 7 that, before the subscription should be made, the company should agree and bind itself, by a proper instrument of writing, to guaranty to the state the payment, out of the profits of the work, 6 per cent. per annum on the money paid by the state to the company, until the clear annual profits of the canal should be more than sufficient to discharge the sums which it should be liable to pay annually to the state, and should be adequate to a dividend of 6 per cent. per annum among its stockholders; and thereafter the state should, in reference to the stock subscribed for, be entitled to a proportional dividend upon the profits of the work, as declared from time to time, and no more.

With respect to the Eastern Shore Railroad Company, the Maryland Canal Company, and the Annapolis & Potomac Canal Company, it was required, as a condition to the state's subscription to the stocks of these companies, that each should covenant, under seal with the state, to pay it, after the expiration of three years from the payment of the subscription, out of the profits of its works, a sum equal to 6 per cent. on the amount subscribed; and that any excess of dividends on the stock of the state above 6 per cent. per annum should be distributed to the other stockholders.

The provision with regard to the subscription to be made to the stock of the Baltimore & Ohio Railroad Company is contained in section 9, and is as follows:

"And be it further enacted, that before any subscription shall be made to the capital stock of the said Baltimore and Ohio Railroad Company under and by virtue of this act, the stockholders of said company shall in general meeting assembled stipulate, agree and bind the said company by a proper instrument of writing, signed by the president, and under the corporate seal thereof, to be lodged with the treasurer of the Western Shore, to guarantee to the state of Maryland, after the expiration of three years from the payment by the state of each of the installments on the stock hereby authorized to be made to the stock of said company, the payment from that time, out of the profits of the work, of six per centum per annum, payable semi-annually on the amount of money which shall be paid to the said company under and by virtue of this act until the clear annual profits of the said railroad shall be more than sufficient to discharge the interest which it shall be liable so to pay to the state of Maryland, and shall be adequate to a dividend of six per centum per annum among its stockholders; and thereafter the state shall, in reference to the stock so subscribed for, and on so much thereof as the state may hold, be entitled to have and receive a perpetual dividend of six per centum per annum out of the profits of the work as declared from time to time, and no more, and all and so much of such annual

profits as shall exceed six per centum shall be distributed to the other stockholders according to their several interests in the said company; and in consideration of the interest so to be secured to the state, the said Baltimore & Ohio Railroad Company shall be, and they are hereby authorized in addition to the charge now authorized to be made by said company for the transportation of passengers, to increase the price or charge for such transportation to any amount not exceeding one cent per mile for each person passing on said road."

It was thus provided, with respect to the Baltimore & Ohio Railroad Company, that for the first three years after the subscription there should be nothing paid by the company, then that there should be paid out of the profits of the work 6 per cent. per annum on the amounts paid by the state on account of its subscription, payable semi-annually, until the profits should be adequate to pay all the stockholders 6 per cent. dividend annually, and thereafter there should be paid to the state a perpetual dividend of 6 per cent. out of the profits, as declared from time to time, and no more; all excess of profits to be distributed to the other stockholders.

It is contended, on behalf of the petitioner, that this language expresses a purpose to pledge or specifically appropriate the profits of the road to the extent, and in such manner, that no money thereafter borrowed, and no obligations thereafter incurred, by the company, and no interest on such borrowed money, and no annual charges resulting from such obligations, could ever have priority of payment over the annual sums or the perpetual dividends payable to the state out of the profits. It is to be observed that there is no pledge or specific appropriation of the profits, except such as results from the language in which the undertaking is expressed. The company executed the guaranty to the state in the exact words of section 9, and there was no mortgage or conveyance of any kind. That it was well understood that there was a difference between such a covenant, guaranty, or undertaking and a specific pledge of revenue is indicated by a clause of section 2 of the act of 1833 (chapter 33), passed February 6, 1834, authorizing a subscription by the state to the separate and distinct stock of the Baltimore & Ohio Railroad Company issued for the construction of the railroad to Washington, which exacts that, before the certificates of indebtedness of the state are delivered in payment for the stock subscribed, the company shall execute an obligation, pledging the property and revenues of the company, for securing to the state the payment of the interest semiannually on the excess by which, at the time of each payment, the installments paid upon the state's subscription exceeded the installments paid upon the subscriptions of the individual subscribers; and in the act of 1833 (chapter 105), passed February 27, 1834, authorizing the payment of the balance of the original subscription of the state to the stock of the company, it was provided that the company should execute an obligation, pledging the property and revenues of the company to pay the interest on the certificates of indebtedness issued by the state for that purpose, to the extent of the excess of the state's payments over the payments of the installments payable by the individual subscribers. And in 1839, it having been found that the 6 per cent. state bonds, originally given to the company in payment of the subscriptions to stock, were not salable upon the terms prescribed, the leg-



islature of Maryland passed an act (Acts 1838, c. 386) April 5, 1839, directing that an equivalent amount of sterling 5 per cent. 50-year bonds of the state be given to the Baltimore & Ohio Railroad Company and the Chesapeake & Ohio Canal Company, in substitution for the original 6 per cent. bonds when surrendered:

"Provided, however, that the said companies, respectively, shall secure by mortgage or other lien on all the property and revenues of said companies, respectively, to the satisfaction of the said treasurer of the Western Shore, the payment of the interest at the rate of five per centum per annum on the stock created by this act semi-annually at least ninety days before the first day of January and July, in every year, for the term of three years from the date of the bonds or certificates of said stock, together with the cost of transmitting said interest to London to be there paid, and also the difference in exchange of currency between London and the city of Baltimore."

And in the act of 1837 (chapter 314), it will be seen that the state attempted to provide for obtaining a priority in the net profits for the payment of its interest or dividends over subsequent loans, but the act was not accepted by the company, and did not become operative.

There are other instances in the Maryland laws, with respect to the corporations created to engage in works of internal improvement, which indicate that, when there was an intention to create a preferred charge upon earnings, or to appropriate revenues for a specific purpose, language definitely expressing that intention was used, and proper legal instruments were directed to be executed, which, in terms, granted or dedicated the revenues for the specific purpose. Several of these acts are cited and commented upon in *Macalester's Adm'r v. Maryland*, 114 U. S. 598, 5 Sup. Ct. 1065. And noticeably by the act of 1834 (chapter 241), passed March 18, 1835, it was provided that a state loan should be made to the Chesapeake & Ohio Canal Company and to the Baltimore & Susquehanna Railroad Company, with the condition, however, that each of these corporations should pledge to the state the whole of its net revenues and other property, to secure the payment of the interest, and for the final payment of the loan. As the state proposed to raise the money to pay for the stock of the Baltimore & Ohio Railroad Company by issuing its own bonds, nothing would appear to have been simpler, if there had been any intention of creating a lien upon any specific part of the revenue or earnings of the road, than to have exacted either a pledge and appropriation in perpetuity, or, at any rate, until the state's bonds were paid, as was done with respect to the company's property and revenues for the period of three years from the date of the bonds by the act of 1838 (chapter 386).

The fact that a pledge by mortgage was exacted by the state to cover the short periods mentioned in the foregoing acts is fairly indicative, we think, of two conclusions—First, that the state intended, except for the short periods covered by those mortgages, to leave the company's revenue untrammelled by any specific appropriation to itself; and, second, that, as the annual sums guaranteed by the company to the state, whether as interest or dividends, were, except during the period covered by the mortgage, payable from first to last only out of profits, no specific pledge, lien, or appropriation was necessary or proper, for the reason that profits are a fund, which, when

ascertained, belong to the stockholders as proprietors, according to the priorities, and limitations of their stock. If it had been the intention of the legislature that the position of the state should be that of creditor, or analogous to that of creditor, there would be no reason for restricting its rights to a payment out of profits. A creditor might be restricted to payment out of revenue, or out of net revenue, or out of revenue from which enough has been taken to pay operating expenses, repairs, and fixed charges; but a creditor who is never to be paid the principal of his debt, and is to have only an annual sum, and is restricted, as to that annual sum, to a payment out of profits, is but a preferred stockholder. The state had already, by the act of 1827 (chapter 104), authorized a subscription of 5,000 shares of the capital stock of the company, and the authority given by the act of 1835 (chapter 395) was to "subscribe to the capital stock" \$3,000,000; and section 9 speaks only of a subscription to be made to the capital stock of the said Baltimore & Ohio Railroad Company. By section 6, it was provided that, for each 5,000 shares of stock so subscribed, the state should be entitled to appoint one director, so that the \$3,000,000 subscription for 30,000 shares gave to the state 6 additional directors; and it is a fact that the state and the city of Baltimore together for many years, by reason of the directors, which, as stockholders, they were authorized to appoint, had a controlling majority in the board of directors. There is nothing in respect to the 30,000 shares of the capital stock subscribed for by the state which distinguishes those shares from other shares of the company's capital stock, except the provision contained in section 9; and, as we have seen, every provision made by that section for payment in respect to these shares is a payment to be made out of the profits, with no restriction of any kind as to the indebtedness, obligations, or contracts which the company might incur in the effort to make profits. The guaranty of payment exacted by that section is a guaranty limited by the fund from which the payment is to be made, and, therefore, if there are no profits, there are to be no payments. *Taft v. Railroad Co.*, 8 R. I. 310. The state held its 30,000 preferred shares of the capital stock of the company until 1867. Until 1865, the company remitted to London the semiannual interest on the state's sterling bonds, and after that date paid 6 per cent. interest to the state on \$3,000,000, in semiannual payments, until 1888, and after that date the company declared semiannual dividends of 3 per cent. on this stock, and paid them to the state, or to its assignees, until the appointment of the receivers. No certificate of any kind for the stock was issued until 1867.

By the constitutions of the state of Maryland of 1864 and 1867, the board of public works was authorized to exchange the interest of the state as stockholder and creditor in the Baltimore & Ohio Railroad Company for an equal amount of bonds or registered debts owing by the state, "to the extent only of all the preferred stock of the state on which the state is entitled to only six per cent. interest," at the market price of the stock, but not less than par. At various times, the state parted with all of its holdings of the preferred stock, except an amount now held for the free school fund, to various corporations and individ-

uals, and among them to the petitioner, for full value. The first certificate was issued in 1867 to an assignee of the state, and thereafter all certificates, including those held by the petitioner, have been in the following form:

"No. ———.

"Baltimore and Ohio Railroad Company.

——— Shares.

"Six Per Cent. Preferred Stock.

"This is to certify, that ——— is entitled to ——— shares in the preferred capital stock of the Baltimore and Ohio Railroad Company, the said shares being part of the thirty thousand shares of the said preferred capital stock of the said company, which were subscribed for by the state of Maryland, under the act of December session, 1835, ch. 395, entitled 'An act for the promotion of internal improvement,' and being a part of the preferred capital stock heretofore exchanged by the board of public works of the state of Maryland for the bonds and registered debt of the state, under the provisions of the third section of the twelfth article of the constitution of the said state. The owner of this stock is entitled to a perpetual dividend of six per centum per annum, and no more, upon the said shares, payable out of the gross profits of the said company, under the terms of the original subscription of the said state of Maryland for said stock, and under the guaranty of the said Baltimore and Ohio Railroad Company, made in pursuance of a resolution of the stockholders of the said company, adopted in general meeting on the eighteenth day of July, in the year eighteen hundred and thirty-six. The said dividends are hereafter payable on the first days of January and July in each and every year, and the said stock is transferable on the books of the company, on return of this certificate, with an assignment indorsed thereon.

"Witness the seal of the company, attested by the signature of the treasurer thereof."

The object of the state in granting the charter to the railroad company was to enable it to construct an improved highway to the Ohio river, and it gave to the company all the rights and powers necessary to construct and repair a railroad from Baltimore to the Ohio river, and to make, or cause to be made, lateral railroads; and by the 14th section of the act of 1835 (chapter 395), it was made the duty of the company to establish, at convenient places on its main stem and branches, depots for goods, and to provide suitable carriages in adequate numbers to promptly transport all goods offered at its depots, and it was made liable for damages for failure to do so. By section 13 of the original charter (Act 1826, c. 123), the president and directors were given power to increase the capital stock as many shares, from time to time, as they might deem necessary, and to borrow money, and to issue certificates, or other evidence, therefor, and to pledge the property of the company for the payment of such loans and interest. By the act of 1845 (chapter 313), they were authorized to issue bonds or certificates of indebtedness under seal, and to sell or dispose of them on such terms as to the president and directors might seem proper. With these powers given, and these duties imposed, it was proper for the company to borrow money, if needed, and to give mortgages, if required, and to contract for branch roads, and for suitable equipment; and subsequently, by the act of 1865 (chapter 70), the company was specially empowered to construct and repair the Metropolitan Branch, and to issue bonds, and pledge the property of the company for the payment of the cost of the same. The property has come into the custody of the court with these valid incumbrances charged upon

it, in such manner that a default would threaten the integrity of the road.

The question is not whether, if before the incumbrances were created or the contracts entered into, the company might have been enjoined by the state or the holders of the first preferred stock from endangering the profits out of which was to be paid the 6 per cent. per annum guarantied to the state, but the question is whether, at this time, the court can say there is a profit fund, which these secured lien creditors must not touch, because it is appropriated to the preferred stockholders, and charged with the payment of the 6 per cent. per annum claimed by them. The industry of learned and zealous counsel has not produced an authority in which, from facts or language at all similar, such an appropriation has been declared.

A case relied upon on behalf of the petitioner is *Ketchum v. St. Louis*, 101 U. S. 306. That was a loan made by the county of St. Louis to the Pacific Railroad Company upon the security of the earnings of the road. Before this transaction the railroad had become bankrupt, and, being largely indebted to the state of Missouri, a law had been passed appointing a fund commissioner, to take complete control of the earnings and income of the property. In this condition of affairs, the county of St. Louis loaned \$700,000 to complete the road, under an act of Missouri, which provided that the fund commissioner, or such person as might at any time thereafter have the custody of the funds of the road, should pay to the county of St. Louis \$4,000 every month, and \$1,000 additional every December, out of the earnings of the railroad, to meet the interest on the loan until the railroad should pay it off. The supreme court said (page 315):

"It was not a simple naked covenant to pay out of a particular fund, but the act, being accepted by the parties interested, operated as an equitable assignment of a fixed portion of that fund,—an assignment which became effectual, without any further intervention upon the part of the debtor, and which the party holding the funds of the company, whether the fund commissioner or some other person, could respect without liability to the debtor for so doing. \* \* \* It was an engagement to pay out of a specially designated fund, accompanied by express authority to its custodian to apply a specific part thereof to a definite object. \* \* \*"

Even to this ruling, based upon facts so pregnant, Mr. Justice Strong and Mr. Justice Bradley dissented, not finding that there was created an equitable lien upon the earnings of the railroad company, or upon its property. In *Tompkins v. Railway Co.*, 125 U. S. 109, 8 Sup. Ct. 762, *Ketchum's Case*, just cited, was commented upon, and the court said that its facts were peculiar, and that:

"It was a specific appropriation by statute of a fixed and definite portion of the future earnings of the railroad to a particular purpose, with express statutory provision for a custodian of the earnings as they accrued, whose duty it should be to apply this special portion in this specified way. No further action of the company was required. \* \* \* [Page 125, 125 U. S., and page 770, 8 Sup. Ct.] The earnings of the road, to the extent that they had been specifically appropriated to the county of St. Louis, never did belong to the company after the bonds were accepted, and the grant was in equity of such an interest in the road as was necessary to produce the earnings. Hence, a conveyance of the road afterwards to one with notice was necessarily subject to the prior equitable charge on the road, which had been created in favor of the county."

The case of *Tompkins v. Railway Co.* arose under a statute of Arkansas directing state bonds to be issued in aid of a railroad, and providing that a tax should be imposed, from time to time, upon the railroad company, equal to the amount of the interest on the bonds, and after five years an additional tax of  $2\frac{1}{2}$  per cent., to continue until the bonds were paid by the railroad company, in which case the road should be entitled to a discharge from all claims or liens on the part of the state; and providing that, upon default in payment of this tax, the state, by writ of sequestration, should seize and take possession of the income and revenue, and collect the same until the amount in default was paid. It was claimed that this created an equitable or statutory lien or charge in favor of the state upon the income and revenue of the road, to the extent necessary to meet the interest and principal of the bonds, and that the bondholders could avail themselves of the lien, and enforce it against subsequent incumbrances or purchasers. But, notwithstanding the ruling in *Ketchum's Case*, it was held by the supreme court that no lien was created upon the property or revenues of the railroad company in favor of the holders of the bonds, and that purchasers under a subsequent mortgage took the property clear. The court said:

"Here there never was any grant of earnings, and, consequently, there never was any grant of an equity in the road."

The court further said:

"We agree with counsel for the appellants that if, on an examination of the statutes, read in the light of the circumstances which surrounded the legislature at the time of their enactment, it appeared to have been the intention to charge the road of the company, as a road, with a liability for the repayment of the loan to be made, it would be the duty of a court of equity to do everything in its power which was necessary to enforce that charge. And it may also be true that the courts ought to construe the statutes liberally, with a view to the establishment of such a charge as against the company itself, or those claiming under it, because, if the charge was actually created by the statutes, those dealing with the company were bound to take notice of it. But, after a careful consideration of the statutes, and construing them liberally in favor of the state, we have been unable to find that any such intention did in fact exist. There was a plain and simple way in which such a lien could be created, and that was by providing in express terms for it."

The foregoing cases were adjudications upon the claims of undisputed creditors. The petitioner's case must be regarded as weaker, in so far as there is a legal inference that the claim of a stockholder, with a voice in the management of the corporation, is subordinate to the debts due to creditors. That this inference is a well-recognized rule of law, and that to rebut it the expression of a contrary intent, in clear and unambiguous language, is required, is shown by the following citations: 2 *Beach, Priv. Corp.* § 505; *Cook, Stock, & Corp. Law*, § 271; *St. John v. Railway Co.*, 22 Wall. 136-147; *Branch v. Jesup*, 106 U. S. 468, 1 Sup. Ct. 495; *Warren v. King*, 108 U. S. 389, 2 Sup. Ct. 789; *Railroad Co. v. Nickals*, 119 U. S. 296, 7 Sup. Ct. 209; *Hamlin v. Railroad Co.*, 24 C. C. A. 271, 78 Fed. 664; *Taft v. Railroad Co.*, 8 R. I. 310; *Chaffee v. Railroad Co.*, 55 Vt. 110; *State v. Cheraw & C. R. Co.*, 16 S. C. 524; *Field v. Lamson & Goodnow Manuf'g Co.*, 162 Mass. 388, 38 N. E. 1126; *Henry v. Railway Co.*, 3 Jur. (N. S.) pt. 1, p. 1133.

It is urged by the counsel for the petitioner, and with much force, that all the present holders of the first preferred stock have purchased it from the state since the decision of the court of appeals of Maryland in 1848, in the case of *State v. Baltimore & O. R. Co.*, 6 Gill, 363, and that they and all others had a right to rest upon that decision as settling the meaning of section 9 of the act of 1835. That was a case instituted by the state of Maryland, as a holder of the common charter stock of the company. One of the principal points in controversy was whether or not the board of directors could use the profits of the work for reconstructions and improvements, instead of dividing them among the common stockholders. The court decided that, if the directors, in the honest exercise of their duties, deemed it wise to apply the net profits to any of the purposes of the charter, they could do so, and were at liberty to withhold dividends from the common shareholders for that purpose. Answering an argument which had been urged against this view, the court said:

"But it is urged that, if the net profits of the company can be applied to the construction of the road, or to extraordinary works of repair, there would be no profits left to secure the guaranty provided by the 9th section of the act of May session, 1836. But we think the true construction of that section is that this guaranty is to be satisfied out of the gross profits of the company."

The court then proceeds, by an analysis of section 9, to show that the term "profits," as used in the first part of the section, is contradistinguished from the net profits or the "clear annual profits declared from time to time," mentioned later in the section.

If there were now in the hands of the receivers gross profits resulting from the operation of the road, and the question arose as to whether they were to be used to satisfy the petitioner's claim, or were to be used for the reconstruction and extraordinary repairs of the road, the decision in 6 Gill would be in point; but the question whether, by section 9, and the instrument of writing executed thereunder, the gross profits of the work were so granted and charged that no mortgage or other obligation of the company thereafter made could be satisfied from the revenues before gross profits were arrived at, was not decided. The question, so far as it relates to incumbrances now existing, must be determined from the language used, interpreted, where it is ambiguous, by light from the circumstances of the transaction itself; but, in order to affect the rights of third parties, the language so interpreted must be found to have the meaning contended for.

Looking to the fact that the company was charged with duties under its charter which required it to expend large sums of money, and to acquire lateral branches, and that it had given to it the power to borrow money on mortgage of its property, considering that no language customarily used to create a charge upon or a pledge of revenue or income was used, and that the general nature of the state's subscription was that of a stockholder, and not of creditor, it seems to us that it is giving to the decision in 6 Gill a scope which does not rightly belong to it to say that, because of it, no incumbrance since placed upon the property can be allowed to diminish and reduce the gross profits, and that, because of that decision, creditors secured by

mortgage had notice that "the profits of the work" must be taken to be equivalent to gross revenue or gross income. No such question as this was before the court of appeals in *6 Gill*, and the language of the court's opinion was not used with reference to any such subject-matter.

The case on behalf of the petitioner and the other holders of the first preferred stock comes to this: that the company having covenanted to pay the state 6 per cent. per annum out of the profits, and having paid it for more than half a century, it has during that time, under powers given it by its charter, borrowed money upon mortgage, and made contracts for lateral branches, the annual payments upon which now consume its earnings, to the extent that there are at this time no profits; and the petitioner contends that those who hold the mortgage bonds and who owned the lateral branches should have taken notice that the preferred stockholders had a claim for 6 per cent. per annum, which was entitled to be satisfied before the claims of such creditors, and the preferred stockholders point to section 9 as establishing their right. We are of opinion that the language of section 9 does not create an equitable assignment, or give an equitable lien, upon any fund which can work such a result. *Garrett v. May*, 19 Md. 177; *Tompkins v. Railway Co.*, 125 U. S. 109, 8 Sup. Ct. 762; *McKittrick v. Railway Co.*, 152 U. S. 473-496, 14 Sup. Ct. 661; *Thomas v. Railway Co.*, 139 N. Y. 163, 34 N. E. 877; *Lehigh Coal & Nav. Co. v. Central R. Co.*, 34 N. J. Eq. 38; *Day v. Railroad Co.*, 107 N. Y. 129, 13 N. E. 765. From the fact that the payments to the state were only to be made out of the profits, it does not seem at all probable that the framers of the act of 1835 (chapter 395), as they did not restrict the power of the company under its charter thereafter to create mortgages, would have considered it desirable that the company should be required to pay on the state's stock a sum called "profits," which would compel the company to make default upon its mortgage interest, and result in foreclosure. The state's legislation shows a general policy to deal liberally with the Baltimore & Ohio Railroad Company. *Maryland v. Railroad Co.*, 22 Wall. 105-113. Her contracts with the railroads subsequently chartered are much more stringent. See Act 1854, c. 260, exacting a mortgage, with power of sale, upon three months' default, to secure the annuity of \$90,000 a year, payable to the state by the Northern Central Railway Company. *State v. Northern Cent. Ry. Co.*, 18 Md. 205.

For the purpose of this decision, we do not feel obliged to consider the question learnedly and ably argued by counsel, as to whether, after the period when the clear annual profits of the company enabled it to pay 6 per cent. per annum dividends to all its stockholders, the state's claim was irrevocably changed from a demand for interest to a right to a preference dividend. It may be argued that, as the company had for some years been paying 6 per cent. dividends to all its stockholders, before issuing any certificate, by the acceptance of a certificate of stock, which declares that the owner is entitled to a perpetual dividend of 6 per cent. per annum upon his shares, the holder is committed to the assertion by the company that the dividend-paying period had been reached, and that the interest-paying period had

passed, and is restricted to the provisions of section 9, applicable to the dividend-paying period; but we place our decision, not upon this, but upon the fact that both interest and dividends were payable out of profits, without any specific lien or equitable charge.

We think the order asked for must be denied, and the petition dismissed.

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CARR v. GORDON et al.

(Circuit Court, N. D. Illinois. September 15, 1897.)

1. REMOVAL FROM OFFICE—CIVIL SERVICE ACT.

22 Stat. c. 27, providing for the creation of a civil service commission, and for a system of classification of federal officers, competitive examinations, and appointments from eligible lists, and prohibiting various acts in derogation of the purpose of the statute, was intended to provide, for such branches of the civil service as should be included within its provisions, a thoroughly competent body of men, selected solely for competency and fitness, and to protect them against accountability to any political party, and to prevent their discharge, promotion, degradation, or other change in official rank or compensation for giving, withholding, or neglecting to make political contributions in money or other valuable thing; but it did not deprive the appointing power of any previously existing right to remove, promote, or change in rank or compensation for other reasons.

2. SAME—RULES OF NOVEMBER 2, 1896.

The rules promulgated by the president on November 2, 1896, providing for certain classifications and exemptions, and regulating promotions in the service, do not regulate removals from office, except for political or religious opinions or affiliations.

3. SAME—ORDER OF JULY 27, 1897.

The order promulgated by the president on July 27, 1897, providing that "no removal shall be made from any position subject to competitive examination except for just cause, and upon written charges filed with the head of the department or other appointing officer, and of which the accused shall have full notice, and an opportunity to make defense," constitutes an authoritative expression by the executive of the United States of his desire and command to his subordinates with respect to removal from office of those coming within the scope of the civil service regulations. It is an administrative order of the executive, adopted by him in the exercise of his existing right to regulate for himself, in respect to removals, the conduct of those who are subject to his authority. He who disobeys such an order is responsible to the president, and must be dealt with by him, and the president may rescind it at his pleasure.

4. SAME—NOT ENFORCEABLE IN EQUITY.

That order, however, does not emanate from the lawmaking power, is not made in compliance with any law nor in regulation of the execution of any law enacted by congress restricting the right of removal, and is not the law of the land. It confers upon the incumbent of an office within the classified service no vested right to hold office indefinitely, and no right of which a court of equity can take cognizance.

5. SAME.

The regulations and orders of the executive or heads of departments under authority granted by congress are regulations prescribed by law in the sense that acts done under them are upheld, and in that light they may have the force of law. But the failure to do the act thereby enjoined, or the doing of the act thereby prohibited, does not render one liable to the law.

6. POWER OF CONGRESS TO REGULATE REMOVALS.

Quære, whether congress has the constitutional right to restrict the president's power of removal.



### In Equity.

The complainant filed his bill against the defendant Charles U. Gordon, as postmaster of the city of Chicago, and John M. Hubbard, as assistant postmaster, and charges: That in the year 1893 he was appointed postmaster at Englewood, a post office then existing in the county of Cook, state of Illinois. That he duly served as such postmaster until July 1, 1894, when, by order of the postmaster general, that office was discontinued, and became a part of the post office of the city of Chicago, and was then designated as "Station O" of the Chicago city post office. That thereupon he was by the then postmaster of the city of Chicago appointed superintendent of Station O, and duly qualified, and has since continued, and now continues, in that position, and to fulfill its duties. That such office is one subject to competitive examination, and governed and controlled by the civil service act of the United States approved January 16, 1883 (22 Stat. c. 27, p. 403). That September 3, 1897, the defendant Gordon addressed to him the following letter:

"Post Office, Chicago, Ills., Executive Division, September 3, 1897.

"C. W. Carr, Esq., Superintendent Station O, Chicago, Ills.—Dear Sir: It has been decided to transfer Superintendent Vreeland to Station O, to fill the place now occupied by you, on and after September 6, 1897. Auditor Matter has been instructed to make the necessary transfer on the books, Monday, the 5th. On completion of this, you will report for duty to the superintendent of the city division.

"Yours, truly,

Charles U. Gordon, Postmaster."

—That, calling upon the superintendent of the city division as directed, he was informed by him that he was assigned for duty to some position in the department in the main post office under the city delivery, stating nothing with respect to salary; and it is charged that there is no position in such main post office under the city delivery where the salary is as much as \$2,000 per annum, the amount of salary connected with the position of superintendent at Station O. That no written charges of complaint have been made or filed with the head of the department. That he had no notice of any intention to remove him, and had no opportunity to make defense to any charges which may have been preferred against him; and he alleges the intention and design of the postmaster to be to remove him from his position as superintendent of Station O, and to reduce him in rank, without an opportunity to make defense. This action he alleges to be in violation of the civil service act, and rules promulgated by the president of the United States in pursuance thereof. The answer does not contest the facts charged, but asserts that the position of superintendent at Station O is not within the classified civil service of the United States in the sense that competitive examination is required to fill it, other than such examination as is required for entering the letter-carrier service of the postal department of the government. Upon the bill and answer an application is made to the court for its writ of injunction to restrain the removal of the complainant.

John T. McDonald and John W. Ela, for complainant.

John C. Black, U. S. Atty., for defendants.

JENKINS, Circuit Judge (after stating the facts as above). The importance of the question presented, and the far-reaching effect of the conclusion which may ultimately be reached with respect to it, require the careful statement of the provisions of law which hedge about and govern the civil service of the United States, so far as they may have bearing upon the particular question upon which the court is called to pass. In the consideration of the question the court is not at liberty to indulge in speculation concerning what ought to be. Its duty is limited to the determination of the law as it is. If the acts of congress are not sufficient to include such regulation of the public service as is desirable, the remedy must be applied by the legislative, and not by the judicial, department of the government.

As early as the year 1871, an effort was made to reform the civil service of the United States in order to promote its efficiency, and by act of March 3, 1871 (16 Stat. c. 114, § 9, incorporated in the revision as section 1753), the president was authorized to prescribe regulations for the admission of persons into the civil service, and to ascertain the fitness of each candidate in respect to age, health, character, knowledge, and ability for the branch of service into which he sought admission, and authority was given to employ suitable persons to conduct such inquiries, to prescribe their duties, and to establish regulations for the conduct of persons who may receive appointment in the civil service. The reform thus originated was followed in the year 1883 by an act entitled "An act to regulate and improve the civil service of the United States" (22 Stat. c. 27, p. 403), commonly called the "Civil Service Act." This act provides for the appointment by the president, by and with the advice and consent of the senate, of three persons as civil service commissioners, to constitute a United States civil service commission. It was made the duty of these commissioners to aid the president, as he may request, in preparing suitable rules to carry the act into effect; and when such rules have been promulgated it became the duty of all officers of the United States in the departments and offices to which such rules should apply to aid in all proper ways in carrying the rules, and any modification of them, into effect. The act further provides that such rules should provide and declare, as nearly as the conditions of good administration would warrant, among other things, for open competitive examinations for testing the fitness of applicants for the public service then classified or thereafter to be classified under the act, and which should test the relative capacity and fitness of the persons examined to discharge the duties of the service into which they sought appointment; and all the offices, places, and employments arranged or to be arranged in classes should be filled by selections according to grade from among those rated highest as the results of such competitive examinations; that there should be a period of probation before any absolute appointment or employment; that no person in the public service should, for that reason, be under any obligation to contribute to any political fund, or to render any political service, and that he should not be removed or otherwise prejudiced for refusing to do so; that no one in the service has any right to use his official authority or influence to coerce the political action of any person or body; that notice should be given by the appointing power to the commission of the persons selected for appointment or employment from among those examined, of the rejection of any such person under probation, of transfers, resignations, and removals, and of the date thereof; the record of all which should be kept by the commission. The commission was authorized to employ a chief examiner, whose duty it should be to act with the examining boards to secure accuracy, uniformity, and justice in all their proceedings. The act makes full provision for the punishment of any one in the public service who should willfully and corruptly, by himself or in co-operation with any other, defeat, deceive, or obstruct any person with respect to the right of examination according to the rules and regulations to

be adopted, or who should willfully, corruptly, and falsely mark, grade, or estimate, or report upon the examination or proper standing of any one examined under the act, or who should willfully and corruptly make any false representations concerning the same, or who should willfully or corruptly furnish to any one any special or secret information for the purpose of either improving or hindering the prospects or chances of any one so examined or to be examined, being appointed, employed, or promoted. The act further provided, with respect to the department of the treasury and the postal service, that the secretaries of those departments should make classifications and report the same to the president. After the expiration of six months from the passage of the act, no officer or clerk should be appointed or should be employed to enter or be promoted in either of the classes then existing, or that might be arranged under the act pursuant to the rule, until he had passed an examination, or was shown to be specially exempted therefrom. By section 13 of the act it was provided that no officer or employé of the United States mentioned in the act shall discharge, or promote, or degrade, or in any manner change the official rank or position of any other officer or employé, or promise or threaten so to do, for giving, withholding, or neglecting to make any contribution in money or other valuable thing for any political purpose; and stringent provisions were made prohibiting any senator or representative or territorial delegate of the congress, or senator, representative, or delegate elect, or any officer or employé of either of said houses, or any executive, judicial, military, or naval officer of the United States, or any clerk or employé of any department, branch, or bureau of the executive, judicial, military, or naval service of the United States, to be in any manner concerned in soliciting or receiving any assessment, subscription, or contribution for any political purpose whatever from any officer, clerk, or employé of the United States, or any department, branch, or bureau thereof, or from any person receiving any salary or compensation from moneys derived from the treasury of the United States; and prohibiting any person to collect contributions of money or other things of value for political purposes in any room or building occupied in the discharge of official duties by any officer or employé of the United States mentioned in the act, or in any navy yard, port, or arsenal, and prohibiting any officer, clerk, or any other person in the service of the United States from directly or indirectly giving to any other officer, clerk, or person in the service of the United States, or to any senator, or member of the house of representatives, or territorial delegate, any money or valuable thing on account of, or to be applied to the promotion of, any political object whatever. A violation of these stringent provisions was made a misdemeanor punishable by fine not exceeding \$5,000, or by imprisonment not exceeding three years, or by both such fine and imprisonment.

The purpose of this act and its limitations are manifest. Its object was to provide for the civil service, or for such branches of it as should be included within the provisions of the act, a thoroughly competent body of men, selected for competency and fitness for the positions sought. Any citizen who should, by the necessary examination,

approve himself qualified for the position, was made eligible to appointment to that position without respect to political faith or other considerations which had theretofore largely controlled in the appointment to place, and to protection in the position which he might thus secure against accountability to any political party. He was protected by the provisions quoted from solicitation, and it was provided that he should not be discharged, promoted, or degraded, or in any manner changed in official rank or compensation, for giving or withholding or neglecting to make any contribution of money or other valuable thing for any political purpose. There is, however, no provision in this act which denies to the appointing power the right of removal, discharge, promotion, or change in rank and compensation, as might have been done prior to the act, with the single exception noted,—prohibiting such removal or change for giving or failing to contribute to a political purpose, or for rendering or failure to render a political service. It has been supposed in some quarters that congress undertook by this civil service act to restrain the exercise of the power to remove by the appointing power, and it is said that, if this was not, the intention of congress, then the act is mere brutum fulmen, and the attempt of congress to improve the civil service is futile and abortive. I do not so understand the act, nor do I consider the object of congress to be abortive from failure to so provide. If it was the design of the congress to absolutely prohibit the exercise of the power of removal, it was a simple matter to have so declared; and the fact that removal was forbidden for a particular cause is strong to show that it was not designed to be forbidden with respect to other causes. It is a cardinal canon in the construction of statutes, "*Expressio unius est exclusio alterius.*" The congress saw fit to prohibit removal for the one cause stated. That is equivalent to an expression by the legislature that it was not deemed wise that removal should be prohibited for other causes. The evil sought to be remedied was explicitly stated. The act declares that no one in the public service is for that reason under obligation to contribute to political funds, or to render political service, and he should not be removed or otherwise prejudiced for refusal to do so. That protection was thrown about the incumbent in office, not as a right personal to himself, but for the general good of the service; not as conferring upon him the right to hold his position irrespective of other needs of the service, nor as giving him an unlimited claim to the position, but merely to purge the public service of that which had become scandalous,—the substantial compulsory assessment of public officers for political purposes. I perceive in this act, with respect to the limitation of the power of removal, no other purpose to be subserved, and no other thought expressed. Nor does it follow that such construction of the act renders abortive the provision with respect to examinations and limitation of the power of appointment and promotion to those who have passed the examination. It still remains true that the act procures a body of men for the public service whose appointment is made to depend upon fitness, and not upon political favor. That was the object sought to be accomplished. It is in no way disturbed because congress has failed to otherwise limit the power of removal, because, notwithstanding

ing the power to remove may exist, the filling of the vacancy so created must not be controlled by political considerations, but the appointment must be made from those who have passed examination. It is not within the province of the court to consider whether it would be wise to further restrict the power of removal. That is a matter purely within the legislative discretion, and with which the courts cannot concern themselves. We have only to declare the law as it was enacted, and to construe its meaning. It may be, however, observed that the history of the legislation in question justifies the conclusion that the omission further to restrict the power of removal was not without design. It was deemed sufficient to prevent undue political influence, and that appointment to office should be restricted to those who had passed examination, and had proved themselves qualified. It may be that congress considered that, in the administration of the business of the government through its many departments, something is due to the head of each department or office with respect to the personnel of his subordinates, irrespective of the question of qualification for the position,—something with respect to his conduct, to his behavior to his superior, even if the incumbent be thoroughly qualified in the mere discharge of the duty pertaining to the position; that the head of the office or department should have some measure of control over those for whom he is responsible. It may also be that the congress considered that with respect to most subordinate positions it is the better policy that the responsible superior should deal with the question of removal or change; that the public business might be blocked or seriously interrupted if the superior should be obliged to entertain and enter upon the formal trial of every charge which, in the intense struggle for place, might be brought against the incumbents of office. It was possibly for these reasons that congress omitted further restriction upon the power of removal. It is sufficient, however, to say that congress has not otherwise than as stated limited the power of removal or change of position in the public service. It may be pertinent to observe that the constitutional right of congress to restrict the power of the president to remove from office, which is an incident to the power of appointment, is not without doubt. An interesting historical review of the question may be found in *Parsons v. U. S.*, 167 U. S. 324, 17 Sup. Ct. 880, in an elaborate opinion by Mr. Justice Peckham. In that case it was ruled that the president could lawfully remove a district attorney of the United States within the four years from the date of his appointment, notwithstanding the statute provided that "district attorneys shall be appointed for a term of four years and their commissions shall cease and expire at the expiration of four years from their respective dates"; the statute being construed to mean that the term should not last longer than four years, subject to the right of the president to sooner remove.

On the 2d day of November, 1896, the president of the United States made and promulgated certain rules, revoking all others, for the regulation of the civil service. This was stated by him to have been done "in the exercise of power vested in him by the constitution, and the authority given to him by the 1753d section of the Revised Statutes, and by an act to regulate and improve the civil service of the

United States, approved January 16, 1883." These rules provided for certain classifications and exemptions from such classifications, and regulated promotions in the service. It is not necessary to state those rules in detail. It is only needful to say that they do not regulate removals from office, except for political or religious opinions or affiliations, and that the bill in this case charges no such consideration for the action of the postmaster which is here in question. But on July 27, 1897, the president of the United States promulgated an order announced as an amendment to rule 11, as follows: "No removal shall be made from any position subject to competitive examination except for just cause, and upon written charges filed with the head of the department or other appointing officer, and of which the accused shall have full notice, and an opportunity to make defense." This is an authoritative expression by the executive of the United States of his desire and command to his subordinates with respect to removal from office of those coming within the scope of the civil service regulations. Possessed by the constitution of the power of appointment and removal, except, possibly, as he may be therein restricted by act of congress, the executive has the right to regulate for himself the manner of appointment and removal. He may direct his subordinates, who exercise under him, in certain cases, the power of appointment and removal, with respect thereto, and may regulate the manner in which they may act for him; but this is an administrative order of the executive, not made in compliance with any law, or in regulation of the execution of any law enacted by congress restricting his right of removal, but is simply an instruction to those who hold positions by virtue of his appointment of the manner in which they shall discharge their duties in respect to the removal of their subordinates. The order is not the law of the land; it is not the emanation of the lawmaking power, but is merely a regulation adopted by the executive, as he rightfully might, in regulation of the conduct of those who are subject to his authority. He made it, and may, at his pleasure, rescind it. The law of the land is not subject to repeal by the executive. The regulation and orders of the executive or heads of departments under authority granted by congress—such as the order under consideration here—are regulations prescribed by law in the sense that acts done under them are upheld; and in that light they may have the force of law. But the failure to do the act thereby enjoined, or the doing of the act thereby prohibited, does not render one liable to the law. *U. S. v. Eaton*, 144 U. S. 677, 688, 12 Sup. Ct. 764. Consequently, no vested right to hold office indefinitely is acquired by the incumbent by virtue of the executive regulation in question. This executive order or regulation therefore confers no right upon the incumbent of office of which a court of equity can take cognizance. He who disobeys such order of the president is responsible to, and must be dealt with by, him. Courts of equity are not constituted to regulate the departments of the government. Their jurisdiction is limited to the protection of the rights of property. They have no concern, as I understand the boundaries of their jurisdiction, over the appointment and removal of public officers. Possibly, in exceptional cases, where one having a

vested right in and possession of a public office is sought to be ejected therefrom unlawfully, and by force, equity may intervene by writ of injunction to protect such possession against the interference by a claimant to the office, remanding the latter to the legal remedies by which he may establish his title. High, Inj. § 1315. But to no greater extent has the equity jurisdiction gone, and it cannot rightfully be employed to interfere between superiors and subordinates with respect to an office in which one has no vested right. Thus, in *Re Sawyer*, 124 U. S. 200, 210, 8 Sup. Ct. 482, it is said:

"The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property. It has no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors, or over the appointment and removal of public officers. To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses, or for the removal of public officers, is to invade the domain of courts of common law, or of the executive and administrative department of the government."

And so, also, in *World's Columbian Exposition v. U. S.*, 18 U. S. App. 42, 159, 6 C. C. A. 58, and 56 Fed. 654, the court of appeals of this circuit, speaking through Mr. Chief Justice Fuller, declared:

"The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property. The court is conversant only with questions of property, and the maintenance of civil rights, and exercises no jurisdiction in matters merely political, illegal, criminal, or immoral."

At the argument the court was referred to a decision by Judge Jackson in the United States circuit court for the district of West Virginia, in the case of *Priddie v. Thompson* (rendered July 28, 1897, as yet officially unreported) 82 Fed. 186, in which case it was held that, without respect to the order of the president of July 27, 1897, the power of removal from office, except for cause, did not, under the civil service act, now exist, and that a court sitting in equity would restrain such attempted removal. With deference, I cannot concur in the conclusion of that learned judge. I find no language in the act hinting at or suggesting any such intention on the part of the congress of the United States. I think, as I have above explained, that under any proper construction of the act the intention to leave the power of removal where it previously existed, except in the one case specified, is clear and undoubted; and the case *In re Sawyer*, *supra*, which is quoted by Judge Jackson to explain the power of a court of equity to enjoin removal from office, is directly opposed, as I think, to the conclusion of the court in *Priddie v. Thompson*.

Since the foregoing was penned, I am advised by the public press of the decision of Judge Cox, of the supreme court of the District of Columbia, rendered September 14, 1897, in the case of *Wood v. Gary*, Postmaster General, in which that court would seem to have reached the same conclusion to which I am constrained. I have no opportunity of examining the opinion of the court in that case. If reliance may be placed upon the press report of the decision, it would seem to proceed along the same lines of reasoning adopted in this opinion.

It follows that the rule for a writ of injunction must be discharged, and the temporary restraining order dissolved.

## GRATZ et al. v. LAND &amp; RIVER IMP. CO. et al.

(Circuit Court of Appeals, Seventh Circuit. October 4, 1897.)

No. 406.

**1. EVIDENCE—UNACKNOWLEDGED AGREEMENTS RELATING TO SALES OF LAND.**

The Wisconsin statute (Laws 1891, c. 288) declares that all unacknowledged agreements relating to sales of land which have been recorded in the register's office for 20 years may be proved by certified copies, with the same effect as if the instruments had been acknowledged. The act, however, provides that it shall not affect pending suits. *Held*, that the statute was applicable to a suit brought after its passage to quiet title, and incidentally to restrain an ejectment suit, though the latter suit was instituted prior to the enactment.

**2. POWERS OF ATTORNEY—DEEDS.**

Four persons having taken steps to procure title, as tenants in common, to a section of land, one of them executed a power of attorney authorizing the attorney to convey an undivided one-fourth of such section. By an error or oversight of the land office, title was made to each of a quarter section in severalty. Thereafter each of the grantees made conveyances of their quarter sections to a third party, who then reconveyed to each of them an undivided one-fourth interest in the whole section. Thereafter the attorney, under the power of attorney, executed a conveyance of an undivided one-fourth interest in the entire section. *Held*, that this was an effectual conveyance of such undivided interest, as it carried out the clear intent of the parties at the time it was given.

**3. SAME.**

A recorded power of attorney to convey certain lands remains in force, as to purchasers in good faith, without notice, from the attorney, though the grantor himself in the meantime conveys the same lands by a deed which remains unrecorded.

**4. CONFLICTING DEEDS—PRIORITY OF RECORD—BURDEN OF PROOF.**

A junior purchaser, whose deed is first recorded, is presumptively a bona fide purchaser for value, without notice, and the burden of proof to the contrary rests on the senior purchaser, whose deed has not been recorded.

**5. CONVEYANCE BY TENANT IN COMMON OF UNDIVIDED ACRES.**

A deed by a tenant in common conveying a specified number of acres, undivided, in a tract described, is not void for uncertainty, but is an effectual conveyance of such a proportion of the tract as the whole number of acres conveyed bears to the whole number of acres in the tract, and entitles the grantee to all the rights and remedies incident to the tenancy in common. And, where the tract borders upon a river, such a conveyance includes a proportional interest in the bed of the stream.

**Appeal from the Circuit Court of the United States for the Western District of Wisconsin.**

Fractional section 16 in township 49 north, of range 14 west, in the county of Douglas and state of Wisconsin, is bounded on the north and west by the St. Louis river and St. Louis Bay. The section was surveyed by the government of the United States in the year 1854, and according to that survey and the plat thereof returned to the general land office of the United States, and filed in the office of the surveyor general, the section contained 522.80 acres of land, as follows: The northeast fractional quarter, 130.25; the northwest fractional quarter, 86.50; the southwest fractional quarter, 146.05; the southeast quarter, 160. Under the school-land grant of the enabling act admitting the state of Wisconsin into the Union, approved August 6, 1846 (9 Stat. 56, c. 89), this section, with others, was granted to the state of Wisconsin for school purposes. On August 4, 1855, Frank Whittaker, William Herbert, Frank Perfect, and Wellington Gregory agreed with M. W. McCracken (for A. S. Mitchell and others), by an instrument in writing under their respective hands and seals, but not acknowledged, and recorded in the register's office of Douglas county on the 9th day of July, 1856,



substantially, that the parties first named should proceed to the capital of Wisconsin, and purchase school section 16, and, upon receiving title thereto from the state, should convey to McCracken or Mitchell, or such others as McCracken might request, a full, equal, undivided one-half of the section, in fee simple. McCracken therein agreed to convey to one James A. Markland an undivided sixteenth of an undivided one-half, to be conveyed to him upon payment within one year from that date by Markland of a one-sixteenth part of the expenses incurred by McCracken. On August 17, 1855, Mitchell agreed with McCracken, by instrument under their respective hands and seals (witnessed by Whittaker, but not acknowledged by the parties thereto, and recorded July 24, 1856), that Mitchell, upon payment by McCracken within a year of an amount equal to one-half of the sums paid in that time by Mitchell, to convey to McCracken an undivided half of the undivided half of the section. By these arrangements the title to the section was designed to be vested as follows:

A. S. Mitchell, an undivided quarter.....	130.70 acres
M. W. McCracken, an undivided quarter.....	130.70 "
Herbert, an undivided eighth.....	65.35 "
Perfect, an undivided eighth.....	65.35 "
Whittaker, an undivided eighth.....	65.35 "
Gregory, an undivided eighth.....	65.35 "
<b>Total .....</b>	<b>522.80 acres</b>

The undivided quarters owned by Mitchell and McCracken were subject to the right of Markland to an undivided one thirty-second. December 7, 1855, Herbert and wife executed a power of attorney to Whittaker and Perfect, authorizing them to convey, in whole or in separate parcels, "a certain tract of land, with the appurtenances, whereof we are seised in fee," described as follows: "The undivided one-fourth of the school section in township 49, of range fourteen (14) west." On June 2, 1856, the four pre-emptors executed to Joseph G. Wilson a bond conditioned to convey an undivided one-eighth part of the section when the title should become perfected in them. This instrument was executed on the part of Herbert by his attorneys in fact, and recorded on the 2d day of June, 1856. On June 18, 1856, the state of Wisconsin, by its governor and secretary of state, issued patents for the land in question, as follows: To Herbert, for the northeast fractional quarter of section 16, containing 130.35 acres; to Perfect, the northwest fractional quarter of section 16, containing 86.41 acres; to Gregory, the southwest fractional quarter of section 16, containing 146.05 acres; to Whittaker, the southeast quarter of section 16, containing 160 acres. It would appear that these patents were irregular or invalid because not executed by the commissioners of school and university lands. To cure the error, proper patents executed by the latter officers were issued November 26, 1861, to the same parties, and for the quarter sections as stated. On July 7, 1856, Perfect, Whittaker, Gregory, and Herbert (the deeds of the latter being executed by Whittaker and Perfect, his attorneys in fact) executed to A. S. Mitchell, each, two deeds, which conveyed to him the quarter sections by them respectively entered, thus vesting the entire legal title to the section in Mitchell. At the same time, Mitchell conveyed to Perfect, Gregory, Herbert, and Whittaker, jointly, the undivided half of section 16, the deed reciting, "The intention of this deed being to convey to each of said four parties of the second part, Frank G. Whittaker, Frank Perfect, Wellington Gregory, and William Herbert, the undivided one-fourth part of said undivided half of said section hereby conveyed." By these deeds the title of the section was vested, or supposed to be vested, an undivided one-half in Mitchell, and an undivided one-eighth in each of the four pre-emptors. On July 8, 1856, Herbert deeded to Mitchell "all of his right, title, and interest in section 16, being the undivided one-fourth part of the undivided one-half of the section." This deed was not recorded until July 15, 1856, and was executed by Herbert in person. On July 9, 1856, Herbert, by his attorneys in fact, executed to James A. Markland an undivided one thirty-second part of the section. This deed was recorded the same day. On that day Whittaker, Gregory, Perfect, and Herbert (by his attorneys, Whittaker and Perfect) deeded to Joseph G.

Wilson an undivided one-sixteenth of the section. This deed was also recorded on that day. If the two deeds named take precedence of the deed from Herbert to Mitchell, the latter would own the following interests in the section: An undivided one-half under deeds from all the pre-emptors, 261.40 acres; under deed from Herbert, 40.84 acres; total, 302.24 acres. Mitchell deeded, July 7, 1856, to Joseph G. Wilson, an undivided one thirty-second; on May 4, 1857, to Edmund H. Taylor, Jr., "an undivided fifty-seven acres" of the section; on February 13, 1858, to M. W. McCracken, "the undivided fourth part of section 16, \* \* \* minus eight acres, and supposed to contain 122.70 acres, more or less, and situated on the Bay of St. Louis, in the county aforesaid." This deed purported to be executed and to be received in abrogation of any other deed of land in that section made by Mitchell to McCracken, and in discharge of all bonds given by Mitchell to convey land in that section. February 26, 1861, Mitchell conveyed to certain trustees for Mary B. Mitchell, his wife, and her four children, 114.36 acres, undivided, in section 16, and afterwards, February 19, 1874 (his former wife having died, and he having thereafter intermarried with Nellie D. Mitchell, who joined in the deed), conveyed to certain trustees in trust for the children of Mary B. Mitchell "an undivided interest, amounting to 114.36 acres," in the section. Mitchell died May 1, 1882, and his heirs and the trustees under the trust deed in December, 1882, executed conveyances to Spooner of 106.21 acres, undivided. Upon the assumption that Mitchell acquired from Herbert 40.84 acres, making, with the previous conveyance to him by the pre-emptors, a total of 302.24 acres owned by him, he would seem to have conveyed to his trustees 8.15 acres more than he owned.

The appellee the Land & River Improvement Company acquired the title under these several owners to the 522.80 acres, assuming the validity of the conveyances by Herbert, through his attorneys in fact, to Markland and to Wilson. The appellants represent the interest, if any, existing in Mitchell, his children or heirs, remaining undisposed of. This property remained vacant until the year 1884, and is now incorporated within the limits of the city of Superior. From erosion by the waters of the river or bay of St. Louis, the acreage of the upland is now reduced to 424.98 acres. On April 4, 1887, under a statute of the state of Wisconsin, the commissioners of Douglas county established a dock line in front of this property, which was approved by the United States war department December 5, 1894. The east and south boundary lines of section 16, prolonged to meet this dock line, would include an area of 837.66 acres. It was stipulated as a fact, subject to objection to its materiality, that neither Mitchell nor any of his children supposed that the section in controversy contained more than 522.80 acres, as stated in the government survey, until about the year 1890, when the surviving children were advised by their counsel that the section extended to the thread of the current of the St. Louis river, bounding the section on the northwest. In November, 1890, the present appellants brought ejectment in the circuit court of the state of Wisconsin for the county of Douglas against the present appellees to recover an undivided 11-32 of the section, which suit was removed to the circuit court of the United States for the Western district of Wisconsin. Thereafter, in the year 1892, the appellee the Land & River Improvement Company filed its bill in the latter court to restrain the proceedings in the action at law, and to quiet the title to the section; setting forth at length the history of the devolution of the title, and praying that its title and possession of the premises may be quieted in the complainant by decree of the court, and that the parties defendant to the bill asserting any title or claim to the lands in question may be decreed to release the same to the complainant therein. To this bill the present appellants duly answered, setting forth their claim of title, and they also filed their cross bill, asking that they be decreed to be the owners in common of the undivided 11-32 of the section; that all instruments of conveyance specifying undivided acres of the section shall be equivalent only to a conveyance of an undivided interest, of which the numerator shall be the specified number of acres in the deed, and the denominator the entire acreage of the section, whether upland or overlaid with water; and that their title be quieted as against the claim of all the defendants to the cross bill. This cross bill was duly answered to, and replication filed; and at the hearing a decree was rendered in behalf of the original complainant, the Land & River Improvement Company, the appellee

here, quieting and confirming its title to the section, enjoining the prosecution of the action in ejectment, and decreeing that the appellants have no right, title, or interest in or to any of the land, privileges, appurtenances, or water rights, or any right in the bed of any stream or streams adjoining the section.

I. M. Earle and H. S. Wilcox, for appellants.

John C. Spooner and A. L. Sanborn, for appellees.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

JENKINS, Circuit Judge. It is urged that the court should not consider the record of the unacknowledged agreements of the parties to this title. It is enacted by chapter 288 of the Laws of Wisconsin for the year 1891 that all agreements relating to sales and conveyances of land, or of any interest therein, which have not been acknowledged, but which shall have been recorded in the proper register's office for 20 years, may be proved and admitted in evidence, by the production of the record or a duly-certified copy, with the same effect as if such instrument had been properly acknowledged. The act contains, however, a proviso that its provisions should not affect any pending suit or proceeding. This bill was filed December 15, 1892,—nearly 20 months after the publication of the act. It is true that the action in ejectment was instituted in November, 1890, and prior to the act, but that action and the question of competent evidence upon the trial of that action are not before us. The bill here is one to quiet the title, the restraining of the prosecution of the action at law being merely incidental relief to effectuate the decree in this suit. The act is manifestly applicable here, however ineffectual it might prove to sanction the introduction in evidence of the recorded but unacknowledged agreements upon the trial of the suit in ejectment. We think these instruments are properly before us for consideration, under the provisions of the statute in question.

It is clear that the parties contemplated that the four pre-emptors should obtain the title to section 16 as tenants in common,—each to own an undivided one-fourth. All the agreements speak thus; but when it came to the entry of the land, either because of the custom of the land office of the state, or through error, the title was taken to each quarter section in severalty. Each pre-emptor then conveyed to Mitchell the quarter section entered by him, and Mitchell at the same time conveyed to the four pre-emptors an undivided one-half of the whole, thus placing the title as originally designed. The power of attorney from Herbert to Whittaker and Perfect under date of December 7, 1855, before the legal title was obtained, authorizes a conveyance of a certain tract of land, whereof Herbert was seised in fee, described as the one undivided one-fourth of the section, and was clearly made in view of the agreement of the parties to obtain undivided interests in the section. By the subsequent deeds inter partes the title was placed as originally contemplated. We cannot, therefore, doubt that the power of attorney was effectual to authorize a conveyance of the undivided interest of Herbert. Such was the practical construction placed upon the instrument by all the parties, and Herbert, by his subsequent deed, sanctioned such construction of it. We cannot at this late day give to the instrument the strict construc-

tion contended for, which runs counter to that placed upon it by those interested, and which would be effectual to oppose the clear intent of the parties, and to divest titles acquired in good faith under it.

We proceed to inquire with respect to the validity of the deeds to Wilson and to Markland under this power of attorney. It is objected to their validity that the execution by Herbert to Mitchell of the deed of July 8, 1856, of all his interest in section 16, accomplished the object of the agency created by the power of attorney, terminated the authority of the agents, and that notice of such termination was not essential. The objection cannot be sustained. The power of attorney was recorded, giving notice to the world of the authority of the agents. The law requires that the termination of that authority, to be effective against purchasers in good faith from the attorney, should be likewise recorded. It may be conceded that the conveyance by Herbert, in a sense, terminated the agency, because the subject-matter upon which the agency operated was disposed of by his deed; but, failing the recording of the deed, the termination of the agency was not effective against those dealing in good faith with the agents, for, without notice of revocation, the parties were justified in acting upon the presumption of the continuance of the agency. *Hatch v. Coddington*, 95 U. S. 48; *Insurance Co. v. McCain*, 96 U. S. 84; *Johnson v. Christian*, 128 U. S. 374, 381, 9 Sup. Ct. 87.

It is further objected that the deed from Herbert to Mitchell, being prior in point of time, although subsequent in point of record, was effectual to pass the title of the premises, and was valid against the whole world, except bona fide purchasers for value, without notice, and that the burden of proof with respect to the bona fides of the deeds subsequent in date, but prior of record, is cast upon those claiming under them. This presents a question not altogether without difficulty, and in respect to which the authorities are not wholly at agreement. *Jackson v. M'Chesney*, 7 Cow. 360; *Wood v. Chapin*, 13 N. Y. 509; *Shotwell v. Harrison*, 22 Mich. 410; *Hoyt v. Jones*, 31 Wis. 389, 404; *Lampe v. Kennedy*, 56 Wis. 249, 14 N. W. 43; *Cutler v. James*, 64 Wis. 173, 179, 24 N. W. 874; *Prickett v. Muck*, 74 Wis. 199, 206, 42 N. W. 256. In the state of New York it is ruled that under the recording act the junior purchaser, whose deed is first recorded, is presumptively a bona fide purchaser for a valuable consideration, without notice, and that the burden of proof to the contrary rests upon the senior purchaser, whose deed has not been recorded. In Michigan it is held that the burden is upon him who claims by virtue of priority of record to show affirmatively the payment of a valuable consideration, but that the burden is upon him claiming under a deed of prior date, but subsequent record, to show that such purchaser under the deed having priority of record had notice of the prior, unrecorded deed. This ruling is founded upon the notion that, the payment of the purchase price being peculiarly within the knowledge of the grantee under the deed having priority of record, the law would not impose the burden of proving the negative fact upon the opposite party. In this case there was a very able and strong dissent by Campbell, C. J., to the effect that there is no ground for any such

distinction, and that the burden rests upon the party claiming under the unrecorded deed. In *Hoyt v. Jones* the supreme court of Wisconsin for the first time considered the subject, and, in an able opinion by Chief Justice Dixon, concurred with the dissenting opinion of Chief Justice Campbell, and with the decisions of the state of New York, and held that the law would not presume fraud or bad faith on the part of the subsequent purchaser, and that the grantee under the unrecorded deed, being a party in the wrong, by omitting to record his deed, must assume the burden of showing a want of consideration or notice in the purchaser under the deed having a priority of record; and this, we think, is the better rule, because, as suggested by Chief Justice Campbell, any other doctrine would render the registry laws of very little value, especially in a case like the present, in which we are dealing with transactions of over 40 years ago. The witnesses to the transaction may have died, or may have become inaccessible. If the prior, recorded deed was fraudulent, Mitchell had ample means to protect his title by resorting to the courts at a time when the transaction was fresh, and the witnesses to it were living and could be obtained. His delay is that which at this time renders proof difficult, and it seems but just, under such circumstances, that the burden should be cast upon him and those claiming under him, rather than that the law should indulge the presumption that these deeds executed almost simultaneously with Mitchell's were fraudulent. There is no proof here of the time of the delivery of the deed to Mitchell. It was not recorded for a week after its execution. Mitchell and his heirs rely, as they properly may, upon the presumption of law that it was delivered at its date. But, to effectuate that presumption, it seems unjust that we should indulge the further presumption that the grantees of the recorded deed were guilty of fraud, which is never to be presumed. The authority of *Hoyt v. Jones* is thought to be weakened by the subsequent decisions in the supreme court of Wisconsin. In *Lampe v. Kennedy* it was ruled that between the subsequent purchaser, whose deed is first recorded, and one not claiming under the grantee in the prior conveyance, the burden is upon the latter to show notice of the prior conveyance, and want of valuable consideration. No one will dispute the correctness of the rule, but Mr. Justice Lyon, after rightly deciding the point, enlarges in the following language:

"Probably, also, in a contest between two grantees of the same grantor (the last deed being of record, and the first unrecorded), the onus would be upon the junior grantee to show that he purchased in good faith, and for a valuable consideration."

This observation is purely obiter, was made without any reference to the prior decision of the court in *Hoyt v. Jones*, and is not authority. In *Cutler v. James* the point does not appear to have received much consideration, but the opinion indicates that the burden of proof may be shifted from one party to the other, according to the circumstances of the case. There was no direct evidence on the one side or the other with respect to notice of the prior, unrecorded deed, but certain inferences from the facts indicated want of notice; and the court held that the burden was upon the party claiming under the

prior, unrecorded deed. There was no reference to the case of Hoyt v. Jones. This case supports, rather than questions, the doctrine of Hoyt v. Jones. In Prickett v. Muck the court ruled that, because the defendant was shown to have actual notice of the existence of the will and the death of the testator at the time that he took a conveyance of the property from the grantee in the deed having priority of record, he could not be entitled to the protection of the statute without showing that his grantor was a purchaser in good faith and for a valuable consideration. No reference is made to the case of Hoyt v. Jones, except that it is cited approvingly upon another point. The case seems to have turned largely upon a question of pleading, and there is no indication that the court designed to overrule its former decisions. We are satisfied that the rule in Hoyt v. Jones is the better rule to work out substantial justice. If the rule, however, were otherwise, there are here certain facts, and inferences which we may properly indulge from the facts, which we think should avail to shift the burden upon the appellants, if it originally rested upon the opposite party. The deed to Mitchell is dated July 8th. It was retained from the record until July 15th. On July 9th the two deeds were executed by Herbert, by his attorneys, to Wilson and Markland, respectively, and were recorded on the same day. The four pre-emptors had, on the 2d day of June previous, executed to Wilson a bond conditioned to convey to him an undivided one-eighth part of the section when the title should become perfected in them. This instrument acknowledges the payment of the consideration of \$900, was executed on the part of Herbert by his attorneys in fact, and was recorded on the 2d day of June, 1856. By this instrument Wilson obtained an equitable interest in the land, of which Mitchell had constructive notice by the record at the time of the execution to him by Herbert of the deed dated July 8, 1856. We cannot doubt, moreover, that Mitchell had also actual notice of the equitable title of Wilson, and agreed to assume, and did assume, in part, the obligation of the pre-emptors to convey; for on the 7th day of July, 1856, the day previous to the conveyance by Herbert to him, Mitchell conveyed to Wilson an undivided one thirty-second part of the section. This conveyance is by the answer asserted to have been in compliance with the undertaking of Herbert on the bond, but the further allegation that it was in full satisfaction of that obligation is not proven, and cannot be assumed, because it was a conveyance of but one-fourth part of the amount agreed to be conveyed. The two conveyances vested in Wilson an undivided three thirty-seconds of the section, whereas by the bond he was entitled to an undivided one-eighth; and the record does not satisfactorily account for the deficiency, unless it be represented in the deed to Markland made in pursuance of some arrangement between the parties. The consideration stated in the various deeds and in the bond lend some countenance to the view that, as between the pre-emptors and Mitchell, one-half of the equitable right of Wilson was by agreement imposed upon the undivided half which was conveyed to Mitchell. In this connection the language of the deed by Herbert to Mitchell is not without significance. There is enough, however, to show that Mitchell had

both constructive and actual knowledge of the equitable rights of Wilson, and took the title from Herbert subject to them. We perceive, therefore, no reason upon which the conveyance to Wilson under power of attorney can, upon this record, be successfully impeached; and we think, aside from any general rule, that the circumstances cast the burden of proof upon those claiming under the deed prior in date but subsequent of record.

The equities with respect to the deed to Markland are less clear and strong, but we think there is sufficient to impose the burden of proof upon the claimants under the unrecorded deed. There does not appear, it is true, to have been any written agreement by Herbert to convey to Markland; but before the entry of the land there was an agreement by McCracken to convey to Markland an undivided one thirty-second part of the section, upon payment of a certain proportion of the expense to be incurred. This appeared in the agreement with the original pre-emptors, and it is under this agreement that Mitchell obtained his title. Wilson did not obtain all the land to which he was entitled, and for which he had paid. An undivided one thirty-second part was retained, which corresponds with the amount agreed to be sold to Markland upon payment by him of his proportionate part of the expenses incurred. The land was entered at the price of \$1.25 an acre, and Markland was entitled to receive 16.33 acres. The consideration mentioned in the deed from Herbert to him was \$20. We cannot, of course, say that there was an arrangement between Mitchell, Markland, McCracken, and Herbert by which the obligation to convey to Markland was imposed upon Herbert, but the indications point in that direction. Mitchell, in conveying to McCracken the undivided one-fourth of the section, retained eight acres,—just one-half of the acreage to which Markland was entitled,—which would indicate that McCracken and Mitchell each assumed the obligation to convey to Markland one-half of the amount to which he was entitled. At this late day it doubtless would be impossible to ascertain with precision just what was agreed between the parties. It is pertinent to observe that down to the time of his death, in 1882, Mitchell claimed to have no remaining interest in the section, and to have conveyed all his interest in trust for his children. This deed, it is true, upon the assumption of the validity of the deeds to Markland and to Wilson, conveyed 8 acres more than he owned; but, if he had claimed those deeds to be void, there would have remained 16.33 acres unconveyed by the trust deed. It is not surprising that transactions of nearly 50 years ago, and with respect to lands of but nominal value, should be obscure and inexact. We think there is enough to show that Mitchell had recognized this deed to Markland to such an extent that the burden of proving that it was not executed for a valuable consideration is imposed upon those claiming under him, even if we are incorrect in the assumption that the burden of proof in the first instance rests upon those claiming under the unrecorded deed. In this view of the case, Mitchell acquired title to 302 acres and a fraction of the land, the title to all of which, by mesne conveyances, became vested in the Land & River Improvement Company, one of the appellees.

It is urged by the appellants that the deeds to Mitchell, to Taylor, to McCracken, and to the trustees for the benefit of Mitchell's children, and from the latter to Spooner, conveying undivided acres in the section, are void for uncertainty. The contention cannot be sustained. The grantee in such deed acquires an interest in the whole tract as tenant in common, and in the proportion which the number of acres conveyed bears to the whole number of acres in the tract, and entitles the grantee to all the rights and remedies incident to the tenancy in common. *Freem. Co-Ten.* § 96. Thus, in *Gibbs v. Swift*, 12 *Cush.* 393, the deed conveyed 211 undivided acres out of a tract of 1,878 acres, and the court ruled:

"It gave him a share, as co-tenant in common of the whole tract, in the proportion which 211 bears to 1,878."

In *Battel v. Smith*, 14 *Gray*, 497, there were deeds of "two and one-quarter acres, undivided, in lot 17"; "three and a quarter acres, more or less, in number 17"; part of "twenty acres and sixty rods, in common pasture, lying in common with other proprietors"; and "two and a half acres of land" in the southeast division of common pasture, "in lot number 17, and is undivided." The court observed:

"By these deeds we think it clear that the grantors intended to convey an undivided interest in the whole of lot number seventeen, in the proportion which the number of acres specified and granted by the deed bears to the whole quantity of land contained in that lot. The use of the word 'undivided' and the phrase 'lying in common' shows that the interest conveyed was undivided and in common, and not an estate in severalty, and the quantity of land granted is ascertained and fixed with certainty by the grant of a designated aliquot part of the whole land owned in common."

To this effect is *Jewett v. Foster*, *Id.* 495.

In *Small v. Jenkins*, 16 *Gray*, 155, there was a conveyance of 1,750 acres, undivided, out of an estate of 14,000 acres held in common with other persons, no share in which had been set off in severalty. The court said:

"Instead of expressing in the deed in express words or terms the part or proportion of their interest which they intended to convey, this was done indirectly, but just as intelligibly and effectually, by a conveyance of a specified number of acres. They conveyed 1,750 acres, undivided, so that, if the whole tract consisted of 14,000 acres, the conveyance was of 1,750-14,000 parts of it."

See, also, *Jackson v. Livingston*, 7 *Wend.* 136; *Corbin v. Jackson*, 14 *Wend.* 619; *Schenk v. Evoy*, 24 *Cal.* 110; *Sheafe v. Wait*, 30 *Vt.* 735.

It is further urged that these undivided acre deeds conveyed only the number of acres designated, and did not grant an interest in the land under water. It is settled that the extent of the title of a riparian owner to the bed of a river is one of local law (*Hardin v. Jordan*, 140 *U. S.* 371, 11 *Sup. Ct.* 808, 838; *Illinois Cent. R. Co. v. Illinois*, 146 *U. S.* 387, 13 *Sup. Ct.* 110; *Shively v. Bowlby*, 152 *U. S.* 1, 14 *Sup. Ct.* 548), and that in the state of Wisconsin the riparian owner takes title to the bed of the river to the thread of the stream (*Norcross v. Griffiths*, 65 *Wis.* 599, 27 *N. W.* 606). It is thereupon insisted for appellants that the conveyance of an undivided number of acres of upland carries with it no title to the bed of the river, that the lan-



guage of the deed should not be enlarged to include more than the specified number of acres, and that at the most, if the grantee in an undivided acre deed is to be deemed a tenant in common, his interest is to be computed, not with reference to the acreage in the uplands, but with reference to the combined acreage of the upland and the bed of the stream to midchannel. We concur with the supreme court of Massachusetts (*Battel v. Smith*, 14 Gray, 497, 499) that by such conveyances as those in question "the grantors intended to convey an undivided interest in the whole" of the lot, "in the proportion which the number of acres specified and granted by the deed bears to the whole quantity of land contained in that lot." In other words, we think that Mitchell intended to convey to Taylor 7-64, to McCracken 15-64, and that the heirs of Mitchell intended to convey to Spooner 13-64, which, with the 2-64 conveyed by Mitchell to Wilson, would aggregate 37-64, or 302.24 acres, the total of Mitchell's holding. He therefore was correct in his assertion that he had disposed of his entire interest, unless the undivided acre deeds take no interest in the bed of the stream. We are of opinion that this latter suggestion must be resolved in favor of the appellees. The nature of the title to the bed of a stream or to a highway is peculiar. It is burdened in the one case with the paramount right of navigation, and in the other with the superior right of traffic, and of those uses to which the public may rightfully put a highway, which are so numerous and burdensome that it has been declared that there is no substantial difference between streets in which the legal title is in the private individual and those in which it is in the public, as to the rights of the public therein. *Barney v. Keokuk*, 94 U. S. 324; *City of La Crosse v. Cameron*, 25 C. C. A. 399, 80 Fed. 264. So that it has come about, as expressed by Judge Redfield in *Buck v. Squiers*, 22 Vt. 484, 495, that:

"In ninety-nine cases in every hundred the parties, at the time of the conveyance, do not esteem the land covered by the highway of any importance either way; hence they use the words naturally descriptive of the prominent idea in their minds at the time, and in so doing define the land which it is expected the party will occupy and improve."

See, also, Wallace's American notes to *Dovaston v. Payne*, 2 Smith, Lead. Cas. 90. In the state of Wisconsin we therefore naturally find that the rule is established that a grant of land bordering upon the highway, one specified boundary of the premises conveyed being the south line of the street upon which the lot abuts, in the absence of other words of exclusion, carries the fee to the center of the street. *Kneeland v. Van Valkenburgh*, 46 Wis. 434, 1 N. W. 63. And, in respect to land bounded upon a navigable stream, a conveyance thereof by metes and bounds, without mention of the stream, but which included the whole of the bank of the stream along the whole length of the part conveyed, was presumed to have been intended to convey, and was held to have conveyed, all the rights of the grantor to the bed of the stream in front of the described land to the middle of the stream, and that such presumption can be rebutted only by an actual reservation in the deed, or by evidence of such circumstances attending the making of the conveyance as clearly show an intention to limit

the ground to the exact boundary fixed by the description. *Norcross v. Griffiths*, 65 Wis. 599, 27 N. W. 606. It is there ruled that the owner of the bank is presumed to be the owner of the stream, and that, while the ownership of the bed of the stream may be separated from the ownership of the bank, such intention must explicitly appear by the grant, to overcome the presumption. In the light of these authorities, we have no difficulty in reaching the conclusion that the bed of the stream passed with the conveyance of the upland. We have shown that the undivided acre deeds constitute the grantees tenants in common with the other owners in this section. It is clear that the extent of their ownership was in proportion to the whole number of acres within the meander line. We do not overlook the fact that the meander line is not the boundary of the lot, but it was a line within the contemplation of the parties, by which to designate and ascertain the extent of the interest conveyed. There are no words of reservation which exclude the bed of the stream. The presumption must therefore obtain that it passed with the bank, and the evidence is clear that it was designed so to pass. The decree is affirmed.

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BAYNE et al. v. BREWER POTTERY CO.

(Circuit Court, N. D. Ohio. June 16, 1897.)

RECEIVERS—APPOINTMENT AND REMOVAL—ANCILLARY APPOINTMENT—NONRESIDENCE.

A receiver appointed by a federal court in New Jersey for a New Jersey manufacturing corporation whose plant and business are located in Ohio, and subsequently appointed on the commencement of an ancillary suit, by a federal court in Ohio, will not be removed by the latter court on the application of mortgage creditors who have subsequently become parties, merely on the ground that he is a nonresident of Ohio, where it appears that he is a fit person to manage the business, and intends to give it his personal supervision.

John K. Rohn and E. W. Tolerton, for the motion.

Hoyt, Dustin & Kelley and Edwin Robert Walker, opposed.

SAGE, District Judge. Samuel B. Sneath, trustee of the first mortgage bondholders under the mortgage made by the defendant, was, upon his own motion of the 26th of April, 1897, made party defendant in this cause, and on the 1st of May, 1897, filed an answer and cross bill upon the mortgage made to him to secure 60 bonds of \$500 each, with 6 per cent. interest, and prayed for a decree of foreclosure. The bill in this case was filed on the 10th of April, 1897, setting up the filing of a bill in the circuit court of the United States in and for the district of New Jersey by the complainants against the defendant, a corporation existing under and by virtue of the laws of the state of New Jersey, having its principal office in the city of Trenton, in that state, seeking a discovery of the goods and chattels, rights and credits, moneys, effects, and real estate, of every kind and description, belonging to the defendant, setting up also the insolvency of the defendant, and praying the appointment of a receiver; and that such proceedings were had in said circuit court upon the

filing of said bill that an order was thereupon made by said court appointing Frederic A. Duggan, of the city of Trenton, county of Mercer, state of New Jersey, receiver of the defendant, to take possession of all its goods and chattels, moneys and effects, land and tenements, books and papers, choses in action, bills, notes, and property of any and every description, and to sell, convey, or assign all its real and personal estate, and pay into court all of the proceeds; also generally to do and perform all the duties imposed upon him required by law and by the course and practice of the court. A copy of said bill is made an exhibit to the bill herein filed, which, although not so designated, was intended to be an ancillary bill. Upon the filing of the bill in this district, said Duggan was, upon motion, appointed receiver; but the court then intimated that, inasmuch as the property within this district was entirely separate and distinct from whatever there might be in the district of New Jersey, this court would proceed upon its own orders and decrees with reference to the sale or other disposition thereof.

On the 6th of May, being 11 days after Sneath was made a party, he filed a motion for the removal of Duggan, receiver, for the reasons:

"(1) That he was originally appointed by order of the circuit court of the United States for the district of New Jersey, and that the defendant, although incorporated under the laws of that state, has no office or place of business or property in that state. (2) That the receiver is a resident of the state of New Jersey, and that all the property, real and personal, of the defendant, is situate in the city of Tiffin, Seneca county, Ohio. (3) That he was appointed without notice to petitioner, who was trustee of the first mortgage bonds, as set forth in his cross bill herein, and without notice to the directors, managers, officers, or other persons interested in the management of said business, and they had no opportunity to be heard. (4) That his appointment was suggested by complainants, who were largely interested in the pottery companies located in New Jersey, competitors of said defendant company, and that he is, and will be, if permitted to remain as receiver, entirely controlled by complainants in the management of said business. (5) That the receiver has no interest in the business of the defendant company, and has no knowledge or experience in the conduct thereof, and since his appointment has taken no interest in the business, and is not qualified to act as such receiver in any respect. (6) That, if the receiver should devote to the business the attention which is required, the expenses incident thereto by reason of his being a nonresident of the state of Ohio, and far removed from the locality of said business and its property, would be greatly increased. (7) That the complainants have a very small interest in said business; and that the petitioner represents, as trustee and otherwise, most of the indebtedness of the defendant company."

On the 22d of May the receiver filed a full and complete inventory of the estate, property, and effects of the defendant company, their nature and value; also an account of the debts due from the defendant company and to the defendant company. It appears from the inventory that the defendant company has on hand manufactured goods of the value of \$19,937.76, goods unmanufactured of the value of \$3,334.54, goods in process of manufacture of the value of \$389.73, and accounts receivable to the amount of \$21,167.05, of which \$10,129.50 are considered collectible; and that the indebtedness, exclusive of the principal sums secured by mortgage, is \$41,447.31.

The receiver filed with these papers a petition in which is set forth the condition of the real estate of the defendant company, and of its

pottery plant situate thereon, which, it is averred, was closed down and ceased to be a going concern in April, 1897.

The petition further sets forth that for a long time prior to the receiver's appointment the business at the pottery plant at Tiffin was much run down. Its reputation as a business concern was seriously impaired, owing to the making of goods therein poor, crazed, defective, and otherwise imperfect; that the output became practically unsalable; and the pottery, by reason of its having a bad name in the trade, would not sell to advantage to the creditors and stockholders thereof.

After setting forth in detail the condition, and also the possible prospects, of the pottery, to which he claims there is now open a large and unusual market and field of operation in the Western and Southern states, and the opportunity for making said plant and premises, if rehabilitated, a going concern of the first order, with large and quick sales of its goods and output, and profit for the creditors and stockholders, whereas, if the works should be indefinitely shut down, and the property forced to a sale, great loss and sacrifice would result to creditors and stockholders, the receiver prays for an order authorizing and directing him to run and operate the plant and works, and for that purpose that he be authorized and empowered to raise money upon receiver's certificates, not to exceed in the aggregate at any one time \$25,000.

Upon consideration of the affidavits filed pro and con, and of the briefs of counsel, my conclusion is that the motion must be overruled. It was urged upon the oral argument that the appointment of the receiver was an improvident one; that is to say, that the presumption was that Judge Kirkpatrick made the appointment upon the suggestion of counsel, without personal knowledge regarding the qualifications or fitness of the appointee. There is no evidence whatever to that effect. The presumption is altogether the other way, and it is supported by abundant evidence that the receiver is thoroughly competent for the position, having practical knowledge of the pottery business, and having had large experience. As to his being a nonresident of the district, that is something which not infrequently happens in cases wherein receivers are appointed; but it appears from the affidavits that the pottery at Tiffin was so unsuccessfully conducted by the parties interested there prior to the receivership that serious losses were entailed; and that both Mr. Sneath, who is now proposed as receiver, and Mr. Brewer, who was then in charge, and is now active in support of the motion, expressed their conviction that it would be better for the interests of all concerned that the New Jersey parties should take charge of and manage the business. It is said to be conceded that no notice was given to the defendant company of the appointment of the receiver. That is wholly incorrect. The record in the case shows that due service was made upon the company through its proper officers in New Jersey prior to the appointment, and that like notice was given of the application to be made in this district for an ancillary appointment.

The claim that the receiver has no interest in the business of the defendant company is not only in itself no objection, but is, on the

other hand, a strong recommendation. By the statute of Ohio, parties interested are ineligible. Although they are not strictly ineligible in equity, disinterested parties, who are competent, are preferred. The overwhelming testimony of the affidavits is that there is nothing in the claim that Mr. Duggan is under the control of persons who have an adverse interest. It does appear that the stockholders in the Trenton Pottery Company are largely interested in the Brewer Pottery Company, but it also appears that they have the most friendly feeling towards that company. There are affidavits containing direct offers to turn over the overflow orders of the Trenton Pottery Company to the Brewer Pottery Company in case Mr. Duggan is permitted to operate the plant of that company, and the true version of the testimony is that there is no hostility nor clashing of interests between the two companies.

It is also claimed that the complainants have no interest in the business as creditors, and a very small interest as stockholders. On the contrary, the bill shows that the complainants have an interest in the business as creditors, sufficient, at least, to give them a standing in this court. The affidavits show that the holders of over \$127,000 of the entire one hundred and seventy odd thousand of the capital stock are directly interested in this suit, and in full accord with the complainants.

As to the objection that all the property, both real and personal, belonging to and owned by the defendant company, is situate in the city of Tiffin, Ohio, Mr. High, at page 43 of the third edition of his work on Receivers, says:

"It would seem to be unnecessary that the property constituting the subject-matter of litigation should be within the jurisdiction, provided the parties in interest are subject to its control; and there are frequent instances where the English court of chancery has appointed receivers over assets or property situated in foreign countries."

To the same effect, see Kerr, Rec. p. 124; Beach, Rec. (Alderson's Ed.) § 247. In *Bidlack v. Mason*, 26 N. J. Eq. 230, the chancellor said:

"On principles of comity the aid of this court will be extended to a receiver of a foreign corporation seeking to obtain possession of the property of the corporation here as against the officers of the corporation who may be endeavoring by fraud or subterfuge to withhold it."

In that case the receiver was appointed by the supreme court of the state of New York for a manufacturing company formed and existing under the laws of that state, and was permitted to take possession of property in Camden, N. J. All the property of the company was in the state of New Jersey, in the company's factory in Camden. See, also, *Phoenix Iron Co. v. New York Wrought Iron Railroad Chair Co.*, 27 N. J. Law, 484. In *Bank v. McLeod*, 38 Ohio St. 184, Judge Johnson, delivering the opinion of the court, said:

"It is not necessary that the property should be within the jurisdiction of the court. Thus, courts of England have appointed receivers to manage landed property in India, Canada, China, Ireland, South American states, and other places."

See, also, 2 Daniel, Ch. Pl. & Prac. \*1731, and cases cited, and *Gluck & B. Rec.* (2d Ed.) pp. 34, 36. In ancillary proceedings, the

custom and practice is to appoint as receiver the person originally appointed.

"The proceedings attending such ancillary or auxiliary proceedings are those of comity, rather than of compulsion, and invoke harmonious action between courts of different territorial jurisdictions in administering the same estate. The doctrine is one of necessity, occasioned because a court cannot, by its order or decree, affect and control property in another jurisdiction. A feature of ancillary receiverships is that the same person is generally, though not always or necessarily, appointed receiver. Thus his power becomes co-extensive in every jurisdiction wherein he is appointed, and a complete and uniform management of the property is secured." Beach, Rec. (Alderson's Ed.) p. 40, § 28a.

In *Rust v. Waterworks Co.*, 17 C. C. A. 16, 70 Fed. 129, the circuit court of appeals, Eighth circuit, said:

"When the receiver of a foreign corporation, appointed by a court of the state of its creation [New Jersey], presents a petition to a court in another jurisdiction [Colorado] to have a judgment against such corporation opened, and an opportunity to defend the suit, such court has power to authorize him to defend such action in its jurisdiction, as it would have power to appoint him receiver, and authorize him to bring and defend suits generally."

So, in *Fost. Fed. Prac.* p. 399:

"When a receiver has been appointed by one federal circuit court, the others, through judicial comity, will usually appoint the same person an ancillary receiver of so much of the same estate as is within its jurisdiction."

In *New York, P. & O. R. Co. v. New York, L. E. & W. R. Co.*, 58 Fed. 279, Judge Lurton uses the following language:

"We are not prepared to say that circumstances might not arise which would justify and demand independent action in the appointment of receivers by each court of independent jurisdiction, and even the removal of receivers once appointed. But the respect due by courts of co-ordinate power and jurisdiction to each other, and especially that due by a court whose jurisdiction in a large part is in some sense ancillary to the court of primary jurisdiction,—the court where the rights and equities of all must finally be aggregated, and the accounts of the receivers be adjusted,—demands that a strong case should be made before independent and divergent orders should be made tending to bring on conflict between courts endeavoring to administer the same property in such manner as will best subserve the interests of all interested in it."

As to the increased expenses resulting from the nonresidence of the receiver, that matter will be entirely in the hands of the court, which will see to it that no unreasonable or extravagant charges or expenses shall be allowed.

The defendant company, although operating and having its property in the state of Ohio, is a corporation existing under and by virtue of the laws of the state of New Jersey. That sovereignty having been sought for the purpose of the creation of the corporation with whatever advantages or exemptions have been thereby secured, neither the stockholders, nor the creditors who dealt with it as a New Jersey corporation, ought now to be heard to object to the jurisdiction of the courts located in the state of which it is legally a resident.

Mr. Sneath, who is suggested as receiver, is without practical knowledge or experience in the business. He is president of a bank, and has other matters in charge, which, it would seem, would make it practically impossible for him to give the attention to the business

which would devolve upon the receiver. I am disposed to give a thorough and impartial trial to a new management which promises a favorable and successful outcome, rather than to commit the business to essentially the management which was, up to the time of the receivership, altogether unsuccessful and unprofitable. I do not intend, however, to throw the reins over the neck of the receiver. It is averred that he has declared he would not be able to give his personal attention to the business. This is, however, denied by him. The court relies upon his promise to the contrary. The motion will be denied at the costs of the mover.

An order will be made requiring the receiver to proceed at once to take charge of and operate the plant, to file in court monthly reports showing the state and progress of the business, receipts and disbursements, the number of hands employed, the number of days each month of his presence at Tiffin in the care and supervision of the business, and, generally, whatever may be necessary to enable the court to keep an eye intelligently on his operations.

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LEONARD v. MARSHALL et al.

(Circuit Court, W. D. Missouri. May 21, 1897.)

1. EQUITABLE ASSIGNMENT—WHAT CONSTITUTES.

One procuring a loan from an agent of the lender for the purpose of discharging a debt of the same amount due by him to a third party, on executing the note and mortgage verbally directed the agent to pay over the money, when received from his principals, to such third party; and the latter, on learning of the arrangement, assented to it. *Held*, that this was an equitable assignment of the fund.

2. LACHES.

Plaintiff, through one T., made a loan to G., secured by a trust deed. When the loan became due T., who was an agent of certain eastern money lenders, engaged to procure for G. a loan from them with which to pay off plaintiff's loan. T., therefore, who was the trustee in plaintiff's trust deed, procured from him the note, in order that he might release the trust deed, so that G. could make a new mortgage to the new lenders. The trust deed was accordingly released of record, and a new note and trust deed executed by G., and forwarded by T. to his principals. The latter, instead of forwarding the full \$5,000, the amount of the new loan, rendered to T. a statement showing that he owed them \$2,600, consisting of two items of \$1,000 and \$1,600 each, and remitted him the balance, with directions to apply it, together with the \$2,600, upon the loan. T. in fact owed them only \$1,600, but he did not make any objection to the statement. G. had directed him, on receiving the amount of the loan from his principals, to pay it over to plaintiff; but T., without the knowledge either of his principals or of G., applied the money to his own use, continuing to pay the interest to plaintiff as if the same were coming from G., and leaving plaintiff to suppose that G. had not yet obtained the new loan. Plaintiff, although he had surrendered his note, made no effort to find out the real reason why he did not receive his money, and did not even examine the county records to discover whether his trust deed had been released. Some two years later, T. became a fugitive, and plaintiff, learning the true state of affairs, sued the eastern money lenders for the amount which they had charged against T. in the account rendered to him, and which they had not forwarded to be applied on the new loan. *Held* that, in view of plaintiff's laches, he, rather than defendants, must suffer the loss to the extent of the \$1,600 actually

due from T. to defendants when they rendered him the account, but that defendants were liable for the \$1,000, which in fact T. did not owe them.

This was a suit in equity by M. W. Leonard against T. W. Marshall and William Chalfant, Jr., to recover the sum of \$2,600, with interest thereon to March 1, 1892. The facts were as follows:

On October 16, 1885, the plaintiff, a resident of Howard county, Mo., loaned, through one J. C. Thompson, to one M. O. Green, a farmer of Pettis county, Mo., \$5,000, and took his note, due in three years, secured by deed of trust on 640 acres of Pettis county farm lands. After this note became due, Thompson suggested to Green that he could get him an eastern loan at a lower rate of interest, with which he could take up and pay plaintiff's note. Thompson for a long time had been making loans for defendants, T. W. Marshall & Co., in Pettis and adjoining counties, and had general charge of their loan business there. Green assented to this arrangement, and on July 8, 1891, Thompson, having prepared Green's application for a loan of \$5,000, forwarded the same to defendants, who thereafter agreed to make the loan. Thompson prepared the note and deed of trust securing the same upon the same land on which the plaintiff's note was secured. The note was payable to the order of T. W. Marshall & Co., and the deed of trust was made to J. C. Thompson as trustee for them; and on August 1, 1891, Green executed the note and deed of trust, and delivered them to Thompson for defendants. At the same time he directed Thompson to pay plaintiff's note with the proceeds of the loan he was getting from defendants. Thompson placed the note and deed of trust with his private papers, where they remained until September 30, 1891, when he filed the deed of trust for record in the county recorder's office; but he still retained the note in his hands. On August 14, 1891, defendants wrote, inquiring of Thompson about the Green loan, to which he replied that he had the papers already executed, but was waiting for Green to make up the difference between this loan and the old loan with accrued interest. Nothing further seems to have been done in the matter until about the 25th day of February, 1892, when Thompson wrote to the plaintiff, Leonard, stating that Green had secured a loan, and was ready to take up plaintiff's note, and directing plaintiff to indorse it, so that he (Thompson) could release the deed of trust, as the legal holder of the note; which plaintiff accordingly did, sending the note to Thompson for collection and remittance. Accordingly, on February 27th, Thompson released plaintiff's deed of trust, and on the same day wrote to defendants, T. W. Marshall & Co., forwarding to them all the papers connected with their Green loan, making excuses for the delay, and asking them to remit the full amount of the loan, less the commission agreed upon. To this the defendants replied, inclosing a statement of their account with Thompson, as follows:

"We credit you M. O. Green loan.....	\$4,875 00
We charge you on acc't of Janney loan.....	\$1,000 00
On acc't of David McNair loan.....	1,600 00
Remittance to New York.....	2,275 00
	<hr/> \$4,875 00"

They accordingly remitted, instead of the full \$5,000, less their commission, as requested by Thompson, the balance shown by this account, namely, \$2,275. The McNair loan referred to in the account was a loan made by defendants through Thompson, and which had become due, and had been paid to Thompson for the defendants; and it seems that it had been understood between defendants and Thompson that he should retain the amount to be applied upon the Green loan when the transaction should be completed. In regard to the Janney loan of \$1,000, charged to Thompson in this account, the facts were as follows: One McGruder owed defendants \$2,000, secured by mortgage. Janney also owed defendants \$2,000, and was ready to pay \$1,000 thereof, and have the remainder extended. McGruder owed Janney \$1,000, and an arrangement was made, and carried out through Thompson, whereby McGruder's loan was increased to \$3,000, and Janney's debt was decreased by \$1,000, which satisfied McGruder's debt to Janney. The result was that the defendants stood, in respect to Thompson, in the same condition as before; but they had charged Thompson with the \$1,000 due from Janney, though Thompson had in fact never



received it. Thompson was an officer of the First National Bank of Sedalia, Mo., and kept therein the account of the defendants, T. W. Marshall & Co., they apparently trusting this matter entirely to him. As a matter of fact, this account was overdrawn at the time of the transactions in question, Thompson presumably having otherwise appropriated the money. He never paid the principal of the plaintiff's note, or any part of it. Some time after sending the note to Thompson for collection, plaintiff demanded the money therefor, but was informed by Thompson that Green had failed to get his loan. Plaintiff then demanded back his note, but Thompson informed him that it had been lost or misplaced, and that he would look it up soon, and send it to him. Thompson continued to pay the interest on plaintiff's note as if it were coming from Green, up to October, 1893, plaintiff supposing all the time that Green was in fact paying it, and that the note was a valid and subsisting lien on Green's real estate; and he did not learn the real facts until Thompson's bank failed, on May 4, 1894, and Thompson disappeared. Green also was ignorant of the real state of affairs. He knew that his deed of trust had been released, and supposed that Leonard had received from Thompson the amount due thereon. When the bank failed, the defendants' account was still largely overdrawn. Immediately on discovering the actual condition of affairs, plaintiff sued the receiver of the bank for the \$2,275 that Thompson obtained from defendants for the purpose of the Green loan, and recovered a judgment for the same. Plaintiff, having learned that defendants had deducted the \$2,600 which they claimed Thompson owed them from the amount of the Green loan, instituted this suit to recover the same, claiming that in equity it belonged to him, and was wrongfully withheld.

James T. Montgomery, for complainant.  
Montgomery & Montgomery, for defendants.

PHILIPS, District Judge. The first question of importance lying at the threshold of this controversy is one of law: If it were conceded that defendants had not paid over the money on the Green loan to Thompson, what right of action would complainant have to recover the fund in defendants' hands? He could not sue at law therefor, on the ground that defendants owed Green, for the want of privity of contract. This is conceded by complainant's counsel. The only ground, therefore, upon which he can recover is that asserted in the bill and argument,—as an assignee in equity under Green. I shall not undertake to review the authorities discussing the doctrine of equitable assignments, illustrating the varying circumstances under which such assignments may or may not be sufficient. The field is broad, presenting some incongruities, and much refinement in discussions. I am content with the rule laid down in the text by Pomeroy on Equity Jurisprudence (volume 3, § 1280):

"It is an established doctrine that an equitable assignment of a specific fund in the hands of a third person creates an equitable property in such fund. If, therefore, A. has a specific fund in the hands of B., or, in other words, B., as a depositary or otherwise, holds a specific sum of money which he is bound to pay to A., and if A. agrees with C. that the money shall be paid to C., or assigns it to C., or gives to C. an order upon B. for the money, the agreement, assignment, or order creates an equitable interest or property in the fund in favor of the assignee, C.; and it is not necessary that B. should consent or promise to hold it for, or pay it to, such assignee. In order that the doctrine may apply, and that there may be an equitable assignment creating an equitable property, there must be a special fund, sum of money, or debt actually existing, or to become so in futuro, upon which the assignment may operate; and the agreement, direction for payment, or order must be, in effect, an assignment of that fund, or of some definite portion of it. The sure criterion is whether the order or direction to the drawee, if assented to by him, would

create an absolute personal indebtedness, payable by him at all events, or whether it creates an obligation only to make payment out of the particular designated fund."

—From which it is clear that it is not essential to such assignment that it should have been in writing, or characterized by any special formulary, or indicated by any set phrase or ceremony. The text is that, if A. has a specific fund in B.'s hands, "which he is bound to pay to A., and if A. agrees with C. that the money shall be paid to C., etc., the agreement, etc., creates an equitable interest or property in the fund in favor of the assignee; and it is not necessary that B. should consent or promise to hold it for, or to pay it to, such assignee." An agreement is the coming together, in accord, of two minds, on a given proposition. This may be shown by evidence, direct and indirect, as any other fact may be satisfactorily established in court. It may arise by positive expression or necessary implication. Did Green consent and intend that the money borrowed through Thompson of defendants should be paid by Thompson directly over to complainant? Thompson was to receive and apply the money. That such was Green's purpose and understanding there can be no question, and as little question that Thompson so understood the matter. It is true that when Green was critically examined and cross-examined as to the particular words employed between him and Thompson he could not repeat them, but did depose that such was the understanding. And as persuasive proof thereof he acted thereafter for a year and a half on the assumption that Thompson had received and paid the money over to complainant. And so reliant was he thereon that he never made inquiry thereof, thus signifying that he, as assignor, had no further interest in the fund.

Equity, regarding that as done which should have been done, will, in its eagerness to see that exact justice be done according to the very right and conscience of the matter, effectuate the intention and understanding of these parties. Especially should the court lean to this view where both the creditor and the claimed assignee insist that such was the agreement. Thompson, being complainant's agent to receive the money for him from Green, could bind the arrangement in favor of Leonard, when assented to, as it was, by Leonard. I do not attach much importance to the fact that Leonard did not assent thereto until after the failure of the bank and flight of Thompson, for the reason that he had no notice of the fact that the loan had ever been consummated, and he did assent thereto as soon as he was advised of the fact. This aspect of the case is only important as it affects the conduct of the defendants, and the changed relation of the parties, within that lapse of time, which will be considered hereafter.

A more serious question as to the right of complainant's recovery, in considering the relative equities between these litigants, arises out of the laches of the complainant. The defendants were entire strangers to the complainant and Green in the inception of the transaction in question. Complainant demanded, through Thompson, that Green should pay his debt to them. He authorized Thompson to

collect it, and was advised by Thompson that Green proposed to raise the required money by effecting another loan on the mortgaged land. He was also advised that, to enable Green to effect this second loan, it was necessary that the record in the recorder's office of Pettis county should show a clear title in Green. That this might be accomplished, he assigned his note against Green to Thompson, thus making Thompson the apparent owner thereof, for the express purpose of enabling him to satisfy of record the mortgage. That was done by Thompson. The legal effect of this was to notify all persons subsequently dealing with the land that this particular debt was satisfied against the property; the very object of which was to satisfy the person who should make another loan to Green that the complainant's debt was not in the way. Thompson sent on to defendants the abstract of title, showing satisfaction of the mortgage, before the loan was made by defendants to Green.

The contention of complainant's counsel that Thompson was the general agent of defendants in Pettis county, through whom they transacted in that locality the business of their loans, and therefore the defendants are bound by all the information Thompson had respecting the conduct of this particular business between Thompson and complainant, or between Thompson and Green, is wholly untenable. In effecting this particular loan, Thompson was the agent of Green, and therefore the advancement of the money by defendants to Thompson discharged them from any liability therefor to Green. *Robinson v. Jarvis*, 25 Mo. App. 421-427. The defendants had a right to deal with Thompson upon the assumption that complainant's debt had been taken care of by Green and Thompson. They demanded an abstract showing a clear title to the land in Green, before the loan was closed. After that they had a right, so far as complainant was concerned, to deal with Thompson as between two independent contracting parties. When they accounted with Thompson in respect of the \$5,000, no person, so far as defendants were advised or concerned, had a right to complain thereof, except Green, who made no objection. As Thompson was then indebted to defendants, they had a right, Green not objecting, to settle with Thompson by paying over to him, or under his direction, the balance of the \$5,000 after deducting the sums Thompson owed them. It is true, Thompson directed them to deposit the \$5,000 in the New York bank, to the credit of the First National Bank of Sedalia, of which Thompson was cashier. Defendants deposited only \$2,275, the balance claimed by them as due to Thompson after an accounting with him. As early as March, 1893, they rendered Thompson their account. No objection was made thereto, so far as the evidence discloses, after that, by either Thompson or Green. From that time until the failure of the Sedalia bank, and the published insolvency and flight of Thompson, in May, 1894, the defendants were left in a sense of security respecting the malfeasance of Thompson, or the fact that the complainant had not received his money. During all that time the bank and Thompson had unimpaired credit, and were responding to all demands asserted against them. So, at any time for over a year after defendants settled with

Thompson, had they been advised of complainant's claim, they could have protected themselves against loss on account of this transaction.

The question to be answered by a court of chancery is, who shall bear the loss—the defendants or the complainant—resulting from the malfeasance of Thompson? It is answered by the wholesome rule of equity that, “where one of two innocent persons must suffer by the wrong of another, the one who enables such other to commit the wrong must bear the consequences.” *Sprights v. Hawley*, 39 N. Y. 441–448; *Whittemore v. Obear*, 58 Mo. 280, 286; *International Bank v. German Bank*, 71 Mo. 197; *Cummings v. Hurd*, 49 Mo. App. 140. The complainant, by transferring his note to Thompson, and investing him with the apparent ownership thereof for the express purpose of enabling him to satisfy his mortgage against Green, put it in the power of Thompson to perpetrate the fraud. Not only that, but for 18 months he left the note, indorsed over to Thompson, in his hands, with the knowledge that thereby he had clothed Thompson with the power to satisfy the deed of trust, or otherwise to use the note, without taking the precaution, although within two hours' ride of the recorder's office, to look to see if the mortgage had been satisfied; nor did he ever, during all this time, make inquiry of Green as to whether he had paid the money to Thompson. Surely he ought not, under such circumstances, to visit the loss of his supineness, and overconfidence in Thompson, upon the defendants, who dealt with Thompson upon the reasonable assumption that the complainant's debt had been cared for. The equity of the case, it seems to me, demands that the defendants in this controversy should be acquitted of any liability to the complainant as to not only the \$2,275 it placed to the credit of Thompson's bank with the bank in New York (for which amount the complainant has obtained judgment against the receiver of the First National Bank of Sedalia), but also for the sums actually in Thompson's hands, owing to the defendants, and for which the defendants accounted with Thompson, as before stated.

Another question, however, arises in this connection,—as to whether Thompson in fact owed to the defendants the amount of credits so claimed by them against Thompson. Among the items charged by defendants in said accounting against Thompson was the sum of \$1,000, claimed to have been collected by Thompson from one Janney, belonging to defendants. The evidence in this case shows the facts respecting this item: One McGruder owed the defendants \$2,000 on a matured note, secured by mortgage on McGruder's land. Janney also owed the defendants \$2,000, secured by mortgage on his land. Janney was ready to pay \$1,000 on his loan, and to have the loan extended. McGruder owed Janney the sum of \$1,000, and the arrangement agreed upon, and carried out through Thompson, was that McGruder's loan was increased to \$3,000, and a mortgage taken on his land to the defendants to secure this \$3,000 loan. Thereupon Janney's debt was decreased by the sum of \$1,000, which satisfied McGruder's debt to Janney; the result of this arrangement being that defendants stood, in respect of

the money they were out, and the security they then had, precisely where they were before the conventional arrangement. It was, therefore, simply a matter of bookkeeping, by which the defendants charged up to Thompson the \$1,000 on Janney's account. As a matter of fact, Thompson never received the \$1,000 from Janney, nor did the defendants advance to McGruder in kind. It was simply a rearrangement of the \$4,000 they had loaned to Janney and McGruder; and when the new arrangement was perfected the defendants still held claims against Janney and McGruder to the extent of \$4,000, satisfactorily secured by mortgages on real estate. If it was deemed necessary to charge up the \$1,000 against Thompson, they should have credited him with a like increase in the McGruder debt.

It thus becomes apparent that the defendants did not, in fact, pay over to Thompson the amount of the Green loan by the sum of \$1,000; and the complainant, as the equitable assignee of this fund, is entitled to a decree therefor against the defendants, unless the contention of defendants' counsel be sustained, that by reason of the allegations of the bill the complainant is precluded from asserting the right to a decree therefor. It is contended by defendants' counsel that complainant's bill avers, in effect, that Thompson did have in his hands, on account of collections made for defendants, the sums credited to him in the account rendered by defendants to Thompson. The allegations of the bill respecting this matter are that the defendants sometimes allege and pretend that they have paid the full amount of the said \$5,000 loan to said Thompson, and at other times that they have paid the same to said Green; but the bill then charges the fact to be that defendants have only paid out of said loan the sum of \$2,400, for which the orator makes no complaint against defendants (this having reference evidently to the sums paid by defendants to the New York bank, with commissions, etc.). The bill then proceeds in the same connection to state that "they allege that the First National Bank of Sedalia, or said J. C. Thompson, or both, were indebted to them, the said defendants, in the sum of \$2,600 on account of the collection of certain notes, made either by said bank or by said Thompson," and that in remitting to said Thompson for said Green loan the defendants deducted out of the \$5,000 the said \$2,600. It is to be observed that the words above quoted, "they allege," evidently have reference to what defendants claimed, and, taken in its context, it ought not to be construed as an admission by the pleader that Thompson had collected the said \$1,000 from Janney. And as the court, in furtherance of justice, if it were necessary, would permit the complainant to make this part of his bill clear to meet the state of the actual facts, I am not disposed, upon such a technicality, to permit the defendants to cover up, after the fashion they have attempted, the \$1,000 which they should have paid over to Thompson for Green. One unfamiliar with the distress of mind into which Thompson's frauds and concealments had brought him might wonder how it was that Thompson acceded to a charge against him of this \$1,000 in the account rendered by defendants. But the facts disclosed by the

depositions in this record show that the defendants had reason to suspect the integrity of Thompson, and that he was in no condition to maintain any controversy with them; and he deemed it, in his straitened condition, better to submit to this specious bookkeeping of the defendants respecting this \$1,000 than to protest or resist. It results that decree is ordered against the defendants for the sum of \$1,000, with interest thereon from the date of the institution of this suit.

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HEKKING v. PFAFF.

(Circuit Court, D. Massachusetts. August 24, 1897.)

No. 584.

1. DIVORCE—SUBSEQUENT AWARD OF ALIMONY—JURISDICTION.

A decree of divorce was entered by a circuit court of South Dakota in favor of plaintiff, a resident of that state, against defendant, a resident of Massachusetts; the court having no jurisdiction of defendant. Defendant afterwards married, and subsequently, on an amended bill filed by plaintiff, by leave of the court, without notice or attempted notice to the defendant, a decree was entered awarding plaintiff alimony. *Held*, that such decree was void, and an action based thereon to recover the alimony could not be maintained.

2. SAME—EFFECT OF MARRIAGE OF DEFENDANT.

Where, in accordance with the laws of the state, a court renders a decree of divorce in favor of one of its own residents against a resident of another state without acquiring jurisdiction over the latter, his subsequent marriage will not prevent him, either as a ratification, waiver, or estoppel, from denying the jurisdiction or authority of the court to open the decree and award alimony against him.

D. F. Kimball, for plaintiff.

Jabez Fox and Gerard Bement, for defendant.

PUTNAM, Circuit Judge. April 20, 1893, the plaintiff, who was then a resident of the state of South Dakota, obtained a decree for a divorce against the defendant in the circuit court of that state for the county of Lincoln. In the original complaint she prayed for alimony, but no alimony was granted in connection with the decree of divorce. The entire decree was as follows:

"It is ordered and adjudged that the bonds of matrimony heretofore and until now existing between the said plaintiff and the said defendant be, and the same are, dissolved, and that plaintiff have leave to resume her maiden name of Christine Hekking."

No reservation whatever was made of record with reference to further proceedings in the cause, although it may be that it was in the power of the court to have entered on the heel of such a decree a further decree for alimony against parties over whom it had jurisdiction. In July, 1893, defendant married again. In his answer to this suit he admits that he married in reliance on the decree of divorce. Subsequently, in March, 1896, the plaintiff prayed that the decree entered might be opened. Leave was granted, and thereupon the plaintiff filed an amended bill alleging grounds for alimony which had arisen since the original decree, and praying therefor anew. In

June, 1896, without any notice to the defendant, and without attempting any, the court entered a decree as follows:

"This cause coming on to be heard upon the application of plaintiff for alimony, support, and maintenance herein, O. S. Gifford, Esq., appearing for the plaintiff, and no one opposing, findings of fact and conclusions of law having been waived, and on reading and filing the petition of plaintiff, and after considering the allegations and proofs submitted, it is, upon motion of the plaintiff's attorney, ordered and adjudged that the plaintiff be, and she hereby is, allowed the sum of twenty-five thousand dollars for her support and maintenance, said sum to be paid to her or to her attorneys by defendant immediately; and that this order or judgment be, and the same is, a part of the original judgment herein, and to take effect from the date of said judgment, to wit, the 20th day of April, 1893.

"Done at Sioux Falls, South Dakota, this 29th day of June, 1896."

The suit in the case at bar is based on the latter decree, and seeks to recover the amount of alimony assumed to be adjudged by it. That an action of this nature will lie in the federal courts was settled in *Barber v. Barber*, 21 How. 582. The defendant was never a resident of the state of South Dakota; nor, so far as the proceedings decreeing a divorce and alimony are concerned, was he ever found therein; nor did the court of that state ever obtain jurisdiction over him; nor did he ever appear in the proceedings, or ever waive the lack of jurisdiction, unless and except so far as can properly be deduced from the fact that after the divorce, and long prior to the proceedings in 1896, he married as already stated. The question is not, as urged on us by the plaintiff, one of mere error in a judgment entered by a court having jurisdiction, but one of the absolute want of any effect by reason of entire lack thereof. The plaintiff relies on *Laing v. Rigney*, 160 U. S. 531, 16 Sup. Ct. 366. A careless reading of that case might give an impression that the circumstances were substantially like those at bar; but a careful examination of it shows beyond all doubt that the question considered by the supreme court was not one of jurisdiction, but merely one of the form of proceedings as determined by the local law of the state where the judgment was rendered, and in which both parties resided when the proceedings were commenced. We do not deem it material or of value to examine in detail the decisions of the various state courts cited to us by the plaintiff, as the principles which reach this case are clearly determined by the underlying rules of the common law, and the judgments of the supreme court of the United States. That by those rules and judgments the decree of the state court for alimony would have been of no effect whatever, except for the marriage of the defendant in July, 1893, is put beyond all question. The plaintiff states her proposition to the effect that the defendant's subsequent marriage operated to validate the proceedings in the court of the state of South Dakota by the way of estoppel, waiver, or ratification, although she does not distinguish clearly upon which of these three branches of the law she specifically relies. But there are several difficulties in the way. First of all, as the state itself has an interest in the marriage, its existence or nonexistence cannot be determined by the mere contract or conduct of the parties, whether operating in the form of an express agreement, or in that of estoppel, waiver, or ratification. In one case, as in the other, it is equally the voluntary

act of the party, without the consent of the state. It will be found that none of the well-considered cases to which the plaintiff refers turned on the question whether waiver can validate a decree for a divorce which is actually void, but in each such case there was a judgment by a court having jurisdiction, though alleged to be erroneous, or there was a judgment from which an appeal had been taken, and which would therefore be validated unless the appeal were sustained. Under such circumstances, courts would be justified in applying those equitable rules which enable them to control to a certain extent inequitable attacks on judgments by either a writ of error or an appeal. Anything beyond this, and especially anything which would enable either one or both parties to a marriage to validate, under color of estoppel, waiver, or ratification, a pretended divorce, cannot be held as well-considered law.

The true state of the law seems to us to turn on more fundamental propositions. If there was nothing to be ratified, then, of course, the plaintiff's whole proposition falls to the ground. Now, it is not pretended that the decree of the court in South Dakota granting the plaintiff a divorce was erroneous or invalid, according to the laws and the course of proceedings in that state. We are aware that the courts in Massachusetts have not yet fully recognized for all purposes the validity of a divorce obtained by a husband or wife in a state of which he or she is a resident, the other party still remaining a resident of Massachusetts. The furthest they seem to have gone is in *Loker v. Gerald*, 157 Mass. 42, 31 N. E. 709, where it was held that a divorce obtained by a husband in another state under those circumstances was valid; but the court seems to have rested its conclusions upon the ground which the supreme court refused to accept in *Cheever v. Wilson*, 9 Wall. 108, 123, that by a legal fiction the domicile of the wife follows that of the husband. The latest cases are *Burtis v. Burtis*, 161 Mass. 508, 37 N. E. 740, and *Dickinson v. Dickinson*, 167 Mass. 474, 45 N. E. 1091, which do not seem to exactly touch the proposition under consideration. The rule, however, which the federal courts must recognize, seems to be that stated in *Pennoyer v. Neff*, 95 U. S. 714, 722, to the effect that every state has the power to determine for itself the civil status and capacities of its inhabitants, coupled with the further proposition that the fiction of the domicile of the wife cannot contravene the right of the courts or the legislature of a state to determine her residence within its own borders according to the actual facts, as was settled for the federal courts in *Cheever v. Wilson*, *supra*. *Maynard v. Hill*, 125 U. S. 190, 8 Sup. Ct. 723, practically settles that the principle cited from *Pennoyer v. Neff* applies, whether the determination of the status comes directly from the legislature or through its courts, holding valid a legislative divorce granted to the husband, although the wife was not within the jurisdictional limits, and never had been an actual inhabitant thereof, and had no notice or knowledge of the passage of the act. As South Dakota had undoubted actual jurisdiction to determine the status of the plaintiff, and has done so by a proceeding which is not erroneous under the laws of that state, so that she was divorced from the defendant, and was no longer his wife, the



consequence seems inevitable that the defendant, by marrying, simply accepted the fact of such status of the plaintiff as thus fixed; and he was not asked to do anything, and in fact did not do anything, in the nature of ratification, waiver, or estoppel. 2 Bish. Mar., Div. & Sep. § 137. Had the decree of the court of South Dakota been invalid under the laws of that state, then there would have been an opportunity for waiver or ratification on the part of the defendant; but, as it was not, he merely accepted the condition of things as he found them, and therefore he has done no act of waiver or ratification, nor anything else which could lay the basis for any estoppel, or for any other method of prejudicing his rights as they existed before his subsequent marriage. This is undoubtedly the true solution of this case; but, if the subsequent marriage of the defendant can operate, as claimed by the plaintiff, in the way either of waiver, ratification, or estoppel, yet it would seem that, by all the ordinary rules of law, it would operate as such only in favor of the condition of things as it existed when he was married. The defendant did not by his marriage enter an appearance in the court of South Dakota, or give it jurisdiction over him, and all its after decrees affecting his pecuniary interests were as much without jurisdiction against him personally as had been its prior proceedings. The plaintiff has produced to us no well-considered decision, nor proposed to us any principle of law, which would compel us to impose on the defendant an assumption by him, either by waiver, ratification, or estoppel, of the after proceedings of the court in South Dakota, without limitation, and without jurisdiction over his person or property. The law on this point seems so clear against the plaintiff that it is not necessary to enlarge on it further. If the plaintiff desires that we make any special findings of fact, she may prepare them, submit them to the defendant, and pass them to the court, with such suggestions as the defendant may make in reference thereto. Meanwhile we will enter a general finding as follows: The court finds that the decree on which this suit is based is void, and that, therefore, this suit cannot be maintained.

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UNITED FIREMEN'S INS. CO. v. THOMAS.

(Circuit Court of Appeals, Seventh Circuit. October 6, 1897.)

No. 404.

INSURANCE — CONDITION AGAINST OTHER INSURANCE — WAIVER — PAROL AGREEMENT.

Knowledge by the agent of an insurance company, at the time of procuring the insurance, that the insured intended to take out other insurance, does not operate as a waiver of a condition in the policy subsequently delivered, forbidding other insurance, except by consent of the insurance company indorsed on the policy. The rule that a prior parol understanding or agreement cannot control a subsequent contract applies, and the waiver, to be effectual, must be subsequent to the written contract, and must be made, not only with knowledge of the other insurance, and with intent to waive the condition, but must be supported by a valuable consideration, or become operative by way of estoppel.

**In Error to the Circuit Court of the United States for the Northern District of Illinois.**

This action is in assumpsit, and was instituted by the plaintiff in error, John S. Thomas, for the use of Norman H. Camp, receiver, against the United Firemen's Insurance Company, the defendant in error, to recover for a loss by fire under a policy of insurance issued by the plaintiff in error to the amount of \$2,500 upon certain household furniture. The policy contained the following provisions: First. "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on the property covered in whole or in part by this policy." Second. "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, and conditions as may be indorsed hereon or added hereto; and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto; and as to such provisions and conditions, no officer, agent, or representative shall have such power, or be deemed or held to have waived such provision or conditions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached." The defendant below pleaded the general issue, and also pleaded specially that the plaintiff below obtained a large and unreasonable amount of insurance in other companies, without notice to the defendant, and without its permission, and without written indorsement of other insurance permitted on the policy in suit, by which violation of the contract of insurance the insurance policy issued by the defendant became wholly void. It appeared at the trial that Carlton H. Prindeville, an insurance broker, was employed by Mr. Thomas to procure insurance upon the household furniture in question. He testified that he was not, and never had been, an agent of the plaintiff in error; that his business was that of an insurance broker; that he solicited from owners of property the placing of insurance for them, and that in the absence of instructions he placed the insurance in such companies, and with such agents as he thought proper and desirable, receiving from the agents a certain commission for his service; that Mr. Thomas requested him to procure insurance to the amount of \$12,500, which he placed in four different companies. He applied to Hopkins & Hasbrook, the agents in the city of Chicago of the company plaintiff in error, to place \$2,500 of this insurance, and signed a written application, which does not disclose that further insurance in other companies had been or was to be procured. In answer to a question by the court whether he stated to Hopkins & Hasbrook the amount of insurance that Mr. Thomas desired on his property, he answered, "So far as I recollect, I did;" but he also stated that he could not recollect what he told them, nor whether he communicated with one of the firm or with a clerk in their service. Mr. Hopkins, of that firm, stated that the application for this insurance was made to him personally by Mr. Prindeville, and the application for the policy was signed at that time; that nothing was said with regard to and that he first knew of other insurance of the property after the fire. Prindeville obtained the four policies of insurance from the different companies, and delivered them to Mr. Thomas, who paid him the premiums, which Prindeville paid to the agents, respectively, representing the several companies, receiving from each agent his proper commission. At the conclusion of the evidence the plaintiff in error requested the court to direct the jury to return a verdict in its favor upon the ground that the defendant was not legally liable upon the policy of insurance, which motion was denied, and the ruling is assigned for error. The court charged the jury that the stipulation of the policy with respect to other insurance was binding and conclusive upon the parties unless that condition has been waived by the defendant, and that, if Prindeville was the agent of the plaintiff, the latter would be chargeable with knowledge of the fact that his agent had procured this policy of insurance that did not permit additional insurance; but if, on the other hand, Prindeville was in fact acting for and as the agent of the defendant company in placing this insurance,

and agreed with the plaintiff that he would secure him policies of insurance to the amount desired, to become effective of the same date, and to run concurrently, then the defendant company would be chargeable with knowledge of the fact that there was to be such additional insurance; and if, with such knowledge, the company or the agent that represented it issued the policy, and received the premium upon it, and applied it to its own use, it would constitute a waiver of the condition of the policy,—to which charge there was preserved, and is assigned for error, a proper exception. A verdict was found for the plaintiff below, and reversal of the judgment entered thereon is here sought because of the error stated.

William B. Cunningham, for plaintiff in error.

John Woodbridge and William M. Jones, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

JENKINS, Circuit Judge. If, under the construction of the statute of the state of Illinois held by the supreme court of that state in *Insurance Co. v. Ruckman*, 127 Ill. 364, 376, 20 N. E. 77, Prinderville must be deemed the agent of the insurance company with respect to the transaction in hand, the question is presented whether his knowledge, prior to the issuance of the policy, of intended other insurance, will vitiate a stipulation in the policy forbidding such other insurance. It is the settled law with respect to written contracts of insurance, as well as to other written contracts, that all negotiations or agreements leading up to the written contract are merged in it, and that parol evidence of a supposed prior agreement cannot be entertained to contradict the express stipulations of the written contract. Thus, in *Thompson v. Insurance Co.*, 104 U. S. 252, 259, it was ruled that "a parol agreement, made at the time of issuing a policy, contradicting the terms of the policy itself, like any other parol agreement inconsistent with a written instrument made contemporary therewith, is void, and cannot be set up to contradict the writing." We have had occasion to speak to the same effect, and in no doubtful language. *Union Stock Yards & Transit Co. v. Western Land & Cattle Co.*, 18 U. S. App. 438, 453, 7 C. C. A. 660, and 59 Fed. 49; *Gorrell v. Insurance Co.*, 24 U. S. App. 188, 11 C. C. A. 240, and 63 Fed. 371; *Lumber Co. v. Comstock*, 34 U. S. App. 414, 18 C. C. A. 207, and 71 Fed. 477. The written contract speaks conclusively the agreement of the parties, and cannot be contradicted by parol. Therefore a supposed agreement to permit other insurance, made before the written contract, cannot avail to defeat the subsequent express stipulations of the written instrument. Much less can mere knowledge of an intention of the proposed assured to effect, or that he had effected, other insurance, avoid the conditions of the subsequent written contract. The assured knows, or is bound to inform himself, of the conditions and stipulations of his contract before its acceptance. He should not be allowed to accept the contract, and afterwards defeat an essential condition of it, through plea of ignorance of its conditions. Nor do we understand that the doctrine of waiver can have application here. A waiver is an intentional relinquishment of a known right,—an election by one to dispense with something of value, or to forego some advantage he might have taken or insisted upon. *Warren v. Crane*, 50 Mich. 301, 15 N. W. 465. Mr. Bishop thus defines the term:

"Waiver is where one in possession of any right, whether conferred by law or by contract, and with full knowledge of a material fact, does or forbears the doing of something inconsistent with the existence of the right or of his intention to rely upon it. Thereupon he is said to have waived it, and he is precluded from claiming anything by reason of it afterwards." Bish. Cont. § 792.

But manifestly there can be no waiver of a nonexistent right,—of that which does not exist. Delivery of the policy containing the stipulations against other insurance under circumstances which indicate a previous or contemporaneous parol agreement that such other insurance would be permitted cannot avail, for within the decision in *Thompson v. Insurance Co.*, *supra*, and the other cases cited, no prior or contemporary parol agreement can be set up to contradict the writing. The waiver must be subsequent to the written contract, and, to be operative, must be made not only with knowledge of the fact of other insurance, and with intent to waive the provisions of the existing contract, but must be supported by a valuable consideration, or become operative by way of estoppel. Here, subsequent to the supposed knowledge of an intent to effect other insurance, the parties stipulated by their contract that it should be void if other insurance had been or should be effected, and that no waiver of any condition of the contract should be valid unless written upon or attached to the policy. An intent to waive cannot be entertained from the mere fact of knowledge in the face of an express term of the contract made and delivered subsequent to such knowledge. There was here shown no intent or agreement to waive subsequent to the delivery of the contract, and no consideration for a waiver is disclosed, nor is any estoppel proven. There was no act or conduct upon the part of the insurance company subsequent to the delivery of the contract, inducing change of position by the assured. He knew, or should have known, of the conditions of the policy, and, so knowing them, was informed of the terms of the contract proposed by the insurance company, and with such knowledge paid the premium demanded. There was, subsequent to the delivery of the contract, no act by the insurance company prejudicial to the assured. It was the duty of the latter to have disclosed to the company the other insurance effected, and to procure to be indorsed upon the policy a written waiver of the condition. We have ruled upon the precise question in *Union Nat. Bank v. German Ins. Co.*, 34 U. S. App. 397, 18 C. C. A. 203, and 71 Fed. 473,—a case that is the counterpart of the one in hand. There, prior to the issuance of the policy, the agent of the company knew of and had himself issued other insurance upon the property covered by the policy. We there held that such knowledge could not affect the written stipulations of the subsequent contract, and that the policy declared conclusively the agreement of the parties. We are unable to distinguish that case from the one before us, and our ruling here must accord with that decision. In a proper case, and in a proper proceeding, a contract which, through error, mistake, or fraud, does not speak the actual agreement of the parties, may be reformed in equity. Such was the case in *Insurance Co. v. Ruckman*, *supra*, where reformation of the policy was sought and decreed in equity. No such case is presented here. The assured

brought suit at law upon the policy, and stands upon the very terms of his contract. He asks no reformation of it, and cannot, in this action at law, avoid its express stipulations.

Error is also assigned for certain remarks of the presiding judge during the course of the trial and upon the examination of witnesses. The brief of counsel does not, as it should, refer us to the pages of the record which are thought to contain the objectionable language. We might properly, therefore, and for that reason, decline to entertain the complaint, and in fact it appears from an examination that some of the language complained of and stated at large in the brief is not contained in the record. In view of our ruling upon the question previously considered, we think it unnecessary to pass upon the language of which complaint is made. It is sufficient to say upon the subject in general that every party in a court of justice is entitled to a fair and impartial trial of his cause, and that neither court nor counsel may rightfully use language in the presence and hearing of a jury which shall tend to excite passion or prejudice, or prevent calm, dispassionate consideration of the case. *Reynolds v. U. S.*, 98 U. S. 145, 168; *Hicks v. U. S.*, 150 U. S. 442, 452, 14 Sup. Ct. 144; *Starr v. U. S.*, 153 U. S. 614, 14 Sup. Ct. 919; *Hickory v. U. S.*, 160 U. S. 408, 425, 16 Sup. Ct. 327; *Railway Co. v. Meyers*, 24 U. S. App. 295, 304, 11 C. C. A. 439, and 63 Fed. 793. The judgment is reversed, and the cause remanded, with directions to the court below to award a new trial.

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#### UNITED STATES v. FIRST NAT. BANK OF COFFEYVILLE.

(Circuit Court, D. Kansas, Third Division. August 13, 1897.)

1. **BILLS AND NOTES—PENSION CERTIFICATE.**

A pension certificate or check drawn to the order of a person then deceased is absolutely void.

2. **BANKS AND BANKING—PAYMENT OF VOID PENSION CHECK.**

A pension check was drawn, in the regular course of business, and without knowledge of the facts, to the order of a deceased person. The individual who received it forged the payee's signature on the back, and presented it to the defendant bank, from which it passed, for collection, through two other banks, which in turn, after collection, remitted the proceeds until they reached the defendant, which paid them over to the alleged owner. From the time when the government subsequently discovered the facts, one of the intermediate banks was in voluntary liquidation, and the other was insolvent, and its assets were in the hands of a receiver, and the alleged owner of the note was insolvent. *Held*, that the defendant was liable to the government for the reimbursement of the amount collected, and that the government was not chargeable with laches.

W. C. Perry, for the United States.

J. D. McCue, for defendant.

**WILLIAMS**, District Judge. It appears by the statement of facts in this case that one Mary L. Beard was an applicant for pension; that her application was duly considered by the pension commissioner, and in due course of time the pension was allowed her, and the United States pension agent at Topeka, Kan., issued a certificate to her,

as the mother of Calvin L. Beard, a soldier in Company C of the 7th Illinois cavalry. The said pension certificate was issued on April 12, 1893, payable to the order of Mary L. Beard, in the sum of \$1,364.40. The certificate or check was inclosed in an envelope addressed to Mary L. Beard, and deposited in the mails at Topeka, Kan. It seems further from the agreed statement of facts that the said Mary L. Beard died prior to the issuance of said check, to wit, on January 7, 1893; and the letter containing the check came into the possession of E. A. Beard, her grandson, who forged or caused to be forged the signature of said Mary L. Beard on the back of said check, indorsed it himself, and on the 13th day of April, 1893, he presented the said check to the officers of the defendant bank, and represented to them that he was the holder of said check, and that the signature of the said Mary L. Beard indorsed thereon was genuine. At that time the said E. A. Beard was unknown to any of the officers of the bank, and he was required to have some person known to the officers of the bank identify him; and, being identified by some person known to the officers of the bank, it received the said check, and advanced thereon the sum of \$364.40, and placed to the credit of the said Beard the sum of \$1,000, subject to his check when the said pension check was paid. On April 14, 1893, the defendant transmitted the said check to the National Bank of Kansas City, for collection; and the National Bank of Kansas City, on April 15th, transmitted said check to the Merchants' National Bank of St. Louis for collection; and the said last-named bank, on April 17th, presented the said check to the subtreasurer of the United States, in St. Louis, Mo., and it was paid by the assistant treasurer of the United States to the said national bank. The said Merchants' National Bank remitted the amount of said check to the National Bank of Kansas City, and the National Bank of Kansas City remitted the amount to the defendant bank, in the usual course of business. At the date of discovery of said forgery by the government, and since, the Merchants' National Bank of St. Louis has been in voluntary liquidation, and the National Bank of Kansas City has been insolvent, and its assets in the hands of a receiver. Afterwards, to wit, on April 26th, the defendant bank paid to said E. A. Beard the amount remaining to his credit on deposit in said bank. The United States did not know that Mary L. Beard was dead at the date of the issuance of said check, nor until December 19, 1895, and had no intimation or knowledge concerning the same until that date. The said E. A. Beard, shortly after the payment of the amount by the said bank, became, and ever since has been, insolvent.

The questions of law involved in this case have been so often settled, and are so simple, that it would avail nothing for this court to indulge in any lengthy opinion in regard to it. The issuance of the check to said Mary L. Beard after she was dead was an act utterly void, and the check itself was absolutely void, and no act of any one could breathe into it the breath of life, or make it of any value whatever. When the defendant bank took the check from the said Beard, the grandson of the pensioner, it devolved upon it to know that he was the legal holder of the said check, and it paid the money out at

its own risk, and peril. This is true of any transaction of a similar nature, and is so held by all courts that have passed upon kindred questions. No laches of the government can be attributed in this case, and cannot possibly afford any defense to the defendant. The loss sustained is by reason of its own neglect in paying the check. It has received from the government of the United States the amount demanded in this suit, and there is no reason in law or equity why it should not be held responsible and reimburse the government in the amount paid out. True it is that, if the bank had known of the forgery prior to the payment of the last thousand dollars, it could have saved itself in that sum, but the government did not know of the forgery. It was in no attitude to know of it. The bank should have known that the indorsement was a forgery, and that the person who presented it was not the legal holder of the check. The government has discharged its full duty by having the party arrested, tried, and sentenced to the penitentiary for this offense. Under the agreed statement of facts and the law of this case, the government is entitled to recover a judgment for the amount claimed in this case, and judgment will be entered accordingly.

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#### WRIGHTMAN v. BOONE COUNTY.

(Circuit Court, W. D. Arkansas. October 3, 1897.)

##### LIMITATION OF ACTIONS—REVIVOR OF JUDGMENTS.

Where the legislature passes a statute of limitation barring the revivor of judgments by scire facias after the lapse of ten years from their rendition, and provides further that the act shall take effect and be in force from and after one year from the date of its passage, *held*, that the act applies to existing as well as future judgments, and that past judgments, which have been rendered more than ten years, are barred unless the scire facias is issued within one year from the date of the passage of the act.

This was a proceeding by scire facias to revive a judgment.

O. S. Watkins and W. F. Pace, for plaintiff.

Hill & Brizzolara, for defendant.

ROGERS, District Judge. On the 13th day of May, 1880, George M. Wrightman recovered judgment in the district court of the United States for the Western district of Arkansas, then having circuit court powers, on warrants commonly called "County Scrip," of Benton county, Ark., for the sum of \$6,280, for his debt and damage, with interest thereon at the rate of 6 per cent. per annum from the date of said judgment until paid, together with all his costs in and about said cause laid out and expended. On the 6th of August, 1881, \$1,000 was paid on the judgment, and on the 7th day of July, 1882, the second payment of the sum of \$843.46 was made, and on the 14th of April, 1883, a third payment of \$1,176 was made, and on the 18th of March, 1885, a fourth payment of \$705.47 was made. After this the judgment was assigned to W. A. Grever and Cos Altenberg, whom the

court finds still own the remainder of the judgment. On the 6th of April, 1897, the said Grever and Altenberg caused a scire facias to be issued out of the circuit court of the United States for the Western district of Arkansas, to which court the original case had, by proper orders, been transferred, under the act of congress approved the 25th day of January, 1889, and found in the twenty-fifth volume of the Statutes at Large. p. 655, to revive said judgment. At the time this judgment was recovered, and until the 8th day of April, 1891, there was no statute of limitations to the revival of a judgment in this state. The courts, however, had held that they would not revive a judgment after the lapse of 20 years, and so the law stood on April 8, 1891, when the following act of the legislature of Arkansas was passed:

"Section 1. That no scire facias to revive a judgment shall be issued but within ten years from the date of the rendition of the judgment, or if the judgment shall have been aforesaid revived, then within ten years from the order of revivor.

"Sec. 2. This act shall take effect and be in force from and after one year from the date of its passage."

More than 17 years had elapsed from the rendition of this judgment to the suing out of the scire facias, and 12 years had elapsed from the last payment on the judgment to the suing out of the scire facias.

Two questions arise: First. Whether or not the act approved April 8, 1891, applied to existing judgments, or whether it operated prospectively, and only was intended to apply to judgments thereafter rendered. A careful examination of the authorities leads the court to conclude that it was the purpose of the legislature that this act should apply to judgments then in existence, as well as those which should subsequently be rendered.

The second question is much more difficult. By the terms of the second section of the act, *supra*, it is provided that the act shall take effect and be in force from and after one year from the date of its passage. It is insisted that, if the act approved April 8, 1891, applied to existing judgments, it did not go into effect until one year from the date of its approval, and hence that it took away all remedy from the plaintiff by which he could enforce his judgment; and this position is not without authority. In *Price v. Hopkin*, 13 Mich. 318, Judge Cooley, delivering the opinion of the court, distinctly holds that, while the general power of the legislature to pass statutes of limitations is not doubted, these statutes must always allow a reasonable time after the statute goes into force within which suits shall be brought, and that a statute which denies a reasonable time within which to bring a suit is, in effect, a statute legislating the property of one person to be the property of another; and that such a statute is a palpable violation of the constitutional provision that no person shall be deprived of property without due process of law. He then proceeds to argue with much vigor that a statute can have no force or effect for any purpose before, by the terms of the act itself, it goes into effect,—citing *Charles v. Lamberson*, 1 Clark (Iowa) 442; *Cargill v. Power*, 1 Mich. 369; *Rice v. Ruddiman*, 10 Mich. 125. He refers to the case of *Smith v. Morrison*, 22 Pick. 430, and declines to follow it. In concluding the argument he says:



"If the period between the passage and the taking effect of the statute can be regarded as time allowed by the statute for bringing suit, then, in any case where by a prospective statute a time is limited for that purpose, the time should begin to run at the time when the statute is passed, and not when it takes effect. But the court hold that the intervening time is not to be counted as a part of the time limit,"—citing *Platt v. Vattler*, 1 McLean, 157, Fed. Cas. No. 11,117.

On the contrary, other courts have held that the object and purpose of the legislature in fixing a time when the act shall go into effect could not be for any other purpose than to operate as notice to persons having judgments to institute their suits before the act went into effect, and, if they failed to do so, that they would be barred. In support of that contention the following cases, which seem to me to be strongly in point, are cited: *Duncan v. Menard* (Minn.) 21 N. W. 714; *Eaton v. Supervisors*, 40 Wis. 673; *Stine v. Bennett*, 13 Minn. 153 (Gil. 138); *Burwell v. Tullis*, 12 Minn. 572 (Gil. 486); *Smith v. Morrison*, 22 Pick. 430; *Hedger v. Rennaker*, 3 Metc. (Ky.) 255.

After the most careful consideration, I am unable to assign any reason why the legislature provided that the act of April 8, 1891, should not take effect and be in force until one year from the date of its passage, except upon the theory that persons who then had judgments should sue out *scire facias* to revive them on or before one year from the date of its passage. If it does not mean that, then the second section of that act seems to me to be absolutely nugatory,—to mean nothing; and it is a well-known canon of construction that every provision of a statute shall be construed so as to permit the whole to stand. It seems to me that this second section clearly indicates what the legislature intended, namely, that this act should apply, not only to future judgments, but to past judgments; and that all judgments would be barred in ten years from the date of their rendition unless *scire facias* to revive them was issued on or before one year from the date of its passage. I conclude, therefore, notwithstanding the very able opinion of Judge Cooley in 13 Mich., that the weight of authority is against him, and that the judgment in question is barred.

#### WEED v. UNITED STATES.

(District Court, D. Montana. August 2, 1897.)

##### 1. DISTRICT ATTORNEYS—FEES IN MONTANA.

By Rev. St. § 824, district attorneys are allowed \$20 in each case tried before a jury. Section 837 provides that "district attorneys and marshals for the district of Oregon and Nevada shall be entitled to receive double fees." Supp. Rev. St. p. 767, § 16, provides that "district attorneys in the state of Idaho shall be allowed the same fees as those allowed in the district of Oregon." And by 26 Stat. 947, and 27 Stat. 223, 714, making appropriations for legislative, executive, and judicial expenses of the government for the fiscal years ending June 30th in the years 1892, 1893, and 1894, it is provided that the marshals, district attorneys, and clerks of the circuit and district courts of the districts of Washington, Montana, and North Dakota shall receive the fees and compensation allowed by law to like officers performing similar duties in the districts of Oregon and Idaho. *Held*, that for each case tried by him before a jury, in the circuit court for the district of Montana during the period affected by the last-named acts, the district attorney was entitled to a fee of \$40.

**B. SAME—FEES IN JURY CASES.**

Rev. St. § 824, allowing a specified fee to United States district attorneys for each case "tried before a jury," includes cases which are tried before a jury, although there is a mistrial, and no verdict is rendered.

**B. SAME—CRIMINAL CASES.**

Rev. St. § 824, provides that when an indictment for a crime is tried before a jury, and a conviction had, the district attorney may be allowed a counsel fee in proportion to the importance and difficulty of the case, not exceeding \$30. *Held*, that in cases covered by this provision, and also by Rev. St. § 837, Supp. Rev. St. p. 767, § 16, 26 Stat. 947, and 27 Stat. 223, 714, providing for the allowance of "double fees" in certain cases, the court may fix the "counsel fee" at \$60.

**C. SAME—FEES FOR EXAMINING LAND TITLES.**

Rev. St. § 355, prohibits the expenditure of money upon any site or land purchased by the United States for the purpose of erecting thereon any public building until the written opinion of the attorney general shall be had in favor of the validity of the title, and requires that the district attorneys of the United States, upon the application of the attorney general, shall furnish any assistance or information in their power in relation to the titles of the public property lying within their respective districts. Section 189 provides that "no head of a department shall employ attorneys or counsel at the expense of the United States, but, when in need of counsel or advice, shall call upon the department of justice, the officers of which shall attend to the same." Supp. Rev. St. p. 18, prohibits compensation or perquisites for court officers of the government beyond salary and statutory compensation, "provided this shall not be construed to prevent the employment and payment by the department of justice of district attorneys as now allowed by law for services not covered by their salaries or fees." *Held*, that a district attorney employed by the attorney general to investigate the title to land authorized to be purchased by the United States, and to make an abstract of the title, is entitled to a reasonable compensation for his services and expenses, over and above his regular salary.

**D. SAME—ACTION FOR FEES—REJECTION BY ACCOUNTING OFFICERS—EVIDENCE.**

In an action by a United States district attorney against the United States to recover the amount of a fee allowed by statute for a certain trial before a jury, the allegations of the complaint that the claim had been disallowed by the proper accounting officer, and that it remained unpaid, are sufficiently established *prima facie* by proof that the claim had been duly presented, and payment refused; and, if the defendant relies on subsequent allowance and payment, it must prove the same.

Considering the issues presented in this case, I make the following findings:

(1) I find that the plaintiff, Elbert D. Weed, is a resident and a citizen of the state of Montana. (2) That the said Weed, between the 21st day of February, A. D. 1890, and the 21st day of February, 1894, was the duly appointed, qualified, and acting United States district attorney for the district of Montana. (3) That on the 14th, 15th, and 16th day of January, 1892, the said Weed appeared in the circuit court for the district of Montana, and prosecuted the case of the United States against one Fred. Partello before a jury, which jury failed to agree, and was discharged by the said court. Subsequently the United States dismissed said cause. (4) That on the 13th day of May, 1892, the said Weed appeared in the circuit court, district of Montana, and prosecuted the case of the United States against one Amelia D. Barnum before a jury, which jury returned a verdict of not guilty. (5) That on the 16th day of May, 1892, said Weed appeared in the circuit court, district of Montana, and prosecuted the case of the United States against Bernard Leopold before a jury, which returned a verdict of guilty. (6) That on the 18th day of May, 1892, the said Weed appeared in the circuit court, district of Montana, and prosecuted the case of the United States against one Adolph Barnaby before a jury, which returned a verdict of guilty. (7) That on the 19th, 20th, and 21st days of December, 1892, the said Weed appeared in the circuit court, district of Montana, and prose-

cuted the case of the United States against James T. Collins before a jury, which returned a verdict of guilty. (8) That on the 5th day of December, 1892, the said Weed appeared in the circuit court, district of Montana, and prosecuted the case of the United States against one Alfred A. Hasler before a jury, and a verdict of guilty was returned therein. (9) That on the 24th day of February, A. D. 1893, the said Weed appeared in the circuit court, district of Montana, and prosecuted the case of James McGrath before a jury, and a verdict of guilty was returned therein. (10) That, for the services specified in the said case mentioned in the third finding above set forth, said Weed presented an account against the United States to the proper accounting officer thereof, for the sum of \$40, and that said account was disallowed. (11) That, for the services in the said case mentioned in the 4th finding above set forth, said Weed presented an account against the United States to the proper accounting officer thereof, for the sum of \$40, and said account was disallowed. (12) That for the services mentioned in every one of the cases specified in findings 5, 6, 7, 8, and 9, above set forth, said Weed presented an account against the United States to the proper accounting officer thereof for the sum of \$60, and that said accounting officer allowed, in every one of said cases therein mentioned, a fee of \$30, and refused to allow the balance of the fee charged in each of said cases, namely, \$30. (13) That in every one of said cases specified in said findings 5, 6, 7, 8, and 9 the United States circuit court for the district of Montana, in which all of said cases were prosecuted, allowed said Weed, as an extra counsel fee, the sum of \$60. (14) That on the 14th day of February, 1893, the said Weed was employed and directed by the attorney general of the United States to make an examination of the title of certain lands near the city of Helena, Mont., to be deeded to the United States as a site for a military post, and forward to the department of justice at Washington, D. C., a report upon the same, accompanied by a complete abstract of the title thereof; that the said Weed performed said services; that the said services were reasonably worth the sum of \$500; that an account for said sum against the United States was presented to the proper accounting officer thereof, and by him disallowed. (15) That the said Weed was employed by the attorney general of the United States on the 9th day of February, 1893, to make an examination of the title to certain lands near the city of Bozeman, Mont., to be deeded to the United States as a site for a fish culture station, and to prepare and forward to the United States a report upon said title, together with an opinion thereon, accompanied by a complete abstract of the title thereto; that said Weed duly performed said services; that the reasonable value of said services was \$250.

As to conclusions of law, I find:

(1) That said Weed was, under the laws of the United States, entitled to a fee in each of the cases mentioned in findings 3 and 4, of \$40. (2) That the said Weed, in each of the cases specified in findings 5, 6, 7, 8, and 9, was, under the laws of the United States, entitled to a counsel fee of \$60. (3) That the said Weed, under the laws of the United States, is entitled to a reasonable compensation for his services mentioned in the finding 14; that such compensation was not covered by any sum provided as a salary for extra services as a district attorney for the United States, and should be allowed over and above any salary earned in fees as such officer. (4) That the said Weed, under the laws of the United States, is entitled to a reasonable compensation for his services mentioned in the finding 15; that such compensation is not covered by any sum provided as a salary for extra services as a district attorney for the United States, and should be allowed over and above any salary earned in fees as such officer.

The reasons that have induced me to make the above findings are set forth in the following opinion:

Elbert D. Weed, in pro. per.

P. H. Leslie and Geo. F. Shelton, for the United States.

KNOWLES, District Judge (after stating the facts as above). Many of the questions presented in this case were considered in rul-

ing upon a demurrer interposed by the United States to the complaint herein. 65 Fed. 399. By virtue of section 824, Rev. St. U. S., district attorneys are allowed \$20 in each case tried before a jury. In the act approved March 3, 1891, making appropriations for legislative, executive, and judicial expenses of the government for the fiscal year June 30, 1892, it is provided that the marshals, district attorneys, and clerks of the circuit and district courts of the districts of Washington, Montana, and North Dakota shall receive the fees and compensation allowed by law to like officers performing similar duties in the districts of Oregon and Idaho. See 26 Stat. 947. Similar statutes were passed in 1892 and 1893. See 27 Stat. 223, 714. Section 837, Rev. St., provides "that district attorneys and marshals for the district of Oregon and Nevada shall be entitled to receive double fees." In Supp. Rev. St. p. 767, § 16, it is provided that district attorneys in the state of Idaho shall be allowed the same fees as those allowed in the district of Oregon. I think, therefore, it must be conceded that, during the times the fees specified in this case were earned, the plaintiff, Weed, was entitled to double fees.

The answer denies that plaintiff is entitled to a fee of \$40 in the case of the United States against Fred. Partello. The reason assigned for a refusal to pay this fee is that there was a mistrial in the case. It appears from the evidence that Fred. Partello was indicted by a United States grand jury for the crime of rape committed on the Crow Indian reservation. To this indictment he pleaded not guilty. Upon this issue a jury was impaneled; evidence was introduced; the cause argued by the counsel, and submitted to the jury, which failed to agree, and were discharged. Subsequently, owing to the inability of the United States to produce important evidence in the case, it was dismissed, and the defendant discharged. It was claimed that this was not a trial before a jury; that, to constitute such a trial, there should have been a verdict in the case. The question is here presented as to what is meant by the term "a trial before a jury."

In the case of *Strafer v. Carr*, 6 Fed. 466, it was held that, to constitute a trial before a jury, a verdict must be returned by the jury. In *Rap. & L. Law Dict.*, under the head of "Trial," it is held that a trial by jury includes a verdict. In the case of *Hillborn v. U. S.*, 27 Ct. Cl. 547, it was held that a trial is had before a jury when the cause is submitted to it, although it disagrees. In the case of *Van Hoorebeke v. U. S.*, 46 Fed. 456, Allen, district judge, said:

"Under this statute, the district attorney is entitled to a fee of \$20. The disallowance of these items by the accounting officers rests on the fact that there was no verdict in the case, the jury in each case having been discharged by the court after all reasonable efforts to make a verdict had been exhausted. The failure of the juries to make verdicts had nothing to do with the labor of the district attorneys in the preparation and trial of the case; and he is as clearly entitled to a fee when a disagreement of the jury occurs as when a verdict is properly returned to the court."

It should be observed that the language of the statute is "a trial before a jury," and not "a trial by a jury." One of the rules for interpreting a statute is the examination into the object sought thereby. *End. Interp. St.* The object sought was undoubtedly the providing a district attorney compensation for his labor in preparing a cause

for trial, as well as in trying the same. It was not to furnish compensation for inducing a jury to return some kind of a verdict in a case. The term "trial before a jury" does not necessarily mean the same as a trial by a jury. Considering the object sought, together with the language of the statute, and I think the case of *Van Hoorebeke v. U. S.*, supra, lays down the correct rule, and that the contention in behalf of the United States cannot be maintained.

In regard to the claim of \$40 in the case of the United States against Amelia D. Barnum, the answer denied that the same was disallowed by the proper accounting officer of the national government, or that the same remains unpaid. The proofs presented in court, however, show that this claim was presented to the proper officer, and payment refused. This was sufficient to establish the allegations of the complaint. If, subsequently, this claim was allowed and paid, this fact should have been established by the defendant.

The answer does not dispute the claim for the fees in the *Barnard Leopold*, *Adolph Barnaby*, *A. Hasler*, and *James McGrath* cases. While it does not fully appear what is the contention of the United States in this matter, I suppose that it would urge the same objection to these fees as was presented in the hearing upon the demurrer in this case, namely, that the plaintiff, *Weed*, was not entitled to a counsel fee of \$60 in each of these cases, but to a fee of but \$30. At that time I said in regard to this counsel fee:

"The last clause of section 824, Rev. St., provides: 'When an indictment for the crime is tried before a jury, and a conviction had, the district attorney may be allowed a counsel fee in proportion to the importance and difficulty of the case, not exceeding thirty dollars.' It will be observed that the term used is 'a counsel fee.' In the case of *U. S. v. Waters*, 133 U. S. 208, 10 Sup. Ct. 249, this allowance is termed 'a counsel fee,' 'a fee,' 'an additional fee.' This fee, it will be observed, is to be fixed and determined as a judicial act by the court. Now, when this fee is fixed by the court, the law above referred to steps in and doubles it. To hold otherwise would be to hold that this allowance cannot be classed as a fee, and hence does not come within the purview of the statute doubling fees of certain federal officers in specified localities, which I have cited above. There is no reason that I can see for doubling the other fees of a district attorney that does not apply to this fee." 65 Fed. 400.

In the main, the language here used I have seen no reason to change. Perhaps I might have stated that the law which doubled the fees gave the court the right to fix \$60 as a counsel fee, instead of that of \$30. The statute was modified to this extent. It appears that the court in each of these cases allowed, in the account of said *Weed*, the full fee of \$60 claimed; and, as I before stated, this was determined judicially. This determination can be attacked collaterally only by showing there was no law authorizing such an allowance. The law, as I hold it, authorized this allowance, and the sum should be paid.

The next question presented for consideration is that which pertains to the charge of complainant for his services in examining the title to certain valuable lands near the city of Helena, Mont., which it was proposed to deed to the United States for a military post. The allegation in the complaint is that the said *Weed* was directed and employed by the attorney general of the United States to perform this

work. This is not denied in the answer. Section 355, Rev. St., provides:

"No public money shall be expended upon any site or land purchased by the United States for the purpose of erecting thereon any armory, arsenal, fort, fortification, navy yard, custom house, light house or other public building of any kind whatever until the written opinion of the attorney general shall be had in favor of the validity of the title, nor until the consent of the legislature of the state in which the land or site may be to such purchase has been given. The district attorneys of the United States upon the application of the attorney general shall furnish any assistance or information in their power in relation to the titles of the public property lying within their respective districts. And the secretaries of the departments upon the application of the attorney general shall procure any additional evidence of title which he may deem necessary, and which may be in possession of the officers of the government, and the expense of procuring it shall be paid out of the appropriation made for the contingencies of the departments respectively."

Under the provisions of this section, the district attorneys are to furnish any assistance or information in their power in relation to the titles of the public property lying in their respective districts. In construing the language here used according to its ordinary import, it would not require any services of the district attorneys except in regard to any other than public property. In this case the information desired was in regard to the title to property that it was contemplated would become public property. Considering, however, the object sought by the statute, and it is perhaps true that the information required was sought in just the case here presented. It has been held by four of the attorney generals of the United States that a district attorney was entitled to compensation for the services performed and the expenses incurred in investigating titles to land authorized to be acquired for sites for public buildings in their respective districts. See opinion of Mr. Cushing, 7 Op. Attys. Gen. 46; opinion of U. S. Atty. Gen. Speed, 11 Op. Attys. Gen. 431; and opinion of U. S. Atty. Gen. Browning, 12 Op. Attys. Gen. 416. These opinions were considered by Atty. Gen. Garland in a subsequent case presented to him for determination. See 19 Op. Attys. Gen. 63. In this opinion that officer points out that, before the passage of the act in which section 189 of the Revised Statute occurs, the heads of the several departments were accustomed to employ district attorneys to examine into the titles to lands sought to be purchased by the United States. Under such employment, the district attorneys performing such services received compensation for their services over and above the usual compensation allowed by law for district attorneys. Section 189 is as follows:

"No head of a department shall employ attorneys or counsel at the expense of the United States, but when in need of counsel or advice shall call upon the department of justice, the officers of which shall attend to the same."

Subsequent to the passage of this section, the services named in the complaint have been required of district attorneys by the department of justice. In discussing this point, Atty. Gen. Garland says:

"According to the construction given in practice, that repeal [that is, the repeal of the law authorizing the heads of departments to employ district attorneys for the services named] did not take away the right of a district attorney to compensation when, acting under competent authority, he performs services of the character above mentioned."

The services referred to were the examination of titles to lands sought to be purchased by the national government. The said section 189 does not say that, when district attorneys are required to perform special services for the heads of the departments, they shall not be paid therefor. The attorney general held in his opinion that the provisions of the third section of the act of June 20, 1874, are confirmatory of the above view. See Supp. Rev. St. p. 18. That section reads as follows:

"That no court officer of the government shall hereafter receive any compensation or perquisites directly or indirectly from the treasury or property of the United States beyond his salary or compensation allowed by law: provided, that this shall not be construed to prevent the employment and payment by the department of justice of district attorneys as now allowed by law for services not covered by their salaries or fees."

What services were referred to in this statute as not being covered by the salaries or fees of district attorneys? There are no statutes which particularly described such services. In the opinions of the attorney generals above referred to, such services to some extent are named. In construing the several acts in regard to district attorneys and their compensation, Mr. Cushing, then acting as attorney general, said in his opinion above referred to, when considering said section 355, Rev. St.:

"This act provides no fee for this duty, although it is required of district attorneys to make such examination of titles and abstracts thereof for the information of the attorney general, to enable him to pass on titles, according to the provisions of joint resolution of September 11, 1841. The duty is a delicate and important one, requiring legal science and much care and personal attention. On the whole, it seems to me reasonable to consider the act of 1853 as providing the fees only of the duties enumerated, and that for duties not enumerated he is to have a fee either in the analogy of those fixed by the act, or at the sound discretion of the head of the department ordering the service."

Mr. Browning entertained the same views when considering this subject. Here was a construction made which defined what were the services in one particular which were not covered by any fee allowed district attorneys. Section 771, Rev. St., defined generally the duties of district attorneys. Fees are provided for each one of these duties, but no duty is named which would embrace the examination of titles to lands for the national government. In section 770 it is provided that "for extra services the district attorney of the district of California is entitled to receive a salary of five hundred dollars, and the district attorneys for all other districts at the rate of two hundred dollars per year." This must mean extra services of district attorneys when acting in that capacity. It cannot be supposed that, should the attorney general require of a district attorney duties clearly outside of his official duties, this sum of \$200 should cover his compensation. Suppose a district attorney should be called upon to make an argument before an arbitration board or commission upon international questions; would this meager compensation be considered adequate for his services? The act of June 20, 1874, above referred to, was passed subsequent to this section 770, Rev. St. It was evidently contemplated at that time that there were services which a district attorney might be called upon to perform which

were not covered by fees named in the statute or the salary provided for in that section. The opinion of Atty. Gen. Garland was written after the passage of both acts, and his construction of the same would award to plaintiff payment for services in such matters as are here presented, over and above such salary. It is evident that such services are not considered the official services of a district attorney. His opinion upon the question of a title to lands has no official sanction. His opinion is the same as that of any other attorney at law. A construction of a statute by such eminent lawyers as the attorney generals above named, when compelled to act thereunder in their official capacity, is entitled to great weight. It should also be observed that many of the services performed in looking into the title to the premises purchased in this case were such that it would hardly be supposed a district attorney, in his official capacity, would be required to perform. The land to which the title was examined was to be devoted to a military post. From the evidence it appears that an abstract of conveyances affecting the same was made. The plaintiff seems to have examined into the amount of representation work done upon some parts of the ground, which had been located as mining claims. The fact that an appropriation of a water right had been claimed and abandoned is noted. The fact of a forfeiture of certain mining claims for a failure to perform the proper amount of work annually, as required by law, is examined into and reported upon. In some cases it is shown that representation work to the proper amount had been performed upon mining locations. I think it would hardly be claimed that the performance of such services came under the duties of a district attorney. I would also say that considering the provision of section 355, wherein district attorneys are required to furnish any assistance or information in their power to the attorney general, they should be interpreted to mean proper legal assistance or such information as an attorney might possess without exercising great industry and expense in procuring of evidence and abstracts of titles.

In regard to the claim of plaintiff for examining the title to the land purchased at Bozeman, Mont., for a fish culture station, the evidence shows that complainant procured an abstract of the title to the same, visited Bozeman, and examined the land and all matters connected with such title. The right to services in this case would come within the same rule as that expressed in regard to the former claim, above considered.

Reputable attorneys were produced in court, who testified that the services for examining into these titles were reasonably worth what was charged therefor by complainant. I am also satisfied that the charges for examining the titles to land the government was to purchase, as above stated, cannot be used to swell the salary to which district attorneys are entitled to under the statute. These services were special services. They were not services done in an official capacity. Any other attorney not a federal officer could have performed the same. Under such a condition, the person performing such services is "entitled to such compensation as the law implies; that is to say, a reasonable compensation." And this compensation



cannot be regarded as part of a salary any district attorney may be entitled to. *Converse v. U. S.*, 21 How. 463; *U. S. v. Brindle*, 110 U. S. 693, 4 Sup. Ct. 180. With this view of the case as presented, I find that complainant is entitled to the judgment prayed for in his complaint. It is therefore ordered that the complainant have judgment against the United States for \$980.

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In re MAY.

(Circuit Court, D. Montana. August 5, 1897.)

No. 472.

1. CONSTITUTIONAL LAW—INTERSTATE COMMERCE—VALIDITY OF STATE LAWS.  
To render a state statute void on the ground that it affects commerce between the states, it must involve some discrimination against goods shipped from other states, or against persons engaged in such commerce.
2. SAME—SALES OF CIGARETTES—MONTANA LAW.  
Pol. Code Mont. § 4064, subd. 15, requires all persons engaged in selling cigarettes, whether on commission or otherwise, to take out a license and pay a quarterly license fee, and also a license fee of \$10 a month. Pen. Code, § 780, renders the conducting of such a business without a license a misdemeanor, and section 19 imposes a penalty of fine or imprisonment. The applicant, residing and engaged in the business of selling cigarettes at Helena, Mont., purchased from the American Tobacco Company, in New York, a number of packages of cigarettes, which were accordingly shipped to and received by him; he also received from the company packages of cigarettes to be sold by him as its agent. The cigarettes were put up in small boxes, on each of which was an internal revenue stamp, and which were packed in a larger box for shipment. He was convicted of selling, without a license, one package of those bought by himself and one of those sent him for sale. On application for a writ of habeas corpus, *held*, that the statute above cited does not impede, restrict, or interfere with commerce among the states.
3. SAME—ORIGINAL PACKAGES.  
Where cigarettes put up in small boxes, bearing internal revenue stamps, are shipped from one state to another, the boxes constitute original packages; but when they reach their place of rest for final disposal, and are to remain there until sold to customers, they thereupon become a part of the mass of the property of the state.
4. FEDERAL AND STATE COURTS—HABEAS CORPUS.  
When it appears that the petitioner for a writ of habeas corpus is held under the judgment of a state court of competent jurisdiction, a federal court should not grant the writ unless the pivotal point has been finally decided by the supreme court, and the illegality of his detention is beyond question.

This was an application by Robert D. May for a writ of habeas corpus.

Elbert D. Weed, for petitioner.

C. B. Nolan, for respondent.

KNOWLES, District Judge. It appears from the statement of facts presented to the court, which facts are agreed to by Atty. Gen. Nolan appearing for the state of Montana, that the applicant, Robert D. May, is and was, at the time he was arrested for the offense herein-after stated, and for a long time prior thereto had been, a citizen of

Montana and a resident therein; that on the 3d day of June, 1897, and for a long time prior thereto, he, the said May, was engaged in Helena, in said state, in the sale of cigarettes; that he purchased of the American Tobacco Company, in the state of New York, a number of packages of cigarettes, to be shipped to him to Helena, Mont., and that said cigarettes were so shipped and received by the petitioner at said point; that the American Tobacco Company shipped them from the city of New York to petitioner, to the city of Helena, Mont., to be sold by him as the agent of said company, and they were received by applicant as such agent; that the cigarettes were placed in boxes, the number of 10 in each box; that on each of these boxes an internal revenue stamp was placed; that these boxes were placed in a larger box for convenience of shipment; that the said cigarettes were exposed for sale by said May in his place of business at Helena, Mont., and on the 3d day of June, 1897, at said place of business, he sold one package of those purchased by himself in New York, and also one shipped to him, to be by him sold, as the agent of the said American Tobacco Company, to one George L. Cressap. On that date a complaint was filed before a justice of the peace named John Steinmetz, by said George L. Cressap, which is as follows, to wit:

"The State of Montana vs. Robert D. May.

"Personally appeared before me this day George L. Cressap, who, being first duly sworn, complains and says that one Robert D. May did, on the 3d day of June, A. D. 1897, at Lewis and Clarke county, state of Montana, with force and arms, wrongfully, willfully, and unlawfully carry on and transact the business of selling cigarettes at retail and as a retail dealer in cigarettes, for the transaction and carrying on of which said business a license is required and prescribed to be taken out and procured from the duly elected, qualified, and acting county treasurer of said Lewis and Clarke county by the laws of the state of Montana, to wit, subdivision fifteen (15) of section 4064 of the Political Code of the said state, without at said day having taken out or procured the said license so prescribed by law as aforesaid, and without at the time aforesaid being in the possession of said license so prescribed by law for the carrying on and transacting of the said business; all of which is contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Montana. Said complainant, therefore, prays that a warrant may be issued for the arrest of the said Robert D. May, and that he may be dealt with according to law.

George L. Cressap.

"Subscribed and sworn to before me this 3d day of June, 1897.

"John Steinmetz,

"Justice of the Peace, Helena Township, Lewis and Clarke County, Montana."

Upon this complaint the said May was arrested and tried, and found guilty of the offense therein charged, and fined one dollar and costs, and adjudged to stand committed to the custody of the constable of said Helena township until such fine and costs should be paid, and in accordance with such commitment is now in custody.

The statute under which the complaint in this case was made is as follows, to wit:

"Every person who at a fixed place of business sells any goods, wares or merchandise or distilled liquors, drugs or medicines, jewelry or wares or precious metals, whether on commission or otherwise, and all butchers, must obtain from the county treasurer in which the business is transacted, and for each branch of such business, a license, and pay quarterly therefor an amount of money to be determined by the class in which such person is placed

by the county treasurer; such business to be classified and regulated by the amount of the monthly average sales made or hiring done and at the rate following those who are estimated to make average monthly sales to the amount."

Then follows the several amounts of such monthly sales, and the license charged, commencing at \$100,000 or more per month, for which a license of \$75 per month must be paid, down to a business in which the sales amount to less than \$400 per month, for which a license of \$3 per month is required.

Division 15 of this section is as follows:

"Every person or persons who is engaged in the business of selling cigarettes, cigarette papers or material used in making cigarettes, except tobacco, shall pay a license of ten dollars per month in addition to any other license herein provided for."

See Pol. Code Mont. § 4064.

Section 780, Pen. Code Mont., provides that any one who conducts any business for which a license is required, without taking out a license therefor, shall be guilty of a misdemeanor.

Section 19, Pen. Code Mont., provides that when no definite punishment is provided, every offense declared to be a misdemeanor is punishable by imprisonment in a county jail not exceeding six months, or by a fine not exceeding \$500.

Under the law defining the jurisdiction of justice of the peace courts, such a court had jurisdiction in Montana of such a misdemeanor as the one above named.

The applicant urges that the license required in this case is in contravention of that part of the constitution of the United States which gives congress control over interstate commerce; in other words, that this license interferes with such commerce or impedes it. It is claimed that the right to ship cigarettes from the state of New York to that of Montana carries with it the right to sell the same in Montana in original packages. There is no doubt but that this is the established doctrine of the federal courts. *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681. Under the authorities in the federal courts it is established that a box holding 10 cigarettes, having upon the same an internal revenue stamp, is an original package. In *re Minor*, 69 Fed. 233. In considering the facts presented in this case, we find that May "was on the 3d day of June, 1897, and for a long time prior thereto, engaged at Helena," in said state and district, in the sale of cigarettes. From this statement it is evident that the said May was engaged at Helena, Lewis and Clarke county, in the business of selling cigarettes. Said section 4064 of the Political Code of Montana, above referred to, provided a license for doing certain kinds of business. There is no discrimination against any business because it pertains to articles shipped from any other state or foreign country. The license for engaging in the business of selling cigarettes pertains to the same, whether the said cigarettes are manufactured in Montana or elsewhere. The complaint under which May was arrested, and tried and convicted, charges only that he, the said May, was conducting the business in said county and state of selling at retail cigarettes. The question then arises as to whether this law

is one that interferes or impedes or restricts in any way commerce among the states of the Union.

In the case of *Machine Co. v. Gage*, 100 U. S. 676, the question was presented to the supreme court as to whether a license tax upon peddlers selling sewing machines in the state of Tennessee was void and could not be enforced. The license was for the peddling of sewing machines, whether manufactured in the state of Tennessee or elsewhere. The court, after reviewing several of its decisions concerning statutes which it was alleged imposed restrictions upon interstate commerce, said:

"In all cases of this class to which the one before us belongs, it is a test question whether there is any discrimination in favor of the state or the citizens of the state which enacted the law. Wherever there is such discrimination, it is fatal. Other considerations may lead to the same result. In the case before us the statute in question, as construed by the supreme court of the state, makes no such discrimination. It applies to all sewing machines manufactured in the state and out of it. The exaction is not an unusual or unreasonable one. The state, putting all such machines upon the same footing with respect to the tax complained of, had an unquestionable right to impose the burden."

In the case before the court the law made no distinction as to the sale of cigarettes as to whether they were manufactured in or out of the state.

In the case of *Osborne v. Mobile*, 16 Wall. 479, the supreme court held that a license tax upon a business which included transportation beyond the state was not in violation of the national constitution, which gave congress power to regulate commerce among the states. In this case the supreme court said:

"In the second of the cases recently decided the whole court agreed that a tax on a business carried on within the state, and without discrimination between its citizens and the citizens of other states, might be constitutionally imposed and collected."

The case referred to is *Case of the State Freight Tax*, 15 Wall. 232.

In the case of *Emert v. Missouri*, 156 U. S. 296, 15 Sup. Ct. 367, the previous decisions of the supreme court upon laws affecting commerce between states are reviewed. In all these cases it appears that, to render a law void as affecting such commerce, there must be some discrimination against goods shipped from other states, or against persons engaged in such commerce. In that case it was held that a law requiring a license from a peddler of sewing machines was not void, although in the case presented the machine sold was manufactured in another state. In this case the doctrine is maintained that a license required by law upon a business, which law does not discriminate against foreign goods or persons of other states, is not in violation of the federal constitution.

The case of *In re Minor*, 69 Fed. 233, it must be confessed, is one very much like the one at bar. By the law of West Virginia, a license of \$500 was required of any one engaged in the business of selling cigarettes or cigarette paper. Cigarettes were purchased in New York of the American Tobacco Company, and shipped to Minor, in West Virginia, and were exposed by him for sale at his (Minor's) place of business, at Martinsburg, in said state. The said American

Tobacco Company consigned to said Minor certain cigarettes to be sold by him as the agent of said company. The goods were exposed for sale in original packages, and two packages sold to one Gearheardt by Minor. Minor was arrested, and made application for a writ of habeas corpus. The writ was granted, and he was discharged. Judge Goff held that the law requiring a license for the sale of cigarettes named was void, as the same had been manufactured in New York, and shipped to said Minor in West Virginia, and by him exposed for sale in the original packages. In his opinion he says:

"It will be kept in mind that the state, by this legislation, is not taxing the property imported by the petitioner as it does other property within its limits by a general and uniform tax rate, but that this tax is imposed for the privilege of selling the imported articles, and is as to them special and additional."

If this was the effect of the Virginia statute, I do not think there is any doubt but that the position taken by that distinguished judge is fully sustained by the decisions of the supreme court. I do not believe the statute of Montana can be considered as a special tax imposed for the privilege of selling the imported article. The tax imposed is upon the business of selling cigarettes, whether manufactured within the state or in another state. In that decision the learned judge states "that it is only by the sale of the imported article that it becomes mingled with the other property within the state." I am sure this position cannot be maintained. In the case of *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. 1091, the supreme court said, of a tax imposed upon a certain lot of coal shipped from Pennsylvania and still in the boats in which it was shipped, and still owned by parties in the state from which it was shipped:

"It was imposed after the coal had arrived at its destination and was put up for sale. The coal had come to its place of rest for final disposal or use, and was a commodity in the market of New Orleans. It might continue in that condition for a year or two years or only for a day. It had become a part of the general mass of property in the state."

In the case of *Robbins v. Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. 592, the supreme court again affirmed the above rule, and said:

"When goods are sent from one state to another for sale, or in consequence of a sale, they become part of its general property, and amenable to its laws, provided that no discrimination be made against them as goods from another state."

The cigarettes sold by May in this case had reached their destination and were exposed here for sale. They had reached their place of rest, and were to remain here until sold to customers. Under the rule above expressed, it would appear to me that they had become a part of the mass of the property of the state. Considering, then, that the tax in this case was upon the business of selling cigarettes, and that they had become a part of the general property of the state, I hold that the license law under consideration cannot be considered void, as in violation of any provision of the federal constitution.

There is a further point presented in this case. The license law which the applicant disregarded is a plain statute, making no discrimination against foreign goods or foreign citizens. The complaint under which the applicant was arrested charges simply a violation of

this statute. I cannot doubt that the court which tried the applicant had jurisdiction of this offense and of his person. Under such conditions, the authorities sustain the view that a federal court should not grant a writ of habeas corpus.

In the case of *Ex parte Spickler*, 43 Fed. 653, the circuit court, speaking by Judge Shiras, said:

"I do not question the existence of the power in the United States circuit court to grant writs of habeas corpus when it is alleged that a person is deprived of his liberty by state action contrary to the provisions of the federal constitution, but it is a power to be sparingly exercised. When it appears that the petitioner is held under the judgment of a state court of competent jurisdiction, before this court should grant him a discharge it should be made to appear that the illegality of his detention is beyond question; and in all cases wherein the pivotal point has not been finally decided by the supreme court, but still remains a debatable question, the circuit court should not discharge the petitioner, for this would be simply converting the writ of habeas corpus into a writ of error, by means of which this court would be asked to review the judgment of the state court upon a debatable question of law arising under the federal constitution, but which it was the duty of that court to investigate and decide."

It cannot be said that the very point presented in this case has been decided by the supreme court adverse to the right of the state to levy and collect this tax.

In the case of *Ex parte Ulrich*, 43 Fed. 661, the circuit court for the Western district of Missouri said:

"The district court of the United States has no jurisdiction, by writ of habeas corpus, to declare a judgment of a state criminal court a nullity, and discharge the petitioner from imprisonment imposed by it, where such court had plenary jurisdiction over the person, the place, the offense, and everything connected with it. In such cases it is the right and duty of the state courts to decide questions arising under the constitution and laws of the United States, and if it errs the remedy is by appeal."

The state court in this case would have the right to determine the question as to whether May was conducting the business of selling cigarettes without a license. If the evidence that he sold two packages of such merchandise on the 3d day of said June was not sufficient to show that he was conducting that business, that was an error which cannot be reviewed upon habeas corpus. It should be borne in mind, however, that it is admitted the petitioner was engaged in the business of selling cigarettes generally in Lewis and Clarke county. In the case of *Ex parte Bigelow*, 113 U. S. 328, 5 Sup. Ct. 542, a motion was made in the supreme court for permission to file a petition for a writ of habeas corpus. The question was presented as to the right to this writ. The court said:

"We are of the opinion what was done by that court was within its jurisdiction, the question thus raised by the prisoner was one which it was competent to decide, which it was bound to decide, and that its decision was the exercise of jurisdiction."

Under these circumstances the court held that the petitioner was not entitled to the writ, as the court in such a proceeding could not review the judgment of the court under which he was imprisoned. Holding, as I do, that the court under whose judgment petitioner is held in custody had jurisdiction of the offense charged in the com-

plaint before it and of the petitioner, I must maintain that this court cannot review its judgment. The writ of habeas corpus prayed for in this case is therefore denied.

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BONNETTE ARC LAWN SPRINKLER CO. v. KOEHLER et al.

(Circuit Court of Appeals, Sixth Circuit. October 11, 1897.)

No. 500.

1. PATENTS—INVENTION—CONSTRUCTION OF CLAIMS—LAWN SPRINKLERS.

The conception of a rotary lawn sprinkler, having concave wings, into which the water was delivered from one side, so as to be distributed over a semicircular area on one side of the distributing point, whereby the distribution could be made from a point near a walk, fence, or building without wetting the same, while not an invention of a primary character, yet disclosed sufficient ingenuity to prevent the application of technical rules intended to narrow the scope of patents of doubtful validity, or to impair or destroy them.

2. SAME—CONSTRUCTION OF CLAIMS—REFERENCE LETTERS.

The use of letters in a claim to designate its elements does not prevent its liberal construction.

3. SAME—INFRINGEMENT—DUPLICATION OF PARTS.

The mere duplication of parts to produce the same result does not prevent infringement, even though it may involve tributary invention.

4. SAME—LAWN SPRINKLERS.

The Bonnette patent, No. 461,415, for a lawn sprinkler having devices for distributing the water over a semicircular area on one side of the distributing point, construed, and *held* valid and infringed as to the third claim.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

This was a suit in equity by the Bonnette Arc Lawn Sprinkler Company against Frederick E. Koehler and Isaac Harter for alleged infringement of a patent for a lawn sprinkler. The circuit court entered a decree dismissing the bill, and the complainant has appealed.

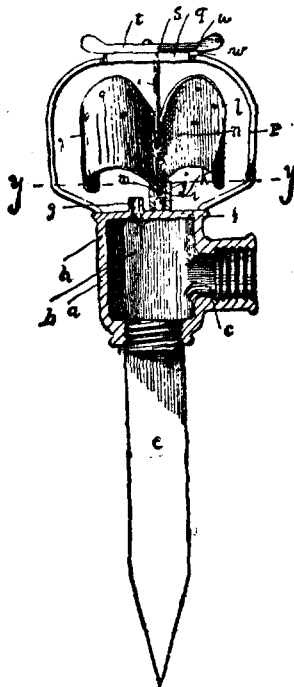
R. A. Parker, for appellant.

Cyrus E. Lothrop, for appellees.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge. This is an appeal in a patent suit from a decree dismissing the bill on the ground that the defendant's device does not infringe the patent sued on. Complainant and appellant is the owner, by assignment, of patent No. 461,415, issued to T. C. Bonnette, for a lawn sprinkler, October 20, 1891. It is said by the inventor in his specifications to be of that class of sprinklers in which a jet of water under pressure is distributed in the form of a spray over the lawn by rapidly revolving blades. One object of the invention, and the only one of importance in this case, is stated to be "to provide devices for distributing the water over a semicircular area upon one side of the distributing point, whereby the water may be distributed from a point near a walk, fence, or building without wetting the

same." The device may be best understood by reference to one of the drawings:



l, l, are curved wings with a downwardly projecting thin edge or web, m, centrally located, and transversely with the rigidly secured spindle, o, upon which the wings and web revolve. The stud, g, located at one side of the spindle or pivotal support, is the nozzle through which the water finds exit from the chamber, a, below, and is thrown against the curved and vertically inclined concave sides, n, of the wings. The operation of the device, when arranged as above, is described in the specification as follows:

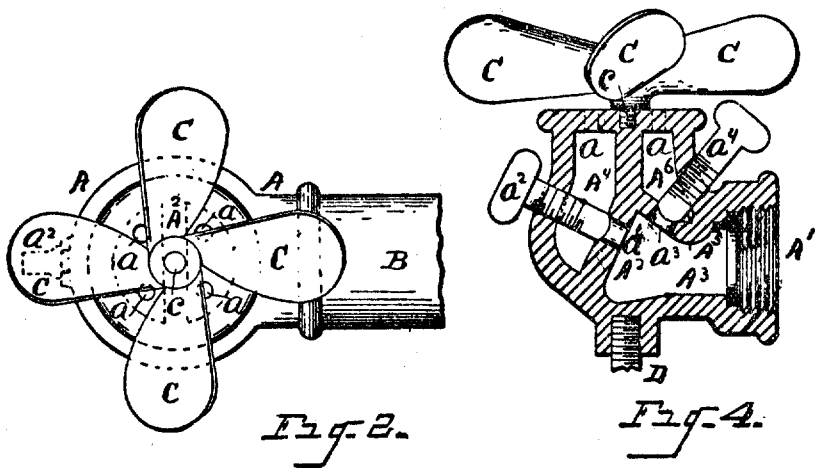
"The stream of water leaving the nozzle is caught by the web, m, as each radial portion thereof passes over the nozzle, and, the force of the stream causing the wings to revolve with great rapidity, the water is directed outward in a fine, broken spray, and distributed over a semicircular area only, the web, m, on passing the nozzle, shutting the stream from further contact with the preceding wing, so that one wing only will be acted upon by the water at a time and over the same portion of their revolution, so that each succeeding wing, as it passes over the nozzle, will distribute the water over the same semicircular area."

The claim for the device thus arranged is the third claim of the patent, and is as follows:

"In a lawn sprinkler, the combination of the wings provided at their base with a transverse web and with the upwardly inclined concave underside, n, and mounted on a centrally located pivoted support, and a nozzle, g, located on one side of the said pivoted support for the purpose set forth, substantially as described."



The device made by the defendants is arranged according to a patent, No. 510,496, issued to one Charles Anderson, December 12, 1893. In this sprinkler, called the "Jewel sprinkler," there is a casing with four holes for the delivery of water, bored through the top of the casing, 90 degrees apart, around the center of the casing, upon which is pivoted a four-bladed wheel substantially like a screw propeller. Within the casing is a perforated diaphragm, and by means of a valve the water may be cut off from two of the holes 90 degrees apart, and in this way the machine will throw four streams or two, at the will of the operator. With four streams, the machine sprinkles a full circle; with two streams, only a half circle. The device can be better understood by reference to Figs. 2 and 4 of the drawings of the Anderson patent:



The only question in the case is whether the Anderson device is an infringement of the Bonnette sprinkler. The contention on behalf of the defendant is that the prior art so limits the scope of the Bonnette patent, and claims that they can cover only the form of device shown in the drawings and specifications. The prior art shows, first, the Merrill sprinkler, in which the water is thrown up against a spiral blade or two blades arranged to revolve over the nozzle, which is in line with the axis of revolution. This sprinkles only a whole circle. The Chamberlin sprinkler is an ordinary nozzle, arranged with an adjustable plate or disk, so attached that it can be moved across the nozzle to divide the water into a spray, much as pressure by the thumb against the water at the nozzle will broaden the stream into a fan shape. This is not a rotary sprinkler at all. Finally, there is the Lawson sprinkler, in which the water is delivered from four holes in a casing arranged in much the same way as in the Anderson device, and is thrown up against a revolving head having a series of spiral blades or wings, slightly cup-shaped, so that the water, in passing through the opening in the head, and striking these spiral blades, will spray the water, cause the head to revolve, and distrib-

ute the spray in a circle. This is the whole prior art as disclosed in the record, and it is quite apparent that, while rotary sprinklers were old, in no one of them had there been any means for sprinkling in a half circle. Bonnette discovered that this could be done by putting the delivery nozzle to the side of the pivot or spindle, on which the winged divider was to be revolved, provided the wings were concave downward. Now, it is quite true that this was not a very important discovery. The art in which it was devised is not the most useful. It could not properly be described as either a pioneer or primary invention, but it does indicate a distinct step forward in the art. It certainly is not in that class of patented devices which are on the border line of mechanical skill and invention, and for which courts have devised the strictest canons of construction. It shows an ingenuity which courts are glad to reward, and which they will not allow technical rules of interpretation, intended to narrow the scope of patents of doubtful merit, to impair or destroy.

In *Blandy v. Griffith*, 3 Fish. Pat. Cas. 609, Fed. Cas. No. 1,529, the court stated the rule of infringement as follows:

"As long as the root of the original conception remains in its original completeness, the outgrowth, whatever shape it may take, belongs to him with whom the conception originated. The root of the conception must always be described in the specification and crystallized in the claim. It is the duty of the court, in giving interpretation to the patent, to give it that interpretation (if the patent is capable of it) which will secure to the inventor that which he has in fact invented."

The root of Bonnette's conception was that if, in a rotary sprinkler with concave wings, the water was delivered into the wings from one side, the area of sprinkling could be limited to that side. Anderson, who had been the foreman of the factory where Bonnette's sprinklers were manufactured, appropriated this conception, doubled the concave wings, and doubled the holes for delivering the water, and so arranged a sprinkler that two holes on one side delivered water into two concave wings of the four at a time, and secured exactly the same result as Bonnette, with one hole and two wings. It seems clear to us that Anderson took the principle of Bonnette's invention, and merely doubled the parts. In this light it is easy to bring the Anderson sprinkler within the terms of the third Bonnette claim. The Anderson sprinkler has a combination of four wings, with upwardly inclined concave sides. It has four sharp edges dividing the space below each wing from that below its neighbors. These edges are transversely located in respect to the pivot on which the wings turn, and are equivalent to two webs, *m*, crossing at right angles, and there are two nozzles located on one side of the pivotal support. It is well settled that the mere doubling of parts to produce the same result does not prevent infringement, even though it may involve tributary invention. The use of letters in a claim to designate its elements does not prevent its liberal construction. *McCormick Harvesting Mach. Co. v. C. Aultman & Co.*, 37 U. S. App. 299, 16 C. C. A. 259, and 69 Fed. 371; *Muller v. Tool Co.*, 47 U. S. App. 189, 23 C. C. A. 357, and 77 Fed. 621; *De Lamater v. Heath*, 20 U. S. App. 14, 7 C. C. A. 279, and 58 Fed. 414.

For the reasons given, we think the defendants' device does infringe the third claim of complainant's patent. The decree of the circuit court is therefore reversed, with costs, and with directions to enter a decree for the complainant, finding infringement, and enjoining its continuance, and for a reference to a master to ascertain the damages.

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RED JACKET MANUF'G CO. v. DAVIS et al.

(Circuit Court of Appeals, Seventh Circuit. October 4, 1897.)

No. 395.

1. EVIDENCE IN PATENT CASES—APPEAL.

A party who has caused a patent to be identified by a witness, but has failed to offer it in evidence, and who has objected to its consideration on appeal when desired by the opposite party, cannot thereafter have it considered by the court to his advantage.

2. PATENTS—CONSTRUCTION OF CLAIMS.

In the case of a novel and useful invention, the claims, though unskillfully drawn, should, if possible, receive a construction which will uphold the patentee's right to his real invention.

3. SAME—FORCE PUMPS.

In a patent for an improvement in double-acting force pumps, whereby the plunger and valve may be withdrawn for repairs without removing the rest of the pump from its fixed position, a statement in the specifications that the invention relates to the class of pumps "which are adapted to be suspended within a well or cistern," does not exclude pumps used in tubular and driven wells.

4. SAME—CONTRIBUTORY INFRINGEMENT.

One who, without authority, makes and sells double-acting pumps like those described in a patent, except that he does not make the lower cylinder, so that his pumps are inoperative unless used with that part, is guilty of contributory infringement.

5. SAME—FORCE PUMPS.

The Vanduzen patent, No. 241,573, for an improvement in double-acting force pumps, construed, and held valid and infringed.

Appeal from the Circuit Court of the United States for the Eastern District of Wisconsin.

This is a suit in equity, brought by the Red Jacket Manufacturing Company, the appellant, to restrain the alleged infringement of letters patent of the United States No. 241,573, issued May 17, 1881, to Benjamin C. Vanduzen, for a pump. The drawings, specification, and claim of the patent are as follows:

"United States Patent Office.

"Benjamin C. Vanduzen, of Cincinnati, Ohio.

"Pump.

"Specification Forming Part of Letters Patent No. 241,573, Dated May 17, 1881.

"Application Filed November 4, 1880. (No Model.)

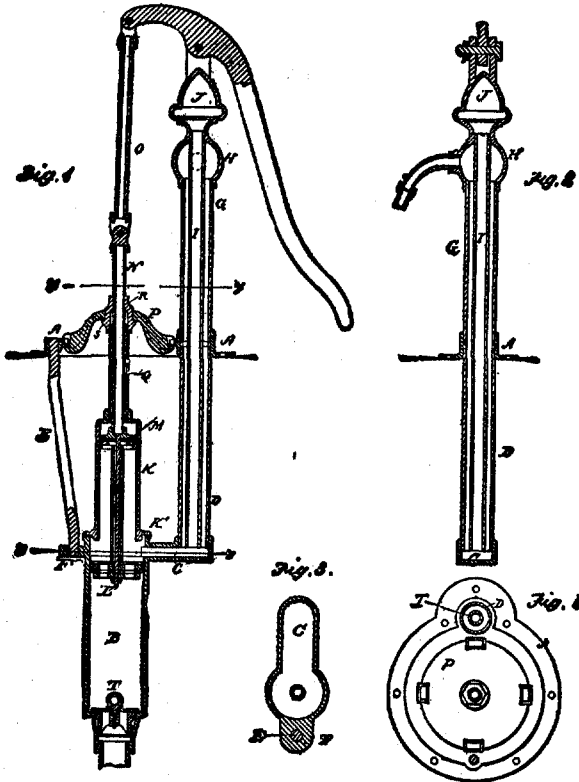
"To all whom it may concern: Be it known that I, Benjamin C. Vanduzen of Cincinnati, in the county of Hamilton, and state of Ohio, have invented certain new and useful improvements in force pumps; and I do hereby declare the following to be a full, clear, and exact description of the same, which will enable others skilled in the art to which my invention appertains to make and use it, reference being had to the accompanying drawings, forming part of this specification, in which Fig. 1 is a central vertical section of the pump constructed in accordance with my invention. Fig. 2 is a similar section, taken in a plane at right angles to the section Fig. 1. Fig. 3 is a transverse section

(No Model.)

B. O. VANDUZEN.  
Pump.

No. 241,573.

Patented May 17, 1891.



Witnesses:

Wm. H. Knight  
Rich. F. Church

Inventor:

B. O. Vanduzen  
By J. A. Bennett  
His Attorney

In the line, x, x, Fig. 1; and Fig. 4 is a section in the line, y, y, Fig. 1. Similar letters of reference in the several figures denote the same parts. My invention relates to that class of pumps which are adapted to be suspended within a well or cistern; and it has for its object to simplify and improve the construction and operation of the same in several important particulars. To this end it consists in so constructing the pump that the plungers and valves can be readily removed for repairs and other purposes without lifting the pump from the well or removing it from its fixed position. It also consists in certain details of construction and arrangement, as I will presently describe. In the accompanying drawings, A represents the flange by which the pump is suspended within the well or cistern, being bolted or secured to the curb. It may be of any size and form to support the working parts, and is cast with a large central opening, through which the plungers and valves are applied and removed. B is the main or fixed cylinder, cast at the top with a lateral water way, C, on

one side, and a lug, F, on the opposite side, to afford means for connecting it to the suspending flange. This connection is formed on one side by the discharge tube, D, screwing into the part C, and the flange, A, and on the opposite side by a screw rod, E. The screw rod is applied by screwing its lower end into the lug, F, sufficiently far to allow its upper end to swing under the flange, A, when the rod is turned to screw into said flange, and be partially unscrewed from the lug. By this construction the use of nuts is avoided, and the whole construction simplified and cheapened. The rod, E, and cylinder, D, support the main cylinder, B, and center it properly to receive the plungers and removable section of the pump cylinder. G is the standard by which the pump handle is supported, and which, together with the lower part D, forms the discharge pipe. The lower end of the tube, G, is fastened in the flange, A, and its upper end carries a cast-iron head, H, containing an air pipe, I, which terminates at its lower end in the discharge passage, C, and at its upper end in the air chamber, J, formed upon or attached to the top of cap, H. K is the upper pump cylinder or section, made of a lesser diameter than the lower cylinder, B, proportioned to the difference between the size of the plungers, one being half the area of the other. L is the lower plunger, and M the upper plunger, both supported in any convenient manner upon the plunger rod, N. The upper end of the plunger is connected with the handle by the rod, O, pivoted to the rod, N, or by other convenient means. In order to apply and remove the plungers and upper cylinder for any purpose without disturbing the lower cylinder or breaking the connection between it and the suspending flange, A, the latter is cast with a central opening of sufficient diameter to allow the upper cylinder to pass through it. This opening is closed with the cap, P, cast with a series of peripheral hooks to enter notches formed in the inner circumference of the flange, A. When the cap is turned, the hooks pass under the flange, and lock the cap in place. The lower end of the upper cylinder, K, is constructed with a flange, K', to fit upon the top of the lower cylinder, B, when the pump is put together, suitable packing being interposed to close the joint. The top of the cylinder, K, is connected by a pipe, Q, with the nut, R, in the center of the cap, P, said nut forming a guide for the plunger rod to force the cylinder down to its place, whereby the upper cylinder and plunger are properly centered with the lower cylinder. The nut, R, is formed with a flange or collar, S, which bears against the under side of the plate, P. The projecting end of the nut is adapted to receive a wrench for turning it. When turned in one direction the collar, S, bears up against the under side of the cap, P, and the flange on the lower end of the cylinder, K, is forced tightly down upon the cylinder, B. This adjustment of the nut forms a complete lock for the cylinder, and holds it properly centered beyond the possibility of casual displacement. If it becomes necessary for any purpose whatever,—such, for example, as repairing the leathers of the plungers, or lifting the lower valve, T, from its seat,—it is only necessary to unscrew the nut, R, sufficiently to loosen the cylinder and cap, P, when, by turning the cap, P, so that the hooks on its edge shall register with the notches in the part A, the cap may be readily lifted off, carrying with it the upper cylinder, K, the pump rod, and the plungers. The cap, P, need not necessarily be a closed cap, although such construction is preferable, because it will exclude the dirt; but it may be made with the central opening for the nut, and with radial arms connected with the flange, A. The valve, T, may be applied to its seat in any suitable manner, provision being made for its application and removal from the top. As shown in the drawings, it is formed with an eye to receive a hook on the end of a long rod inserted in the pump from the top. The operation of the pump does not differ essentially from the operation of other double-acting bucket-plunger pumps, the water being discharged through a nozzle in the head, H; the cap, J, and the pipe, I, serving as an air chamber.

"Having thus described my invention, what I claim is: (1) A suspended pump, having its suspending platform or flange so constructed that the plungers and plunger rod, together with the lower valve, can be lifted out without displacing the stationary pump cylinder, discharge pipe, or said suspending flange, substantially as described; for the purpose specified. (2) The suspending flange, A, made with the central opening large enough to permit the application and removal of the pump plungers and plunger rod without disturbing the main pump

cylinder or suspending flange itself, combined with a removable guide for the plunger rod, substantially as described, for the purpose specified. (3) The nut, R, the pipe, Q, and cylinder, K, combined with the cap, P, the cylinder, B, and the flange, A, having a large central opening, substantially as described, for the purpose specified. (4) The cylinder, B, suspended from the flange, A, by means of the pipe, D, having the air pipe, I, within it, and the screw rod, E, substantially as described, for the purpose specified. (5) The pump cylinders, B and K, formed with a joint between them, by which the part K can be lifted off and removed from the stationary part B substantially as described, for the purpose specified. (6) The pump cylinders, B and K, made of different diameters, and locked together by being braced from the center cap, P, substantially as described, for the purpose specified. (7) The flange, A, having an enlarged central opening, combined with the removal guide cap, P, substantially as described, for the purpose specified. (8) The flange, A, having an enlarged central opening, combined with the removable cap, P, and nut, R, substantially as described, for the purpose specified. (9) The flange, A, having an enlarged central opening, combined with the removable cap, P, adjusting nut, R, pipe, Q, and detachable cylinder, K, substantially as described, for the purpose specified. (10) The combination with the removable cap, P, suitably supported, and detachable cylinder, K, of the adjustable nut, R, and pipe, Q, substantially as described, for the purpose specified. (11) The cylinder, B, cast with a water way, C, on one side, and a lug, F, on the opposite side, for the connection of the devices by which said cylinder is suspended from the flange, A, substantially as described, for the purpose specified.

"The foregoing specification of my invention signed by me this 22d day of October, A. D. 1880.

Benjamin C. Vanduzen.

"Witnesses:

"E. A. Ellsworth.

"Joseph Cox, Jr."

The answer asserted that the claimed invention was not original with Benjamin C. Vanduzen, and was not novel, but had been long in use before the granting of the patent, and had been published, and generally known, used, practiced, and published for more than two years prior to the application for the patent; and also denied infringement. The evidence disclosed that it was old in the art to remove plungers and valves from single-acting pumps for the purpose of repairs without lifting the pump from the well or removing it from its position. The distinction between single and double acting pumps is thus accurately stated by counsel: "All wells employing a bucket-plunger pump to lift or raise water require a water-conducting tube or well pipe extending from the water-bearing strata, to which the well is sunk, to the surface. At a suitable point above the water level (seldom more than twenty-five feet) a foot valve is placed within this pipe, which permits the water to pass upwards through it, but prevents the water from receding or escaping back there through and returning to its original body. The water is lifted up through this foot valve through the medium of a plunger rod reciprocating in said pipe or tube, which has a bucket or plunger on its lower end. This plunger rod terminates a short distance above the foot valve, and is connected at its upper end to a lever or handle by which it is reciprocated. The bucket or plunger is usually an open circular frame having a leathern packing surrounding its circumference, whereby its diameter is made to correspond to the bore of the pipe within which it moves, and the openings in said plungers are so closed that the water can pass upward through it, but not downward. Single-acting pumps have only the one bucket or plunger, just described, on the lower end of the plunger rod, and their operation is such that on the up-stroke the water is sucked up through the contiguous foot valve, and on the down-stroke the bucket passes through the body of water held above and by this foot valve, and, getting under it, lifts the water on its next up-stroke. Each up-stroke of the said bucket or plunger increases the column of water above it in the well pipe until finally it flows out of the discharge pipe of the pump. Double-acting pumps have, in addition to this one bucket or plunger of the single-acting pump, a plunger secured to the plunger rod at a point nearer its upper end, which is constructed in every substantial respect like

the lower plunger except that the water does not pass through it. The operation of the lower plunger in a double-acting pump is the same as the one plunger of the single-acting pump. The office of the upper plunger is to force the surplus water that has risen above the lower plunger during its up-stroke out of the discharge pipe of the pump during the down-stroke of said upper plunger. The portion of the well pipe within which the plunger or bucket on the lower end of the plunger rod moves is a cylinder, which every pump of the class under consideration must positively have in order to be practically useful. In double-acting pumps this cylinder is designated the 'lower cylinder,' to distinguish it from the part in which the upper plunger moves, and its presence in the double-acting force pump is absolutely necessary."

The testimony also showed that suspended pumps are those whose superstructure is sustained by the platform upon which the standard of the pump rests; that tubular well pumps are those used in wells which are drilled or bored out until water is reached, and the well tubing sunk into the well simultaneously with the drilling or boring, or subsequently driven down into the well to the water-bearing strata; that driven-well pumps are those used in wells which are made by taking a "well point," driving it into the earth, and coupling sections of well pipe thereto as it advances into the earth, until the water is reached. There was no evidence that prior to Vanduzen's invention it was possible to remove the plunger, plunger rod, and lower valve in any double-acting pump, whether suspended, tubular-well, or driven-well pump, without unfastening the pump standard, and lifting the entire pump mechanism. The expert Bates, a witness for the complainant below, testified that so far as he knew the removing of buckets and cylinders in double-acting pumps without disturbing the stationary pump was new and novel to mechanics. Upon cross-examination the following question was propounded to witness: "Will you examine R. A. McCauley's patent for double-acting pump patented August 29, 1865, and state whether or not that pump is so constructed that the buckets and valves may be taken out without disturbing the stationary pump. That pump is used for the purpose of pumping water, oil, and other liquids, and it is so specified in the patent." The question was objected to by complainant below for want of notice under section 4920 of the Revised Statutes. The witness answered, "Yes." The paper or patent shown the witness by counsel for the defendant below was marked by the examiner as "Defendants' Exhibit X," but was not introduced in evidence by the defendants, and was not considered by the court below except as described in the question and answer, and the patent is not in the record as presented to the court below or to this court. Upon the hearing counsel for the appellant insisted that the patent was in evidence, and should be considered by the court, and furnished a copy. Counsel for the appellee insisted that it was not in evidence, and that the court could only consider it as it was described in the question. The alleged infringing pump is designed for use in tubular wells, and (with the exception of the air pipe, I, mentioned in the fourth claim of the patent, and the possible exception of the lower cylinder, B, of the patent) is similar in construction to the pump of the patent, the relative arrangement and operation of all the parts being practically the same as that of the corresponding parts of the pump of the patent, the structural changes being immaterial. The alleged infringing pump is manufactured and sold for use in tubular wells, the plunger operating in the tubing, and a valve answering to valve, T, of the patent is placed in the lower end of the tube. At the hearing the court dismissed the bill upon the ground that the defendants' pump did not "correspond in the feature of suspension upon which the invention in the patent is predicated," and that "the omission of the lower cylinder is an essential difference, and the fact that on this distinct and stationary form of construction and use for a tubular well the tubing serves the purpose of a lower cylinder (a common essential of double-acting pumps) could only be held the equivalent of the lower cylinder of the patent under an extreme liberality of interpretation which is not applicable here." No infringement of the fourth claim is asserted.

Frank D. Thomason and James S. Harlan, for appellant.

Gabe Bouck and B. E. Van Keuren, for appellees.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

JENKINS, Circuit Judge. The problem which Vanduzen sought to solve was to so construct a double-acting pump with two cylinders that the plungers and valves could be removed for repairs and other purposes without lifting the pump from the well, or removing it from its fixed position. To do this in a single-acting pump which had but one cylinder was not difficult, and had long been practiced; but in such double-acting pump (unless in the McCauley pump, which we hereafter consider), so far as this record discloses, it was entirely novel, and unknown until the patent in suit. Vanduzen, by his invention, provided a double-acting pump with a removable upper cylinder and a lateral water way located below it, and, with the other elements and devices of the pump, it was rendered possible to remove the upper cylinder plungers and valves without removing the pump from its fixed position. This was certainly a desirable and useful accomplishment, and, if it was novel, the specifications and claims should receive a liberal construction to sustain the patent. The patent is of itself *prima facie* evidence of the novelty of the invention, and the burden of proof is cast upon him who attacks it to show that what is claimed as an invention was, at the date of the patent, old in the art. This the appellees have not done. There is much evidence to the effect that long before the patent in suit pumps were so constructed that the valves and plungers could be removed without removal of the pump from the well, or from its fixed position. And this was unquestionably true with respect to single-acting pumps having but one cylinder. But the evidence wholly fails to show that it was true with respect to double-acting pumps with two cylinders.

It is said by the appellees that this novelty of invention is overthrown by the McCauley patent. The difficulty with this contention is that, as counsel for the appellees assert and insist, the McCauley patent is not before us. The appellees caused it to be identified, but failed to introduce it in evidence, and when the appellant desired this court to consider it in evidence the appellees objected. They cannot, therefore, take any supposed advantage from a patent which they have failed to produce in evidence, and to the consideration of which they now object. Nor can we assume, from the statement of counsel for the appellees in the question proposed to the witness Bates, or from the answer of the witness to the question, that the McCauley patent was for a double-acting pump with two cylinders. The interrogatory put to the witness did not require his construction of the subject-matter of the patent whether it was a double-acting pump or whether it had one or two cylinders, but simply whether that pump was so constructed that the buckets and valves could be removed without disturbing the stationary pump. To the question propounded, an affirmative answer was given, but that is far from an assertion by the witness that the pump was other than a single-cylinder pump, such as had long been known and operated. Nor does the statement of counsel in his question designating the McCauley patent as one for a double-acting pump compel us to so regard it. Statements of counsel are not evidence; nor is the court bound by their construction of a patent which they will not permit us, under the rule invoked, to examine and consider. Bearing in mind that



the burden of proof was upon the appellees, it became their duty to present in evidence whatever would tend to show that with respect to double-acting pumps with two cylinders the invention here asserted was not novel. If, against the earnest protest of their opponent, they availed themselves of a technicality to prevent a consideration by the court of a patent which they claim will disclose want of novelty in the invention of the patent in suit, they cannot complain if the court declines to accept their unsupported assertion of the character of that patent. We therefore think that upon this record it must be held that here was a meritorious invention originating with Vanduzen.

The specification asserts that the invention relates to that class of pumps which are adapted to be suspended within a well or cistern, and in another clause of the specification it is asserted that the operation of the pump does not differ essentially from the operation of other double-acting bucket-plunger pumps, the water being discharged through a nozzle in the head, H; the cap, J, and the pipe, I, serving as an air chamber. These expressions in the specifications were thought by the court below to limit this invention to a pump suspended in a well. The court seems to have fallen into error in the statement that this removable feature was old in double-acting pumps not suspended. We are unable to find any such evidence in the record. We do not discover in the testimony that in any double-acting pump prior to the patent in suit this removable feature was present. The question then arises whether, under such circumstances, the statement in the specification and in the first claim of the patent limits this invention to a pump suspended in a well. It may not be denied that the specification and the first claim of the patent are couched in unskillful language; but in the case of a novel and useful invention the terms employed should, if possible, receive a construction which will uphold, and not defeat, the patentee's right to that which he has in fact invented. In such case the specification and claims should be read in a liberal, and not in a strict, construction. Read in such light, we are of opinion that the specification and claims cover the invention asserted with respect to all force or double-acting pumps with two cylinders. The inventor claims "new and useful improvement in force pumps," and describes the invention. He, indeed, says that it relates "to that class of pumps which are adapted to be suspended within a well or cistern"; but a pump adapted to be suspended is not necessarily a suspended pump, and such language does not, as of course, limit his invention to a pump suspended in a well or cistern. A strict construction of the expression without reference to the context would make it include single as well as double acting pumps. What, then, is the mechanical significance to be attributed to the word "suspended," as employed in this specification, and with respect to the invention described? The thought pervading the entire writing is that the pump is to be placed in a fixed position, from which it need not be removed in order to withdraw the plunger and valves for repairs; and, if such fixed position results from the driving of the pipe into the ground, or is otherwise accomplished, we cannot think that the applicability and use-

fulness of the invention are affected. Looking, then, at the specification from its four corners, and seeking to give effect to all contained within it, it seems clear to us that the invention was intended to apply to all double-acting cylinder force pumps. The result accomplished by the invention was the removal of the plunger and valves without removing the pump from its fixed position. The actual invention applies as well to tubular well, driven well, and all double-acting force pumps in which the plunger rod and lower valve could be removed without unfastening the pump standard, and lifting out the entire pump mechanism. In such pumps the tubing is in fact the lower cylinder of the patent, the plunger and plunger rod being suspended therein by and connected with the upper mechanism of the pump. The statement in the specification that "the operation of the pump does not differ essentially from the operation of other double-acting bucket-plunger pumps" should not avail to narrow the construction which we think should be given the specification. The statement is correct, having manifest reference to the operation of the pump in the discharge of water. The operation is the same. The invention, however, consists in so constructing the pump as to permit the removable feature described. Under this construction of the specification and claim, we cannot doubt that the appellees have infringed. They make and sell pumps in all essential respects like that of the patent. They do not, indeed, make the lower cylinder, but they manufacture pumps to be used in tubular wells, the tube and valve placed therein supplying the lower cylinder and valve of the patent. Their pumps are inoperative and useless unless so constructed. The case presented is therefore one of contributory infringement. *Wallace v. Holmes*, 9 Blatchf. 65, Fed. Cas. No. 17,100; *Renwick v. Pond*, 10 Blatchf. 39, Fed. Cas. No. 11,702.

The judgment is reversed, and the cause remanded for further proceedings in conformity with this opinion.

**SOCIETE FABRIQUES DE PRODUITS CHIMIQUES DE THANN ET DE MULHOUSE v. FRANCO-AMERICAN TRADING CO. et al.**

(Circuit Court, S. D. New York. August 23, 1897.)

**PATENT INFRINGEMENT SUITS—SALE BY GOVERNMENT OF INFRINGING GOODS—PRELIMINARY INJUNCTION.**

A preliminary injunction will not be granted to restrain persons from disposing of alleged infringing goods which they have purchased at a sale by the United States marshal, and which were seized by the government for undervaluation, when it appears that complainant's representative was present at the sale, and gave no notification to bidders of its claim of infringement. The fact that the marshal told him not to make such a statement is immaterial, as the marshal had no right to prevent him from giving warning.

This was a suit in equity by the Société Fabriques de Produits Chimiques de Thann et de Mulhouse against the Franco-American Trading Company and others to enjoin alleged infringement of a patent. The cause was heard on motion for a preliminary injunction.

Philip Mauro, for the motion.  
Charles E. Rushmore, opposed.

**LACOMBE**, Circuit Judge. I do not think a preliminary injunction should be granted restraining defendants from disposing of the goods purchased at the sale by the United States marshal, when the representative of the complainant was present at the sale, saw the goods bid for, and sold to defendants, and gave no notification to any one that such goods were claimed to infringe complainant's patent. The circumstance that the marshal told complainant's representative not to make any such statement does not change the situation. The marshal had neither power nor right to shut complainant off from the assertion of his claim in the presence of the bidders. In fact, it would have been fairer to all concerned if the marshal had himself announced that complainant insisted that the goods infringed his patent. No doubt, had such announcement been made, only a nominal bid for the goods would have been obtained; but that is immaterial. The federal government is not supposed to increase its revenues by selling goods, seized for undervaluation, in such a way as to impose upon bidders by what practically amounts to a misrepresentation. Motion denied.

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**PAUL BOYNTON CO. v. MORRIS CHUTE CO. et al.**

(Circuit Court, D. New Jersey. July 26, 1897.)

**1. PATENTS—PATENTABLE INVENTIONS—AGENCIES AFFORDING AMUSEMENT.**

Inventions affording amusement and diversion are classed among patentable subjects, but only the mechanical agencies employed can be patented; and unless these agencies are new either in themselves or in combination, or a new result is obtained by the co-operation of agencies, they will not be protected by a patent.

**2. SAME.**

In view of the old art of launching ships, there is no patentable invention in the combination of an inclined railway located near a body of water, and a boat-shaped car or toboggan, adapted to move downward over the railway, and, when it enters the water, to float thereon, and be propelled forward by the momentum derived from its descent.

**3. SAME—LIMITATION OF CLAIMS.**

When a claim in its natural meaning is so broad as to be invalid, the court cannot, in order to sustain it, read into it elements or restrictions which are not set out therein, and not referred to in the specifications except by implication.

**4. SAME—TOBOGGAN SLIDE—MECHANICAL EQUIVALENTS.**

In a boat-shaped toboggan, adapted to run upon an inclined railway, and enter a body of water at its foot, and be propelled forward thereon by momentum, there is no invention in providing the runners thereof with guide plates to prevent derailment, these being mere mechanical equivalents of the flanged wheels of the prior art.

**5. SAME.**

There is no invention in providing a boat-shaped toboggan, adapted for use with an inclined railway terminating on a body of water, with spray deflectors, to prevent the occupants from being splashed with water by the rapid movement of the toboggan in the water, since devices of this character have long been used for a similar purpose on boats moving swiftly through the water.

**6 SAME—PATENTABLE INVENTION.**

The Newburg patent, No. 411,255, for a combination of an inclined pleasure railway located near a body of water with a boat-shaped car adapted to be propelled upon the water by the momentum derived from its descent, is void as to all its claims, for want of patentable invention.

This was a suit in equity by the Paul Boynton Company against the Morris Chute Company and others, for infringement of certain patents for improvements in coasters or inclined pleasure railways.

P. C. Dyrenforth, for complainant.

Strawbridge & Taylor, for defendants.

**KIRKPATRICK**, District Judge. This suit was brought for the infringement of the complainant's two patents, No. 411,255, dated September 17, 1889, and No. 419,860, dated January 21, 1890. During the progress of the suit the charge of infringement as to patent No. 419,860 was withdrawn, so that the only matters for the consideration of the court are those connected with patent No. 411,255. The invention sought to be protected by this patent, which was taken out by John P. Newburg, and is held by the complainant by assignment, is stated in the specifications to relate to improvements in coasters or inclined pleasure railways; and what is claimed to be new is set out as follows:

(1) "In an inclined pleasure railway, in combination with an inclined way and track which is located or erected near a body of water, a boat-shaped car or toboggan, adapted, when it reaches the foot of the incline, to enter and float forwardly on the water, substantially as described."

(2) "In combination with an inclined railway which is located with its foot near a body of water, a boat-shaped car or toboggan, adapted to move downwardly over said inclined railway, and, entering the water at its foot, to float thereon, and be propelled forwardly thereon, by the momentum derived from its descent over the inclined railway, substantially as described."

(3) "In combination with the inclined railway having rails, E, the boat-shaped car or toboggan having runners and guide plates extending below said runners on its bottom, substantially as described."

(4) "In combination with the boat-shaped car or toboggan, the spray deflectors fixed to its sides, substantially as described."

(5) "In combination with the boat-shaped toboggan the spray deflectors and the convoluted plates fixed thereon, substantially as described."

(6) "In combination with an inclined railway which may be located near a body of water, a boat-shaped car or toboggan having runners, J, guard plates, K, and spray deflectors, I, substantially as described."

It is claimed for Newburg that he conceived and disclosed to the world a new amusement, known as "Shooting the Chutes." The agencies by which the amusement is afforded consist of an inclined plane erected adjacent to, and terminating in, a body of water, and a boat-shaped car or toboggan having runners and guides and spray deflectors, which shall not only slide down the inclined plane, but float and be propelled by momentum upon the water at the foot of the inclined plane. It appears from the record that Randall A. Harrington, on January 24, 1888, filed an application for, and on June 19, 1888, obtained, a patent, No. 384,843, for an inclined railway and water tobogganing apparatus, in which a wheel toboggan slide or inclined railway was so combined with a lake or other body of water that the momentum acquired by the car in its run down the railway should serve to carry it a considerable distance on the sur-

face of the water. This would have been in clear anticipation of claims 1 and 2 of the complainant's patent had it not been shown that prior to the date of filing Harrington's application, and as early as the summer of 1887, Newburg had put into practical use his idea of a water toboggan. It will be noticed that the Harrington patent includes no claim of patentable novelty in placing the inclined plane near by or adjacent to a body of water, as does the complainant's patent. Inventions which afford amusement and diversion are classed among patentable subjects, but only the mechanical agencies employed can be patented; so that while the adaptation of certain mechanical agencies may be the means of bringing great pleasure to many, and large profits to those first in the field, unless the agencies are new either in themselves or in combination, or a new result is attained by the co-operation of the agencies, they will not be protected by law, or a monopoly of their use granted.

Inclined pleasure railways of the roller coaster and toboggan slide type were in use long before Newburg made application for his patent, and that he knew of their existence is evidenced by the fact that, in the specification of his patent (page 1, line 9), he says that his invention relates to improvements in coasters or inclined pleasure railways. In his opinion, the novelty of his invention consisted in locating his inclined railway near a lake or other suitable body of water, and adapting a car or boat-shaped toboggan, which, descending the railway by gravity, should acquire a momentum that, when it entered and floated upon the water, should propel it forwardly. The boat-shaped car was intended to descend the inclined railway by gravity, as did the roller coasters known to the prior art, and, upon reaching the bottom of the railway, was to be propelled forward by its acquired momentum, as in the case of toboggans sliding over ice. What Newburg sought to secure by his patent he has set forth in his claims, which may be considered separately. Claims 1 and 2, which have been hereinbefore set out at length, contain the same elements. Claim 2 differs from claim 1 in that it states that the car or toboggan, on entering the water, is "propelled forwardly thereon by the momentum derived from its descent over the inclined plane." Taken together, they will be found to include in combination an inclined railway located near a body of water, a boat-shaped car or toboggan adapted to move downwardly over the railway, and, when it enters the water, to float thereon, and be propelled forwardly by the momentum derived from its descent. These elements are the same as those employed in the launching of ships. There is the inclined railway located near the body of water, and terminating therein; the boat or ship to be launched, which, by the force of gravity, slides down the inclined plane, and is adapted to float upon the water, and move forwardly thereon by its acquired momentum. If from claim 1 the word "pleasure" be omitted, and in claim 2 the word "ship" be substituted for "boat-shaped toboggan," we have a structure practically identical in arrangement and operation with that used in the launching of vessels.

But it is said that if these claims 1 and 2, with a broad interpretation of their terms, may be held to describe only the ancient art

of launching ships, then the court should give them a more limited construction, by which the boat-shaped toboggans of the claims shall be boat-shaped toboggans of such form that, when they shoot from the incline to the surface of the water, they shall not ship water or splash the passengers, and so read into the claims elements not specified therein. The complainant admits that there is no description in the claims of the patent nor in the specifications of a boat-shaped toboggan which, when used in the manner described in the patent, the occupant thereof shall not be splashed, but insists that these elements are clearly implied, and that there is nothing to the contrary. The duty imposed upon the patentee by the statute is to "particularly point out and distinctively claim the part, improvement or combination which he claims as his discovery," and, "if he fail to state this fully and correctly, his remedy for the omission is by surrender and reissue." *Ice Co. v. Packer*, 24 O. G. 1273, 1 Fed. 851.

In the case of *White v. Dunbar*, 119 U. S. 47, 7 Sup. Ct. 72, the court says:

"The claim is a statutory requirement, prescribed for the very purpose of making the patentee define precisely what his invention is; and it is unjust to the public, as well as an evasion of the law, to construe it in any manner different from the plain import of its words."

The duty of the court is to construe the claims according to the plain meaning of their words; and, "if the claims are susceptible of two interpretations, that one should be chosen which upholds and vitalizes the patent." *Consolidated Fastener Co. v. Columbian Fastener Co.*, 79 Fed. 795. But this cannot be held to include the formulation of claims by reading into or adding to them elements or restrictions which are not therein set out, and not referred to in the specifications except by implication. Being unable to read into claims 1 and 2 of the patent the elements or restrictions asked for, I am of the opinion that, as set out in the patent, they are, in view of the prior state of the art, void for want of patentable novelty.

Claim 3 of the patent relates to the means by which the boat-shaped toboggan, equipped with runners, is adapted to run on rails with guide plates on the bottom of said runners extended below the same, to prevent derailment. These runners and guide plates are stated in the patent to be the equivalents of flanged wheels, well known to the prior art. Reference has been made by the defendants to the *Stoddard & Terwilliger* patent, No. 314,626, and dated March 31, 1885, and the *Staples* patent, No. 334,094, dated January 12, 1886, which show devices the substantial equivalents of the elements contained in this claim. The *Alexander* patent, No. 277,625, dated May 15, 1883, and the *Floyd* patent, No. 367,286, dated July 26, 1887, show toboggans running on inclined ways, with wheels or runners adapted to prevent lateral motion of the toboggan and consequent derailment. Claim 3 of complainant's patent makes no mention of a body of water, but refers merely to the inclined railway and the boat-shaped toboggan, equipped in such manner as to avoid derailment in its descent along the track. The devices described perform no new function in pleasure railways, and are but the mechanical equivalents

of flanged wheels and other devices set out in the prior patents referred to.

Claim 4 is for the combination of the boat-shaped toboggan with spray deflectors fixed at its sides. The sprays deflectors do not become operative until the boat enters the water, and are in the patent stated to be a preferable device to deflect the spray or water outwardly by the rapid movement of the boat, and prevent its striking the occupants. The form of the flat boat referred to in the patent is such as to accomplish the same purpose, and yet would not be within the terms of the patent. Devices to prevent the splashing of occupants of boats moving swiftly through the water were known before the date of the Newburg patent; and examples of construction to equip the sides of boats with outwardly inclined dashboards, which are the equivalents of spray deflectors, are shown in patent No. 282,853, issued to M. F. Davis, dated August 7, 1883, and No. 239,872, to Charles T. Lonial, dated April 5, 1881, and others to which reference has been made. I find no patentable novelty, in view of the prior state of the art, in attaching these old and well-known devices for deflecting outward the waves through which the boat rides, and so protecting its occupants from being splashed with spray, to the boat-shaped toboggan of the complainant.

Claim 6 is for the combination of an inclined railway, which may be located near a body of water, a boat-shaped car or toboggan, having runners, J, guard plates, K, and spray deflectors, I. We have seen that all of these elements are old in the art, and that they are not of themselves possessed of any patentable novelty. Do they combine in operation, and by their joint effort produce a new effect? "A combination of old devices, in order to be patentable, must contain (1) a novel assemblage of parts exhibiting invention; (2) the co-operation of these parts producing a new result." *Hoffman v. Young*, 2 Fed. 74. The learned judge, in the opinion above quoted, defines clearly the meaning of "co-operation": "The courts do not mean merely acting together or simultaneously, but unitedly, to a common end,—a unitary result. Each and every part must have its sub-function to perform, and each must have a certain relation to or dependence upon the other." What relation to or dependence upon the inclined railway do the spray deflectors bear? The near-by body of water does not affect the action of the guard plates, nor is the action of any element in the combination in any way dependent upon that of any other. The guard plates, K, and the runners, J, perform the same functions as when used in other apparatus in which boats and cars and toboggans run upon inclined ways. The boat-shaped toboggan is drawn down the inclined railway by force of gravity, as boats have been so drawn when launched since the early days. The guard plates and runners keep the boat upon the track or rails until it is launched upon the water, and the spray deflectors throw outward the water through which the boat rides. Each acts independently of the other, and each performs the same function that it did before they were united. "In a combination of old elements, in order to be patentable, all the parts must so act that each qualifies every other. It is not enough that these independent parts are conveniently asso-

ciated in one machine, if each performs the same function it did before they were united. They must be so connected that the new result is due to their co-operative action." *National Progress Bunching-Machine Co. v. John R. Williams Co.*, 44 Fed. 191, and cases there cited; *Green v. Soda-Fountain Co.*, 24 C. C. A. 41, 78 Fed. 119. Claim 6 does not comply with the requirements of setting out a patentable combination, and must therefore be held to be invalid.

On the whole case, for the reasons given, the bill should be dismissed.

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ROEHR v. BLISS et al.

(Circuit Court, D. Connecticut. September 21, 1897.)

**PATENTS—INVENTION—DOOR AND WINDOW FRAMES.**

The Boda patent, No. 385,233, for an improved interior door or window frame constructed in two sections divided longitudinally, and adapted to be applied to the wall opening from opposite sides, and then connected together, so that the frames may be completed in the factory, and thus facilitate the rapid finishing of the building, is void for want of patentable invention.

This was a suit in equity by Charles Roehr against Watson H. Bliss & Sons for alleged infringement of a patent for improved interior door or window frames. The cause was heard on a motion for preliminary injunction.

Charles L. Burdett, for complainant.

William E. Simonds, for defendants.

SHIPMAN, Circuit Judge. This is a motion for a preliminary injunction to restrain the defendants from the infringement of the first three claims of letters patent No. 385,233, dated June 26, 1888, issued to William J. Boda, for an improved interior door frame or window frame. The old and the patented method of making door frames and window frames is described by Mr. George Keller, a well-known architect, in his affidavit for the complainant, as follows:

"The old method of finishing the interior of buildings, as to the woodwork trimmings in the door and window openings, was to frame up these openings by cutting strips of wood to proper length and size, jointing the pieces, securing them in place, and then fitting and finishing by painting, varnishing, or otherwise, which method consumed a great deal of time. By the use of the Boda method, under patent No. 385,233, referred to, about four months' time in the finishing of this building for the Pope Manufacturing Company, heretofore referred to, was saved, as compared with the time that would have been required to finish with the wooden trimmings within the building under the old system. I understand the main feature of the invention to reside in making the trimmings, as a door frame, in two sections, divided longitudinally, and adapted to be applied to the wall opening from opposite sides, the facings having interlocking parts."

The interlocking of the two parts of the frame is not a necessary feature of the invention, for the patentee says in his specification that:

"It will be understood that my invention is not limited to the use of such interlocking jamb, as other methods of connecting the two parts of the completed frame may be employed. Furthermore, while one of the principal



objects of my invention is to so construct and apply the door frame that all nails, screws, and fastening devices, both for securing the component parts of the frame together, and for attaching the completed frame to the wall, are concealed from view, and a smooth and perfect finish obtained, it will be understood that a portion of the advantages of my invention may be derived by securing the two parts of the completed frame to the wall by means of screws or other fastening devices inserted through the facings from the outside, in which event their outer ends might be ornamented as desired, or might be concealed from view by the application of putty and paint in the usual manner."

The first three claims of the patent are as follows:

"(1) As a new article of manufacture, a completed door frame, consisting of the facings and the jamb divided longitudinally in two parts, the sections being secured to opposite facings, and adapted to be applied to the wall opening from opposite sides, substantially as described.

"(2) As a new article of manufacture, a completed door frame, consisting of the facings and an interlocking jamb divided longitudinally in two parts, the sections being secured to the opposite facings, and adapted to be applied to the wall opening from opposite sides, and locked together, substantially as described.

"(3) As a new article of manufacture, a completed door frame, consisting of the facings and the jamb divided longitudinally in two parts, having their abutting faces tongued and grooved, respectively, the sections being secured to the opposite facings, and adapted to interlock with each other when the two parts of the frame are applied to the wall opening from opposite sides, substantially as described."

It will be noticed that claim 1 describes no means by which the two parts of the jamb are to be secured together, while claims 2 and 3 call, respectively, for an interlocking jamb, and a jamb with the abutting faces tongued and grooved. The invention of the first claim is for a window frame, substantially completed in two sections before they are put into the window opening. Each of the sections has one part of a divided jamb. The facings on the opposite sides of the wall are secured to the respective sections, and the divisions of the jamb can be secured to each other and to the studding or wall in any proper way. The defendants have made the door frames for a building in Hartford by dividing the jamb vertically along the center, and fastening to the respective sections the facings which are to appear on the opposite sides of the wall. These sections were finished in the factory, and were then placed in a completed form in the building. The two sections were inserted in the opening in the wall from opposite sides, and were united by a tongue and groove strip. The lengthwise joint between the sections of the door jamb was covered by a rebate strip, which was secured in place by nails or screws. It may be assumed that the first three claims were infringed.

The Boda system of making door finishings is of advantage to builders or individuals who have large contracts or orders to be expeditiously filled. The frames are made in woodworking factories, where the whole work of framing, fitting, casing, oiling, polishing, and drying is expeditiously completed, in comparison with the slow method of constructing the entire woodwork upon a building by the same carpenters. This is simply saying that the system of manufacture upon a large scale, by the division of labor into departments, and the assistance of machinery, is far more expeditious, and in some cases more productive of good results, than the system of labor upon a small

scale, by workmen who take all the progressive steps of manufacture by the aid of ordinary tools. This saving of time, as the result of a business system, has little bearing upon the question of patentability. The patent is for an article of manufacture, and, in order to determine the question of patentability, it is necessary to see whether there is anything, either in the completed article or in the course of construction of the article made under the protection of the patent, which differs materially from the old article or its mode of manufacture under the old-fashioned method.

There is no novelty in the frame as a whole. It is made in the way in which frames have always been made, and with the same parts, and with the same mechanical characteristics, that they have always had, and all the steps in the manufacture are the same. The difference in the method or course or mechanical means of construction is that in one case the separate parts of the sections are nailed together or mechanically united together before they are put in the wall opening, and in the other case the parts of the frame are placed in the wall opening separately, and are then united together. In the one case the pieces are assembled in the factory, and the window frames are sent by the car load to the building, and in the other the same pieces are gradually assembled in the building, and are then fitted and framed together. No patentable invention can be perceived in the modern article. The steps by which it progresses from a board to a frame are the customary steps. The improvement is not in the article, nor in its method of construction, but in the business system under which the article is made. It would naturally be supposed that this system would have made its appearance in carpenters' shops before wood-working factories were established; and, if the numerous affidavits by reputable carpenters living in Hartford are true, the supposition would be well founded. For example, one carpenter says that over 20 years ago, in the regular course of his business, he made window casings in two parts or halves; that in each half the facings and half of the jamb were fastened together before the two halves were put in place, and fastened by dowels in the window opening. This class of testimony is repeated by several builders. Three of them say, in substance, that "the idea of making and joining parts of the casing of a door or window, and uniting such joined parts into a whole when the casing is put in place, for saving time, is by no means original with the said Boda. That idea and mode of procedure were practiced by carpenters in the ordinary prosecution of their business, to my knowledge, as early as 1881, and continuously ever since." One of them says that this method "is but the legitimate and inevitable result of the making of carpenter work by machinery, which the increasing competition—first felt about twenty years ago—has forced upon builders." It is not necessary, in my opinion, to consider whether these affidavits are sufficient upon the question of an anticipation of Boda's invention, as described in the first three claims, for there seems to me to have been nothing patentable in its character. The motion is denied.

## SCHULTZE v. HOLTZ et al.

(Circuit Court, N. D. California. August 23, 1897.)

No. 12,101.

## 1. PATENTS—INFRINGEMENT SUITS—PLEADING—DENIAL OF UTILITY.

A statement in a verified answer that complainant's invention is used only for gambling purposes in saloons and barrooms, and cannot be used for any other purpose, is sufficient evidence of want of utility, in the absence of testimony supporting the patent, to overcome the prima facie case made by the patent itself.

## 2. SAME—COIN-CONTROLLED APPARATUS.

The Schultze patents, Nos. 502,891 and 514,664, for improvements in coin-controlled apparatus, *held invalid* for want of utility.

This was a suit in equity by Gustav F. W. Schultze against Theodore Holtz and others for alleged infringement of certain patents for improvements in coin-controlled apparatus.

John H. Durst, for complainant.

M. H. Hernan, for defendants.

MORROW, Circuit Judge. The bill in this suit is filed to restrain the infringement of certain letters patent No. 502,891 and No. 514,664, granted to the complainant on August 8, 1893, and February 13, 1894, respectively, it being alleged that said patents are for a certain new and useful invention, to wit, certain new and useful improvements and combinations of mechanism in a coin-controlled apparatus. The answer denies, among other things, that the inventions of complainant are new and useful. On the contrary, it is specifically averred that the only use to which the complainant's inventions have been put or applied is for gambling purposes in saloons and barrooms and other drinking places in and about the city and county of San Francisco, state of California, and that the said coin-controlled apparatus cannot be used for any other purpose. Testimony was taken by the complainant, who introduced the evidence of two witnesses, tending to show that the defendants had infringed. No testimony was introduced by the defendants. Solicitor for complainant asks for a decree in his favor on the ground that the defendants have presented no evidence nor made any showing which would justify the court in refusing the complainant his decree. The defendants, however, filed a verified answer, which, in equity, in so far as it is responsive to the bill, not only makes the issue, but is testimony in favor of the defendants, and can only be overthrown by the testimony of two witnesses, or the testimony of one witness and circumstances equivalent to another, or at least sufficient to make a preponderance of evidence in favor of complainant. *Slessinger v. Buckingham*, 8 Sawy. 470, 17 Fed. 454; *Vigel v. Hopp*, 104 U. S. 441; *Fost. Fed. Prac.* (2d Ed.) p. 173, § 84. The complainant, as stated, did introduce the testimony of two witnesses, and defendants, upon cross-examination, elicited testimony which tends to show that the invention of complainant was not new and useful, and that it was a gambling device, and could be used for no other purpose. This testimony was, however, obtained over the objection of the complainant

that it was not proper cross-examination, the witnesses not having been interrogated on that subject in their direct examination. The objection appears to have been well taken, and this testimony must, therefore, be excluded. The case then stands upon the patent and the averments of the answer that the only use to which the invention has been put or applied is for gambling purposes in saloons, bar-rooms, and other drinking places in and about the city and county of San Francisco. This averment is not new matter, but it is responsive to the allegations of the bill that "complainant was the true, original, sole, and first inventor of a certain new and useful invention, to wit, of certain new and useful improvements and combinations of mechanism in a coin-controlled apparatus; \* \* \* that the said invention has been of great profit, convenience, and benefit to the public." The patent is *prima facie* evidence of the utility of the invention it describes, and a mere denial of utility in the answer to a bill for infringement is not sufficient to overcome such *prima facie* evidence. 3 Rob. Pat. § 1029. But in this case the verified answer not only denies that the invention is new and useful, but alleges a specific fact, which, if true, disposes of the question of utility. It charges directly that the apparatus is used for gambling purposes, and that it cannot be used for any other purpose. Clearly, this is an allegation which, under the rule, should be treated as testimony in favor of the defendants, and, in view of the fact that the complainant has introduced no testimony to support the patent, it is, in my judgment, sufficient to entitle the defendants to a decree in their favor. The same conclusion would probably be reached in looking at the claims and specifications of the patent upon the allegations of the answer treated as merely raising the issue of utility. In patent No. 514,664 the inventor sets forth the object of the machine as follows:

"In my previous machine and in this the main object is to return the coin deposited in the machine, or an equivalent thereof, in case a predetermined result be not arrived at; otherwise to retain said coin. This result may be of any suitable character, as, for example, the telling of a fortune, which may be effected by means of a prepared list of statements corresponding to the various positions of the indicating disk."

There is certainly no utility apparent in this device. Let a decree be entered for the defendants, with costs.

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#### HEAP V. TREMONT AND SUFFOLK MILLS.

(Circuit Court of Appeals, First Circuit. August 21, 1897.)<sup>1</sup>

No. 205.

#### 1. PATENTS—NOVELTY, UTILITY, AND INVENTION—INFRINGEMENT—CLOTH-NAPPING MACHINES.

The Gresselin patent, No. 377,151, for a cloth-napping machine of the kind known as "planetary machines," provided with cone pulleys, whereby the speed of the napping rolls may be changed through a different series of known variations, so that the energy with which the napping rolls scratch the cloth may be varied quickly and easily, without stopping the machine, covers a novel, useful, and patentable invention, though all the ele-

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<sup>1</sup> Rehearing granted October 15, 1897.

ments of the combination were old; and the patent is infringed by a machine which differs from it only in having, in place of the cone pulleys, pulleys of different diameters, which are removed and replaced to vary the speed, as desired. 75 Fed. 406, reversed.

**2. SAME—CONSTRUCTION OF CLAIMS.**

While ordinarily a patentee is entitled to all the uses and all the advantages which his invention develops, so far as the new application does not involve additional invention, yet a function not known when the patent issues, and afterwards developed, cannot ordinarily be used to broaden the construction of a claim. *Long v. Manufacturing Co.*, 21 C. C. A. 533, 75 Fed. 835, and *Boston & R. Electric St. Ry. Co. v. Bemis Car-Box Co.*, 25 C. C. A. 420, 80 Fed. 287, applied.

**3. SAME—FOREIGN PATENTS FOR SAME INVENTION—RECITALS.**

It seems that the requirement of a reference in the application to foreign patents for the same invention is a mere regulation of the patent office, which is so far reasonable that it may bar the issuance of a patent until it is complied with; but it cannot invalidate a patent once issued, unless the recital is erroneous through a willful misrepresentation or some fraudulent purpose.

**4. SAME—EXPIRATION OF PATENT PENDING APPEAL—INJUNCTION.**

The patent in suit having expired pending this appeal by reason of the expiration of the French patent, No. 141,170, for the same invention, to practically the same parties, no injunction can issue, and the remedy must be confined to an accounting.

**Appeal from the Circuit Court of the United States for the District of Massachusetts.**

This was a suit in equity by Charles Heap against the Tremont and Suffolk Mills, for alleged infringement of letters patent No. 377,151, issued January 31, 1888, to Henry Nicholas Grosselin, Fils, for a machine for napping cloth. The circuit court dismissed the bill (75 Fed. 406), and the complainant has appealed.

Edwin H. Brown, for appellant.

William A. Macleod, for appellee.

Before PUTNAM, Circuit Judge, and WEBB and ALDRICH, District Judges.

**PUTNAM, Circuit Judge.** This is a bill in equity, charging infringement, which was dismissed by the circuit court. The complainant appealed, so that the words "complainant" and "appellant" mean the moving party in each court, and the words "defendant" and "respondent" mean the alleged infringer. The suit relates to claims 1, 2, and 3 of a patent issued January 31, 1888, to one Grosselin, of Sedan, in France, for improvements in machines for napping cloth; and the court below held that those claims were so limited by the English patent to William Davis, of July 24, 1823, and the German patent to Moritz Jahr, of September 1, 1878, as well as by the state of the art generally, that the respondent cannot be held to infringe.

The patent covers a lubricating device, and perhaps some other matters, not in issue; and, so far as this suit is concerned, it shows a cloth-napping machine which employs a drum having small rolls mounted in bearings upon the periphery thereof. The rolls are covered with card-clothing, and, as the drum is revolved, they are caused to have an independent rotation on their own axes. The napping is effected by the contact of the card-clothed surfaces of the rolls. Machines of the

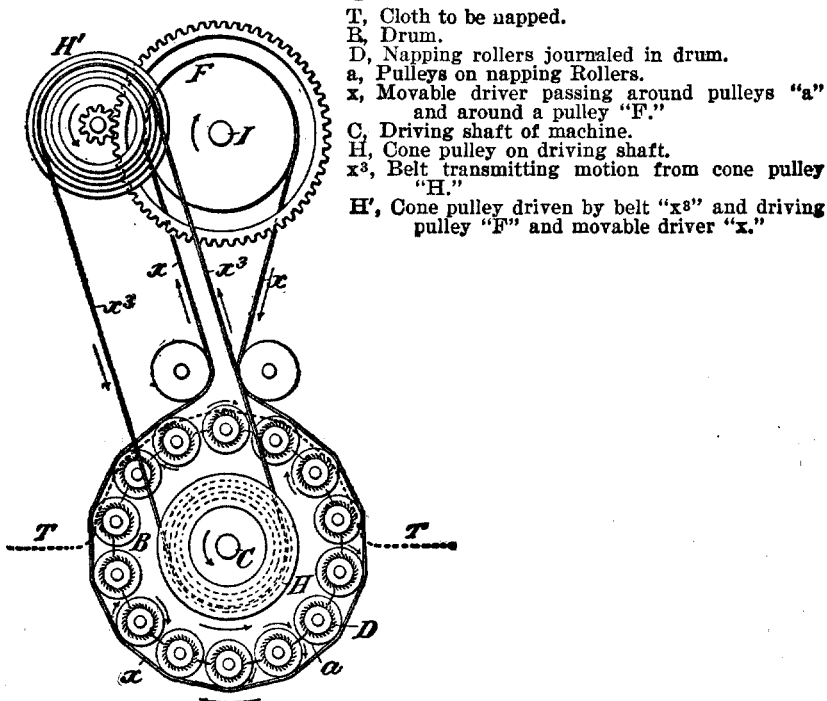
class employing such an arrangement of drum and napping rolls are termed "planetary machines," by way of distinguishing them from those which employ a large drum having the card-clothing affixed to the surface thereof. The machine is provided with cone pulleys, whereby the operator may change the speed of the napping rolls through a definite series of variations, so that the energy with which the napping rolls scratch the cloth may be varied quickly and easily, and without stopping the machine. Claims 1, 2, and 3 read as follows:

"(1) In a gig mill, the combination, with a rotary drum consisting of heads, a shaft, and a series of card or teaseling rollers journaled upon said heads, and provided with pulleys at their projecting ends, of a driving belt applied to each set of said pulleys, and devices, substantially as described, for driving said belts with varying speeds and in different directions, as described, whereby the cards are rotated simultaneously each about its own axis and about the axis of the drum, substantially as described.

"(2) In a gig mill, the combination, with a drum composed of heads, a shaft, and the working card or teaseling rollers, D D, of a shaft, I, cones, H H', belt, X<sup>s</sup>, pinion, f, gear, d, pulleys, F F', belts, X X', and pulleys, a a, substantially as described.

"(3) In a gig mill, the combination, with a drum composed of teaseling cards or working rollers, D D, heads, and a shaft, of pulleys, a a, at the projecting ends of said rollers, and of greater diameter than the rollers, a driving belt in operative relation to each set of pulleys, and devices, substantially as described, for driving said belts with varying speeds and in different directions, substantially as described."

#### Outline Drawing of the Machine in Issue.



A convenient representation of the device is shown in the accompanying drawing.

For a proper understanding of some questions to be discussed, claim 5 must be considered, though not directly in issue. It is as follows:

"(5) In a gig mill, the combination of a rotary drum carrying a series of independently rotating teaseling rollers, with a driving shaft provided with a convex parabolic step pulley, a driven shaft provided with a concave parabolic step pulley, a belt connecting the two pulleys, and means, substantially as described, for transmitting motion to the teaseling rollers, substantially as and for the purpose described."

The specification contains the following:

"The two regulating cones, H H', have each a parabolic generatrix, instead of a rectilinear one, as in ordinary speed cones. The driving cone, H, has a convex parabolic generatrix, as indicated by dotted lines, y y, and the cone, H', a concave parabolic generatrix, as indicated by dotted lines, y' y'. The sum of the diameters of two corresponding steps of the cones is thus always the same, so that the length of the belt does not change. This arrangement of parabolic cones is very important, because it allows of varying in a regular manner the degree of energy or efficiency of the machine by increasing or decreasing, always by the same amount, in shifting the belt from one set of corresponding steps to another. Two cones with rectilinear generatrices would give very unequal differences. The variation of speed and force with ordinary cone pulleys is in accordance with the law of a geometrical progression, and the result is that the difference between the fourth and fifth steps, for example, is not the same as between the second and third, while in my parabolic cone pulley the variation of speed and force proceeds in accordance with the law of an arithmetical progression."

This parabolic cone, however, is not functional with reference to the claims in issue here. The device covered by the invention is operative and useful without it, and it is so far from being an essential element that the device may be claimed and patented with it or without it, or in each way. That it has been patented in each way follows from the fact that the parabolic cone is expressly enumerated as an element in claim 5. Being thus enumerated, and not enumerated in the claims in issue, the ordinary rules of construction require us to hold that in this respect the claims in issue are broader than claim 5; and we need give this particular no further consideration.

The specification also contains the following statements:

"This object is obtained by employing teasels or cards arranged, as heretofore, spirally upon small rollers having their bearings in rotating drum heads, so as to revolve with said drum heads about the axis of the latter."

"The two regulating cones, H H', have each a parabolic generatrix, instead of a rectilinear one, as in ordinary speed cones."

These admit that the planetary system is old, and that speed cones are also old. Indeed, the speed cone and its equivalents are so common in the mechanic arts, and are of such common knowledge, that their application to any new use necessarily raises a doubt whether such new use can of itself involve invention, and raises also a presumption that any invention resting upon it must be narrow, and one of mere detail, as was held by the circuit court in the case at bar. The belt, X, which gives motion to the rolls, is also old; but it had never been used in connection with a speed cone, or its equivalent, for a napping machine built on the planetary system.

The German patent to Jahr is claimed to contain a suggestion of a combination of all the essential elements of the claims in issue, or their equivalents. It is too doubtful in this respect to be accepted,

under the rule which requires that such foreign anticipatory matter should be full and clear, stated in *Seymour v. Osborne*, 11 Wall. 516, 555, and *Eames v. Andrews*, 122 U. S. 40, 66, 7 Sup. Ct. 1073. Speed cones or their equivalents had also long been applied to cylinders carrying napping materials, but none of the witnesses who testify to this make any claim of their prior use in planetary machines, although one represents the respondent, and each possessed great experience in the art. The Perkins machine for dressing leather and the Daniels machine for dressing sewing thread have the elements of a planetary system, but neither contains devices for varying the speed of the rolls, although, perhaps, such devices could easily have been incorporated into them. The earlier patents of Grosselin, or his correspondents, embracing the device now in issue, or the essential parts thereof, cannot be regarded as anticipatory, and will be spoken of in another connection.

It is probably very true that, by selecting from the various prior machines in this particular art, all the elements of the device in suit could be brought together. But to hold that this fact always defeats novelty would be to shut out every combination of old elements from the protection of the patent laws. *Packard v. Lacing-Stud Co.*, 16 C. C. A. 639, 70 Fed. 66, 68; *Boston & R. Electric St. Ry. Co. v. Bemis Car-Box Co.*, 25 C. C. A. 420, 80 Fed. 287, 289. While, therefore, all the elements are old, the novelty of the combination is maintained. There can be no question as to its utility. Although a costly machine, the respondent corporation itself is using 41 of them, including the alleged infringing machines, as against only 36 of other construction. The prior expensive and cumbersome methods are suggested and impliedly admitted by Mr. Thomas, the respondent's superintendent, in connection with the testimony already referred to about the expedients for changing the speed of the old-style napping cylinders. He says:

"Int. With reference to changing the speed by changing the pulleys on the old napping machines, as you have stated, was that an expedient which you had to resort to frequently in the Tremont & Suffolk Mills, with the old machines, or not? Ans. Well, not very frequently. Int. Why not? Ans. From the fact that, having so large a plant and so large a number of machines, we set apart different sections or different numbers of machines for particular work, and, out of the large number of machines which were on the floor or in that department, possibly two-thirds of them were run all the time. If a new kind of goods came that needed any change in the speed, a section of machines was found that were speeded at about the right speed for that class of work; so that we were not compelled to constantly change the speed of machines, nearly as much as we should have been had we been limited in the number of machines."

Indeed, it is apparently conceded that, in the matters of economy and convenience, complainant's machine is radically useful. We have therefore remaining only the questions of patentable invention and infringement. In order to approach these understandingly, we must inquire as to the scope and importance of the change introduced by Grosselin into the art of napping cloths.

The house of lords had this device before them in December, 1895, in *Marsden v. Moser*, 73 Law T. (N. S.) 667, and *Moser v. Marsden*,



13 Rep. Pat. Cas. 24, Lord Chancellor Halsbury and Lords of Appeal Watson, Shand, and Davey sitting. The English patent was unanimously sustained. The claim made in that patent, and under consideration in the house of lords, was as follows:

"Forming raising cylinders by arranging a series of suitably covered raising rollers round a shaft at equal distances from the same, which rollers are made to receive a variable but known motion, independent of that of the so-formed raising cylinders themselves, by means of countershafts or any other suitable driving motion."

Their lordships fully considered the devices of Davis, Jahr, and Grosselin's correspondent, Haddan, the last being the same as Grosselin's earlier machine, which devices are so much pressed in this case. The lord chancellor, at page 29, merely expressed his concurrence in the opinion of Lord Watson. Lord Watson, at page 30, said:

"The improved combination does not appear to me to differ materially from its predecessors in the construction or general arrangement of any of its parts, except those which influence the motion of the individual rollers. The motive power, derived from the main shaft which turns the cylinder, is transmitted through a countershaft, which is connected with the rollers by belting, which bears upon their ends, and communicates motion to them. Between the main shaft and the countershaft, there is connecting mechanism, described as 'wheels, cones, or speed pulleys,' by means of which the revolutions of the countershaft can be easily accelerated or retarded, and can be kept steady at a suitable speed. The practical effect of that device is that, when the apparatus is at work, the revolution of the roller is independent of, or, in other words, is not regulated by, the speed at which the cylinder is revolving, and that such independent motion can be altered and steadily adjusted at any rate of velocity which will suit the character of the fabric requiring to be raised. It is shown by the proof, and it was conceded in the appellant's argument, that these results had never been attained before, and that the apparatus which the respondent claims to have invented has consequently been of great commercial utility. The invalidity of the patent was maintained on these three grounds: (1) That the improvements of the patentee do not constitute the proper subject of a patent; (2) that these improvements were anticipated by reason of their having been disclosed in earlier patents; and (3) that the claim of the patentee is bad, because it embraces matters beyond the scope of his invention, as disclosed in the specification. The first and second of these objections are, in my opinion, devoid of substance. There could hardly be more appropriate matter for a patent than the introduction of mechanism, admittedly novel, into an old combination, with the practical result of converting a comparatively defective apparatus into an efficient and useful machine. Again, the anticipation upon which the appellant chiefly relied consisted in the fact that an earlier patentee had expressed the obvious truism that the motion of the individual rollers in a raising cylinder might be either accelerated or retarded, but without indicating any method by which that object could be accomplished so as to produce a useful result."

Lord Shand said, at pages 31 and 32:

"My lords, the plaintiff, in the specification relating to his letters patent, which were obtained in 1885, has described his invention as one for 'improvements in gig mills employed in the finishing of woven fabrics.' It has been clearly proved by the evidence that the plaintiff's improvements on the machinery or apparatus which had been previously in use were substantial and beneficial. They effected a complete change in the trade of manufacturing the fabric known as 'flannelette,' and that trade, in consequence of the plaintiff's invention, became a commercial success, which it had not previously been. The combination of a cylinder with revolving rollers around its shaft, fitted with the means of teasing or carding the surface of the fabric or material to be raised, had been known in the trade for many years. In previous inventions it had been shown not only that what is called a 'planetary motion' could

be given to the rollers, which was independent (being different in degree from the motion of the cylinder), but that by means of this independent motion a definite result could be produced on the surface of the fabric to be treated. It was further a feature of Haddan's invention, in 1879, that in the same machine or apparatus a certain amount of variable motion and action on the fabric could be obtained by the application of more or less pressure to the rollers from the fixed belts which formed part of his apparatus. The action of the belts, however, depending on the degree of pressure applied, which was not regulated by any mechanical contrivance, was unsatisfactory and uncertain, and consequently the rollers did not receive what is called in the plaintiff's specification a 'variable but known motion.' The plaintiff's invention entirely overcame this serious disadvantage. By the combination adopted by him, a moving belt was used in place of the fixed belts in Haddan's invention, and by means of a countershaft driven from the cylinder, by belts passing over wheels, cones, or speed pulleys, he secured not only a variable, but a known or certain, degree of motion, which admitted of being regulated as desired, so as to vary the action of the rollers with certainty and precision, and thus to produce the effect desired on the fabric. This, it appears to me, constitutes the materiality and point of the improvements described in the plaintiff's specification; and I do not doubt that these improvements, arising from a material change in the apparatus previously employed, and producing highly beneficial results, formed good subject-matter for the plaintiff's letters patent."

Lord Davey said, at page 34:

"The second ground of objection seems to me to ignore and leave out of sight the whole point of the invention. The patentee aims at giving a 'variable, but known,' motion to the rollers. As I understand the evidence, and the case as presented to us by the appellant's counsel, previous inventors had suggested means of giving a 'known' motion to the rollers, as by a fixed cogged ring; whilst others had suggested means of giving a more or less variable motion, as by the fixed straps of Haddan, which were capable of being tightened or loosened. But the known motion was not variable, and the variable motion was not known; i. e. you could not at pleasure run your rollers at any required and known ratio of speed to the speed of the cylinder. The patentee has succeeded in effecting his object by imparting motion to the ring or strap on which the rollers bear or are made to move, and he tells you that he does this 'by means of a countershaft' in connection with a stepped or cone pulley receiving its motion from the main shaft."

The claims in the patent at issue here are more in detail than in that under consideration by the house of lords, but, in view of the state of the art, they are, for all present purposes, practically the same; and, after this forceful and lucid exposition by the house of lords of the importance and scope of this invention, there would seem to be nothing to be urged by the respondent or to be added by us. That what was accomplished by the inventor marked a long step in advance for manufacturing uses, and that, therefore, if it involved invention, it is entitled to liberal protection when the questions of equivalents and infringement are involved, seem too plain to need discussion. But, notwithstanding the expressions we have cited, and the great practical advantages derived from the introduction of the patented machine, the respondent asserts that it involves nothing but the application of well-known devices to uses in all respects of the same kind as those to which they have been before applied. It is true, as already stated, that nearly all, if not all, the elements of Grosselin's combination, were so common in the practical arts that their use anywhere must be regarded as analogous to previous uses; and especially is this true of the cone pulleys. But this does not wholly settle the matter. It raises a presumption, which, however, is not conclusive.

The rule, has, perhaps, been as well stated in *C. & A. Potts & Co. v. Creager*, 155 U. S. 597, 606, 15 Sup. Ct. 198, as anywhere, as follows:

"But, where the alleged novelty consists in transferring a device from one branch of industry to another, the answer depends upon a variety of considerations. In such cases we are bound to inquire into the remoteness of relationship of the two industries, what alterations were necessary to adapt the device to its new use, and what the value of such adaptation has been to the new industry. If the new use be analogous to the former one, the court will undoubtedly be disposed to construe the patent more strictly, and to require clearer proof of the exercise of the inventive faculty in adapting it to the new use, particularly if the device be one of minor importance in its new field of usefulness. On the other hand, if the transfer be to a branch of industry but remotely allied to the other, and the effect of such transfer has been to supersede other methods of doing the same work, the court will look with a less critical eye upon the means employed in making the transfer."

These statements of the rule show that it is not rigid, but that it merely lays the basis of presumptions which ordinarily are against patentability. A striking illustration of one instance where the presumptions were overcome is *National Cash Register Co. v. Boston Cash Indicator & Recorder Co.*, 156 U. S. 502, 15 Sup. Ct. 434, in which the court said, at page 515, 156 U. S., and page 439, 15 Sup. Ct.:

"Indeed, this use of the connecting mechanism can hardly be termed analogous to such as similar mechanisms had been previously used for; but, even if it were, the results are so important, and the ingenuity displayed to bring them about is such, that we are not disposed to deny the patentees the merit of invention."

Another striking illustration is our own decision in *Watson v. Stevens*, 2 C. C. A. 500, 51 Fed. 757. There we said at page 761, 51 Fed., and page 504, 2 C. C. A.:

"We conclude, therefore, that in applying to cases of doubt the primary rules touching what constitutes invention, and the secondary rules touching what is a 'new and useful result,' a 'new function,' or a 'new sphere of action,' we may be influenced by the facts that the improvement in question, although desired for years, was not secured until brought out by the patentee; that the product of the improved machine or process went into general use by the manufacturers for whom it was intended, and displaced wholly or in a very large degree prior products; and that while all prior products had been unsuitable, either through lack of cheapness or adaptation, the new product answered all reasonable requirements."

In *Osgood Dredge Co. v. Metropolitan Dredging Co.*, 21 C. C. A. 491, 75 Fed. 670, and in *Manufacturing Co. v. Holtzer*, 15 C. C. A. 63, 67 Fed. 907, we expressed the caution that *Watson v. Stevens* reaches a very limited class of cases; but the device at issue here has all the surrounding circumstances relied on in *Watson v. Stevens*, but to a more striking and important degree. Indeed, its great usefulness and ingenuity are especially illustrated by the cumbersome efforts of the respondent to accomplish the results of the patented device by its alleged infringing machine. The scope of the invention as stated in the patent is limited to combining in one machine a multiplication of speeds and energies. But the machine seems to have developed special functions, not shown to have been foreseen by its inventor. Among these is that referred to by Lord Shand, through which it has effected, as he says, and as the record here shows, a complete change in the manufacture of flannelettes. There is much proof in the record

pro and con about these special functions, the respondent claiming also that the work of the patented machine is not suitable for all goods, nor satisfactory to all customers. We need not, however, discuss this particular topic. While it is clear that a patentee is ordinarily entitled to all the uses and all the advantages which his invention develops so far as the new application does not involve additional invention (*Reece Buttonhole Mach. Co. v. Globe Buttonhole Mach. Co.*, 10 C. C. A. 194, 61 Fed. 958; *Wright & Colton Wire Cloth Co. v. Clinton Wire Cloth Co.*, 14 C. C. A. 646, 67 Fed. 790), yet a function not known when the patent issues, and afterwards developed, cannot ordinarily be used to broaden the construction of a claim (*Long v. Manufacturing Co.*, 21 C. C. A. 533, 75 Fed. 835, 838, 839; *Boston & R. Electric St. Ry. Co. v. Bemis Car-Box Co.*, 25 C. C. A. 420, 80 Fed. 287, 290, already referred to). Therefore, on the question of infringement, we must limit the scope of this patent to what appears on its face.

It is claimed that the patent is limited by the proceedings in the patent office, as shown by the file wrapper. We have fully discussed this topic in *Reece Buttonhole Mach. Co. v. Globe Buttonhole Mach. Co.*, *ubi supra*, and need not go over it again. The position as to the patent in suit was peculiar, arising from the fact that the patentee, who resided abroad, and was ignorant of our language, was instructing his solicitor in the United States with reference to a very complicated machine; but, within the rules laid down by us in *Reece Buttonhole Mach. Co. v. Globe Buttonhole Mach. Co.*, there is nothing which justifies us in holding that the inventor, either by implication of law or expressly, abandoned any part of his invention. We have therefore left only the question of infringement, to be determined in the light of the nature of the invention, which, though limited in its scope in a certain sense, yet, on account of its importance, is entitled to liberal protection.

The issue of infringement is well stated by the respondent. It says quite correctly:

"The public is entitled to use movable actuating belts for the napping rolls of a planetary napping machine, provided they do not employ, in connection therewith, speed-varying devices substantially such as are presented in the patent in suit for increasing or diminishing the rate of movement of such belts."

The alleged infringing machine is in all respects like the patentee's, except only that, in lieu of cone pulleys, the respondent has pulleys of different diameters, which it removes and replaces as it desires to vary the speed of the teaseling rolls. This, of course, is more cumbersome than the complainant's device, and involves delays which the latter does not involve. Thereupon the respondent states its defense on this issue as follows:

"The said devices [meaning the complainant's] are devices which are regularly embodied and organized into the machine, and whereby at will, by simple adjustment, the speed transmitted to the napping rolls may be varied as desired. The said devices cannot mean a mechanism designed to give one speed, and one speed only, so that it is impossible to vary the speed of the machine while in operation, and so that the speed can, in fact, be varied only by removing the mechanism, and substituting another of a different proportion to give a different speed. If taking off a driving pulley, and making the substitution

therefor of another driving pulley of a different size, be a speed-varying device, it certainly is not a speed-varying device such as is contemplated even remotely by the patentee, for he repeatedly states in his patent that his device permits the speed of rotation of the teasel rollers to be 'varied at will,'—an expression which clearly means that the operator may vary the speed of the parts in his machine, whenever he wishes to do so, by some such simple act as shifting the belt from one portion of the cone to another. The speed of the respondent's machine cannot be said to be capable of being varied at will, if the only way to accomplish a change in the speed is to stop the machine, take out one of the parts, supply another of a different size, and shorten or lengthen the connecting belt."

The respondent also says:

"The respondent's machine must be stopped, and practically reconstructed to a certain extent, before the speed of the napping rolls can be varied; that is, one of the belt pulleys must be removed, and replaced by another one, of a different diameter, and then the belt must be shortened or lengthened to fit the changed size of pulley. There is never in respondent's machine any mechanism or any capacity whatever for changing the speed of rotation of the rolls with relation to that of the drum. It is true that portions of the machine, and in this case the major part of it, can be retained, and, by interchanging other parts, the relative movement of the machine so changed can be varied; but this is equally true of almost any machine that was ever built. It is certainly true of the old Davis patent, where the speed of the napping rolls could be varied by removing the pinions therefrom, and the internal gear, and substituting other pinions and gear of a different size. It is true, as well, of the machines of the Morgan-Brown and Jahr patents. Nearly all machines of every kind are so constructed as to enable one or more of the driving or transmitting parts thereof to be replaced by another or others of different sizes, so as to permit of variation in the speed given or translated. If devices for driving with varying speeds thus are possessed by machines universally, then a reference in a patent to means for driving with varying speeds must be meaningless as a distinctive characterization. If the removal of one belt pulley and the substitution of another is the equivalent of the speed-varying device of the patent, then that device surely is anticipated, for it is a matter of common knowledge that the speed of driving belts in machines may be varied by changing the driving pulley, and substituting therefor one of a different size, a further change being made, if necessary, in the length of the belt to accommodate the new pulley. This mode of producing variation in the speed has been practiced in connection with napping machines."

It is not true, however, that any "mode of producing variation in the speed" by the use of cone pulleys "has been practiced in connection with napping machines" prior to the complainant's device, except with the napping cylinders to which we have referred; nor is it true that either the Davis or the other earlier machines mentioned were either used or constructed to be used with devices for varying the speed, though they might have been reconstructed to be worked as complainant's machine is worked. These facts we have already sufficiently referred to on the question of patentable invention.

On this issue the complainant says:

"To say that the machines are different, because in the machine of the patent in suit the idle pulleys are supported upon the shaft, while in respondent's machine the idle pulleys are put upon the floor, is to present a difference between words, not things; for respondent's machine is just as dependent upon its entire set of pulleys for the fulfillment of its function as a variable napper for producing different naps as is the machine of the patent in suit."

There are two leading observations to be made on this issue: First, applying the rules of construction adopted by us in *Reece Buttonhole Mach. Co. v. Globe Buttonhole Mach. Co.*, ubi supra, no verbal

criticism of the specification in this case can be availed of to deprive complainant of any part of the patentee's actual invention; and, second, it is plain that the respondent's machine was built up on the complainant's machine, and is the result of a studied effort to secure its essential advantages. The respondent has so arranged the various parts which he claims vary from the complainant's elements that the substitution of one size of pulley for another can be made by the respondent with no disturbance of any other part of the machine. By slightly varying the shaft carrying the respondent's pulley, pulleys of various dimensions might at once be attached to it, and the complainant's precise construction would be the result. We do not think the patent can be lawfully evaded, as the respondent has attempted it. The respondent's set of several pulleys of differing diameters is only complainant's cone pulley divided into sections through its axis; and the fact that the set of several pulleys differs, in that it is more cumbersome, and involves delays, is only an ordinary feature of colorable infringements, which are characterized by a mere imitative capacity, without the spirit of invention. The respondent's machine has in it the essence of Grosselin's invention, and we must hold that it infringes.

Another point of importance remains to be considered. The preamble of the complainant's patent contains a recital of several foreign patents which were taken out for the same invention. This recital is erroneous in several particulars, but the record fails to show that there was any intentional misrepresentation. So far as we can discover, the requirement of a reference to foreign patents in the preamble of an application is a mere regulation of the patent office, which is so far reasonable that it may bar the issue of a patent until it is complied with, but which cannot invalidate a patent once issued unless perhaps when the recital is erroneous through a willful misrepresentation or some fraudulent purpose. Rev. St. §§ 4887-4892. But the French patent No. 141,170, issued February 16, 1881, to Grosselin Pere et Fils, expiring 16 years from its date, is for the same invention as that now in issue. Grosselin Pere et Fils are, for all practical purposes, the same as the patentee in the case at bar. Therefore the patent in suit expired after this appeal was taken, and no injunction can now issue. The decree of the circuit court is reversed, with costs, and the case remanded to that court, with directions to enter a decree for an accounting, but to deny an injunction, on the ground that the patent expired after the appeal was taken.

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NEW YORK FILTER MANUF'G CO. v. ELMIRA WATERWORKS CO. et al.

(Circuit Court, N. D. New York. September 20, 1897.)

PATENTS—INFRINGEMENT—METHOD OF FILTRATION.

The Hyatt patent, No. 293,740, for an improved method of clarifying water by introducing into it a coagulant simultaneously with its passage through the filter, thereby avoiding the use of the settling basins of the prior art, and making the process continuous, *held* infringed by a process in which cisterns or tanks were introduced, through which the water passed

with a continuous flow in eddying currents, and which, therefore, were not the settling basins of the prior art.

This was a suit in equity by the New York Filter Manufacturing Company against the Elmira Waterworks Company and others for alleged infringement of letters patent No. 293,740, issued February 19, 1884, to Isaiah S. Hyatt, for an improved method of clarifying water. In a suit heretofore brought by the complainant against Schwarzwald and Fink in the circuit court for the Southern district of New York, this patent was sustained on final hearing, and a decree entered for an injunction and an account (61 Fed. 840), which decree was affirmed by the circuit court of appeals for the Second circuit in January, 1895 (13 C. C. A. 380, 66 Fed. 152). Subsequently a suit was brought by the complainant against the Niagara Falls Waterworks Company for infringement of the same patent, which resulted in a decree for a preliminary injunction (77 Fed. 900), which decree was affirmed by the circuit court of appeals (80 Fed. 924).

John R. Bennett, M. H. Phelps, and F. G. Fincke, for complainant.  
Frederic H. Betts, for defendants.

COXE, District Judge. I have examined with care all of the testimony relating to the only question now open—the question of infringement. In view of what has been said heretofore by this court and the circuit court of appeals it will serve no useful purpose to discuss this question at length. Suffice it to say that, in my judgment, the Elmira plant infringes the Hyatt patent. The defendants seem to entertain the opinion that they may use the Hyatt process if they use something else in connection with it. I do not think so. The real work of purification at Elmira is done by the Hyatt process. The cisterns underneath the filters may or may not be an improvement, but the filters act in precisely the same manner as those which have already been condemned by the courts. The tanks are larger than in the Niagara Case and the sedimentation is greater, but the difference is one of degree only. If a tank, through which a continuous flow of water passes in eddying currents, can become a “settling basin” the Niagara tanks are within this category as fully as those at Elmira. Tanks of this type are not the settling basins of the prior art to which the appellate court alluded in the closing sentence of its opinion.

It would have been better for the complainant if the court had voided the patent in limine rather than place a construction upon it which enables any one to infringe who has wit enough to pass the water on its way to the filter through a cistern where some of the impurities are caught. Upon the theory of the defendants, water of precisely the same degree of purity might be passed to the filter bed from two distinct sources; if conducted there direct it would be an infringement, but if passed through a tank, where the coarser impurities are caught, it would not be. In each instance the water actually filtered contains the same amount of impurities, but in the latter it is found more convenient, owing to its greater turbidity, to arrest some of the coarser impurities before introducing it to the filter bed. In both cases the Hyatt process is used.

It is due to the defendants, I think, in order to avoid further misunderstanding, to say that, in my opinion, they cannot evade the patent upon their present theory. Even though they should increase still further the capacity of the cisterns through which they pass the flowing stream it would not avail them.

The test at Elmira has been severely criticised by the complainant as unfair and misleading chiefly because lime was used and also an unusually large amount of alum. There certainly is foundation for complainant's contention that the plant could not, with good results, be operated practically as it was experimentally. Assume, however, the test to be fair, I am of the opinion that the results obtained fail to show that the defendants' cisterns are settling basins in the sense so frequently alluded to. The motion is granted.

### THOMSON-HOUSTON ELECTRIC CO. v. HOOSICK RY. CO.

(Circuit Court of Appeals, Second Circuit. July 21, 1897.)

#### 1. APPEALS IN PATENT CASES—PRELIMINARY INJUNCTION—SCOPE OF REVIEW.

On appeal from an order granting a preliminary injunction in a patent case, where the court below bases its action entirely upon a prior decision in another circuit, sustaining the patent, the circuit court of appeals is not itself constrained to adopt the rulings of such other circuit court, but is at liberty to re-examine the same, and dispose of the questions of law conformably to its own convictions, giving to the former adjudication only such weight as, in its own judgment, the same is entitled to.

#### 2. PATENTS—VALIDITY—PRIOR PATENT FOR SAME INVENTION—TROLLEY RAILWAYS.

The Van Depoele patent, No. 495,443, for a "traveling contact for electric railways," examined, and compared with the prior patent No. 424,695, to the same inventor, and *held* to be for the same invention covered by that patent so far as concerns the claims which relate to the combinations between the contact device and the suspended conductor and to the structural features of the contact device, and the later patent therefore *held* invalid as to claims 6, 7, 8, 12, and 16.

Appeal from the Circuit Court of the United States for the Northern District of New York.

This was a suit in equity by the Thomson-Houston Electric Company against the Hoosick Railway Company for alleged infringement of a patent for traveling contacts for electric railways. The circuit court entered an order granting a preliminary injunction, and the defendant has appealed.

Charles E. Mitchell, William C. Witter, and Robert N. Kenyon (Henry B. Brownell, of counsel), for appellant.

Betts, Hyde & Betts, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This is an appeal from an order granting a preliminary injunction restraining the defendant from making, using, or vending the apparatus specified in claims 6, 7, 8, 12, and 16 of letters patent No. 495,443, granted April 11, 1893, to the administrators of Charles J. Van Depoele, assignors to the complainant, for



"traveling contact for electric railways." The application for the injunction was resisted upon the ground that the patent as to these claims was void, because the inventions covered thereby had been previously patented to the same inventor by letters patent No. 424,695, granted April 1, 1890, for "suspended switch and traveling contact for electric railways." The validity of the claims, notwithstanding a similar defense, had been adjudicated at final hearing in the case of *This Complainant v. Winchester Ave. Ry. Co.*, by the circuit court for the district of Connecticut (71 Fed. 192). In granting the present injunction, the court below followed that adjudication, without attempting an independent consideration of the validity of the defense.

The preliminary question arises whether upon this appeal the court should undertake to examine, and in a sense to review, collaterally the decision in the Connecticut cause, or should confine itself to the inquiry whether, from the standpoint of the court below, the order was properly granted. We had occasion to consider this question in *American Paper Pail & Box Co. v. National Folding Box & Paper Co.*, 1 U. S. App. 283, 2 C. C. A. 165, and 51 Fed. 229, and adhere to the views which were then expressed. We said:

"While the circuit court, upon a motion for an injunction, might deem itself constrained, contrary to its own judgment, to adopt the rulings of another circuit court upon questions of law made at final hearing, this court is at liberty to re-examine such rulings, dispose of the questions of law conformably to its own convictions, and accord to the former adjudication such weight as, in its own judgment, it was entitled to upon the motion."

The former adjudication was entitled to great weight upon the application for the preliminary injunction, and justified, although it did not necessarily control, the decision. If it had been founded upon evidence not before the court upon the application for the injunction, or not so fully before it, it could not have been intelligently considered by that court; and there would have been no record here upon which it could be re-examined. But the question whether two patents are for the same invention is a question which is to be determined by a comparison of the documents themselves. There may be cases in which it is necessary to resort to extrinsic evidence to ascertain the meaning and the true construction of the documents. The present was not such a case. The patents are unambiguous, and even the file wrappers, which are in the record, are of little value as extrinsic evidence.

Both patents originated in the application of Van Depoele, filed in the patent office March 12, 1887, and relate to the apparatus of that class of electric railways in which a suspended conductor conveys the working current; and a contact device carried by the car is employed for taking off the current, and more particularly to an improved traveling contact, and an improved arrangement and construction of the switches by which the traveling contact is directed to the proper conductor, and to various details of construction and arrangement of the traveling contact and switches. The application was divided, and, while one of the divisional applications was involved in an interference proceeding which delayed the issuance of a patent, the other

divisional application culminated in the patent granted April 1, 1891. In the earlier patent, the patentee, after stating that his invention "relates to electric railways of the class in which a suspended conductor is used to convey the working current, a traveling contact carried by the car for taking off the current for use in operating the motor by which the car is propelled, and the return circuit completed through the rails," states that it consists in certain devices, and their relative arrangement, by means of which a contact device carried by a rod or pole extending from the car, and pressed upwardly into contact with the conductor, is switched from one line to another, correspondingly with the vehicle. He further states that while, to illustrate his invention, he has shown it applied to a contact device which forms the subject-matter of an earlier application for a patent (the later patent), and while he does not intend to claim generally a contact device of this construction, he does make claims to certain details thereof, which are of especial value in connection with his improved switching devices, but which are not essential features of the contact device itself, considered without reference to the switch. In the later patent the patentee states that his invention consists more particularly in an improved traveling contact, and in improved arrangement and construction of the switches by which the said traveling contact is directed into the proper conductor, but that he does not propose to claim the switching devices, although the description and illustration of them are retained because these devices have been already claimed in his patent No. 424,695 (the earlier patent). The later patent also states that, in a still earlier application for a patent, the patentee had shown and described a contact device, consisting of a grooved roller, mounted upon a spring, and sustained thereby a short distance above the roof of the car, but this was in practice found deficient in capacity to follow the sinuosities and deflections of the overhead conductor as ordinarily put up; and he then proceeds to point out the advantages of the use of such a device as is particularly described in the later patent; and he further states that many modifications and minor changes in the invention described will readily suggest themselves to persons skilled in the art, and he does not propose to limit himself to the precise details of construction or arrangement shown.

The claims of the earlier patent are 35 in number, and are addressed more particularly to combinations between the conductor switches and the traveling contact; while the claims of the later patent, which are 16 in number, are addressed more particularly to combinations between the traveling contact and the suspended conductor.

The earlier patent contains a number of claims in which the switching devices are not an element, and the later a number in which they are an element. As these devices are not an element of the combination in either of the five claims of the patent in suit which have been adjudicated, any extended consideration of them will be unnecessary, and the comparison between the two patents will be mainly confined to the descriptive parts and claims of each which relate to the combinations between the contact device and the suspended conductor, and to the structural features of the contact device. These parts are illustrated in each patent by the same drawing (Fig. 1).

The specification of each patent describes a car and a suspended conductor which are identical. Each describes a contact device, or trolley, belonging to the order of "under-running" contacts, and which consists of a swinging arm carrying a grooved wheel at one extremity, and a tension device for regulating its movements. The arm is mounted upon a post on top of the car, and is pivoted and swiveled so as to be capable of swinging both vertically and horizontally through considerable arcs. The tension device is attached to the short end of the arm, and regulates the movements of the arm by pulling the short end down, and holding it in its normal position, while the grooved wheel at the long end is pressed upward into engagement with the underside of the suspended conductor. These parts, as described in both specifications, with the exception of the tension device, are identical in all their essential features. The description of the tension device is the same in each patent except that the words in *italics* appear in the specification of the earlier patent, and are omitted in the specification of the later patent. It is as follows:

"To the lower end of the arm, F, is attached a spring, G, to the lower extremity of which is secured a cord which passes downward through suitable grooves or suitable rollers, and is provided with a weight, H, which serves to hold the spring down, and keep the contact wheel, E, always pressed up against the underside of the conductor, D. At the same time, the spring will instantly yield to allow the wheel to pass under the switch or any obstruction; *and while the arm, F, is movable laterally with respect to the vehicle, the spring and weight will constantly tend to restore the arm to its normal central condition, and assist in carrying the contact arm to partake in the lateral movement of the vehicle.* Being held in position by the weight, *the wheel has a much greater range of action, and, moreover,* the motorman can at any time lower the contact wheel by raising the same, rendering the arrangement very convenient for many purposes. \* \* \* The arm, F, is of a length that will place the contact wheel, E, about over the rear pair of wheels of the car; and the position of the post, f, and the length of the arm, F, itself, will therefore vary with the length of the body of the car, the particular proportions shown being only by way of illustration. The arm, F, is hinged, and should in most instances be also pivoted to the top of its post, f, although a reasonable amount of looseness in the hinged joint will answer the purpose of the pivot, and prevent binding or straining at that point, due to the swaying of the vehicle or deflection of the conductor. \* \* \* The contact-carrying arm described in the present application possesses substantial practical advantages over any other means yet proposed for establishing moving contact between a vehicle and a stationary supply conductor, in that, by the use of a hinged flexibly mounted arm, much greater freedom of movement is compatible with the maintenance of a positive mechanical connection and electrical contact between the vehicle and supply conductors."

Among the claims of the earlier patent are these:

"(15) In an electric railway, the combination of a car, a conductor suspended above the line of travel of the car, a contact-carrying arm pivotally supported on top of the car, and provided at its outer end with a contact roller engaging the underside of the suspended conductor, and a weighted spring at or near the inner end of the arm, for maintaining said upward contact, substantially as described."

"(31) In an electric railway, the combination, with an overhead conductor and a vehicle, of an intermediate contact device, consisting of a trailing arm having a grooved contact wheel at its outer end, and moving laterally relatively to the vehicle, but provided with a spring tending to retain it in its normal central position."

"(32) In an electric railway, the combination, with an overhead conductor and a vehicle, of a trailing contact arm guided at its outer end by the overhead

conductor, and movable laterally relatively to the vehicle, but having a normal centralizing tendency by means of a spring or weight.

"(33) In an electric railway, the combination, with an overhead conductor and a vehicle, of an intermediate contact device, consisting of an upwardly pressed trailing arm, having a grooved contact wheel at its outer end, by which it is guided by the conductor, the said arm being free to swing laterally relatively to the vehicle, but tending to remain in its normal central position by means of a spring or weight.

"(34) The combination, with a vehicle and an overhead conductor, of a trailing contact arm guided normally by the conductor, but having a spring connection with the vehicle tending constantly to maintain it in a definite position, while at the same time it is free to swing laterally with respect to the vehicle against the pressure of the said spring.

"(35) In an electric railway, the combination, with an overhead conductor and a vehicle, of an intermediate contact device, consisting of a rearwardly extending arm guided at its outer extremity by engagement with the conductor, and movable laterally relatively to the vehicle, but having a spring or weight tending to restore it to its normal central position."

The five claims in controversy of the patent in suit are as follows:

"(6) In an electric railway, the combination with a suitable track and a supply conductor suspended above the track of a car provided with a swinging arm carrying a contact device in its outer extremity and means for imparting upward pressure to the outer portion of the arm and contact, to hold the latter in continuous working relation with the underside of the supply conductor, substantially as described.

"(7) In an electric railway, the combination of a car, a conductor suspended above the line of travel of the car, a swinging arm supported on top of the car, a contact device carried by one extremity of the arm, and held thereby in contact with the underside of the electric conductor, and a tension device at or near the other end of the swinging arm for maintaining said upward contact, substantially as described.

"(8) In an electric railway, the combination of a car, a conductor suspended above the line of travel of the car, an arm pivotally supported on top of the car, and provided at its outer end with a contact engaging the underside of the suspended conductor, and a tension spring at or near the inner end of the arm for maintaining said upward pressure contact, substantially as described."

"(12) In an electric railway, the combination with a car of a post extending upward therefrom, and carrying a suitable bearing, an arm or lever carrying at its outer end a suitable contact roller, and pivotally supported in said bearing, and provided at its inner end with a tension spring for pressing the outer end of the lever carrying the contact wheel upward against a suitable suspended conductor, substantially as described."

"(16) In an electric railway, the combination of a car, a conductor suspended above the line of travel of the car, an arm pivotally supported on top of the car, and provided at its outer end with a grooved contact wheel engaging the underside of the suspended conductor, and a tension spring for maintaining an upward pressure contact with the conductor, substantially as described."

In considering the question whether both patents covered the same invention, Judge Townsend, in the Connecticut cause, speaking of the earlier patent, said:

"The original application, filed March 12, 1887, claimed a spring and tension device so arranged as to impart upward pressure. The improved device showed a spring and weight so arranged as to permit lateral motion by the arm, and to 'constantly tend to restore the arm to its normal central position, and assist it to partake of the lateral movement of the car,' to give it a greater range of action, and make it more convenient in operation. This patent for this specific combination, adapted and claimed only for this specific purpose, applied for October 22, 1888, after the original application had been allowed, but before the patent thereon had been granted, was earlier in the date of issue. The original application was delayed by interference proceedings in the

patent office. Whatever may be the rule as to cases where the application for the general patent was filed subsequent to the application for the specific patent, I do not think the patentee should be deprived of his broad patent where the application for such patent was made first, and was delayed in the patent office through no fault of the inventor."

With these conclusions we are unable to agree. We should concur if we could regard the later patent as the generic one, and the earlier, so far as it relates to the contact device, as limited to the structural improvements upon that device. But we are of the opinion that, although the earlier patent contains matter of disclaimer inserted for the purpose of making the later patent ostensibly the generic one so far as it relates to the contact device, such matter is antagonized by, and is wholly inconsistent with, some of the claims. Those claims in which the switching devices are not an element have no place in the patent, and would be in effect obliterated, unless they cover combinations between the suspended conductor and such a contact device as is described in the specification. In case of conflict, the claims, which are the final and definite expression of the patentee's intention, must control.

The operative parts of the contact device are described in identical language in each patent, and the language of the claims aptly describes these parts. While the function of the tension device is stated with more particularity in the earlier patent, the description does not contain a word or hint by which its characteristics can be differentiated from those of the tension device of the later patent. The additional matter is, in effect, a fuller statement of the advantages of the device. In the later patent, as well as in the earlier, the tension device is a spring and weight so arranged as to "permit lateral motion by the arm," lateral motion being afforded because, as the specification of each patent states, "the arm is hinged, and should in most instances be pivoted to the top of the post, f, although a reasonable amount of looseness in the hinged joint will answer the purpose of the pivot." In the earlier as well as in the later patent the spring and weight "are so arranged as to constantly tend to restore the arm to its normal central position," and thus "assist it to partake of the lateral movement of the car," because this is the necessary action of the spring and weight at the short end of the arm. As described in each specification, the tension device is a spring which is held in its proper place by the weight. The spring alone, if fastened to the top of the car, would perform the function of restoring the arm to its normal central position. So would the weight "secured by a cord which passes downward through suitable grooves," or through the roof of the car as shown in the drawings. The weight and spring together re-enforce one another, and allow greater freedom of movement to the arm when arranged as described and shown in both patents. The device, of necessity, exerts a centralizing tendency upon the arm, and serves to maintain upward contact between the grooved wheel and the suspended conductor. Of course, if the claims of the earlier patent do not specify such a tension device as is described and claimed in the later, but specify one which embodies only a subordinate improvement upon it, the patents are not for the same invention.

As was said by this court in *Thomson-Houston Electric Co. v. Elmira & H. Ry. Co.*, 18 C. C. A. 154, 71 Fed. 404:

"An inventor, by describing an invention in a patent granted to him, does not necessarily preclude himself from patenting it subsequently. His omission to claim what he describes may operate as a disclaimer or an abandonment of the matter not claimed; but it has no such effect when it appears that the matter thus described, but not claimed, was the subject of a pending application in the patent office by him for another patent. \* \* \* The invention secured by a patent is that which is secured to the patentee by the claim. \* \* \* The claim, however, is to be read in the light of the description contained in the specification, and its literal terms may be enlarged or narrowed accordingly, but not to an extent inconsistent with their meaning. Identity of language in the claims of two patents does not necessarily import that the invention patented by each is identical, nor does a difference in phraseology necessarily import that they are for different inventions. The test of identity is whether both, when properly construed in the light of the description, define essentially the same thing. When the claims of both cover and control essentially the same subject-matter, both are for the same invention, and the later patent is void."

In determining what kind of a tension device is specified in the claims of the earlier patent, it will be observed that in claim 31 it is defined as a "spring tending to retain" the trolley arm in its normal central position; in claim 32 it is defined as a "spring or weight" exerting a normal centralizing tendency upon the arm; in claim 33 it is defined similarly as in 32; and in claim 34 it is defined as a "spring connection" tending constantly to maintain the arm in a definite position.

The tension device specified in the claims of the later patent is defined in claim 6 as "means for imparting upward pressure to the outer portion of the arm"; in claim 7 as "a tension device for maintaining said upward contact"; in claim 8 as a "tension spring for maintaining upward pressure contact"; in claim 12 as a "tension spring for pressing \* \* \* upward"; and in claim 16 as a "tension spring for maintaining an upward pressure." Inasmuch as the only tension device or means for imparting upward pressure to a trolley arm described in the specification of the later patent is that which consists of the weight and spring as it is described in the earlier patent, the verbal differences in defining its functions in the several claims are of no significance. The thing itself is the same in the claims of both patents. The spring which tends to retain the arm in its normal position is exactly the same spring, and no other, than that which maintains upward contact or pressure between the contact device and the suspended conductor. If any importance is to be attached to these verbal differences, the earlier patent claims a tension device the chief function of which is to exert a normal centralizing tendency upon the arm, but which, of necessity, must maintain the upward pressure; while the later patent claims one the chief function of which is to maintain upward pressure, but must, of necessity, also exert the normal centralizing tendency. If there had been in the description anything by which it could be ascertained which of the structural features exercises one function, and which the other, a different case would be presented. "The matter sought to be covered by the second patent is inseparably involved in the matter embraced in the former patent,

and this, under the authorities, renders the second patent void." *Miller v. Manufacturing Co.*, 151 U. S. 198, 14 Sup. Ct. 310.

It is manifest that both patents are intended to, and do, secure to the patentee the same general inventions as are comprised in the combination of suspended conductor and contact devices, and the combination of suspended conductor, contact device, and switching devices, although the earlier patent also covers improvements in the switches and subordinate combinations between these devices and the elements of the principal combination.

Claim 13 of the patent in suit, for the combination between the suspended conductor, the contact device, and the switching devices, is identical in its phraseology with claim 6 of the earlier patent. That claim reads as follows:

"(13) In an electric railway, the combination of an electrically propelled car, a supply conductor suspended over the line of travel of the car, a swinging arm mounted upon the car, and carrying a contact device at its free end, said contact arranged to bear against said conductor, suitable switching devices upon the track traversed by the wheels of the car, and corresponding switches on the suspended conductor located above those on the track, and arranged to engage the contact devices, substantially as described."

The later patent describes the switching devices of the earlier patent in all their essential features, except as to the subordinate improvements thereon; and claim 13 must be construed as specifying the identical invention specified in claim 6 of the earlier patent. On the other hand, claim 15 of the earlier patent, for the combination between the suspended conductor and the contact device, is identical in phraseology with claim 9 of the patent in suit. The switching devices having been fully described, the matter of disclaimer inserted in the later patent is of no more value in determining its scope and interpretation as to the claims in which the switches are an element than is the matter of disclaimer inserted in the earlier patent as to the claims in which the contact device is an element.

We are of the opinion that claim 15 of the earlier patent describes and embraces everything of substance which is covered by claim 7 of the patent in suit. Claim 15 specifies a combination the elements of which are the car (implied necessarily, and needlessly mentioned), the suspended conductor, and the contact device. The element termed "a contact-carrying arm pivotally supported on the top of the car, and provided at its outer end with a contact roller engaging the underside of the suspended conductor," exactly defines all the essential features of the contact device described in each specification, except the tension device. It must be hinged as well as pivoted; otherwise, the tension device will be inoperative to maintain upward pressure. The element termed "a weighted spring" is the complete tension device described in both specifications, and which, as described, necessarily exercises the twofold function of maintaining upward contact between the contact device and the suspended conductor, and of maintaining the pivoted arm in its central or normal position. The "tension device" of claim 7 is the whole device described in that patent, as the "weighted spring" of claim 15 is the whole device described in the earlier patent.

Claim 15, however, does not specify the combinations of claims 8, 12, and 16 of the patent in suit. The "tension spring" of those claims is not necessarily the "weighted spring" of claim 15.

We are also of opinion that claim 33 of the earlier patent specifies essentially the same combinations embraced in claims 8, 12, and 16 of the patent in suit, and that the "spring or weight" of claim 33 is the same thing as the "tension spring" of claims 8, 12, and 16, the "weight" being only an alternative element. It would be a waste of time to dwell upon the verbal differences in these claims. The changes in phraseology import nothing of substance into their respective combinations. They describe the same things in different language, and the draftsman seems to have expended great ingenuity in cataloguing a group of synonyms.

The order granting the preliminary injunction is reversed, with costs.

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MORGAN ENVELOPE CO. v. WALTON et al.

(Circuit Court, D. New Jersey. August 26, 1897.)

**TRADE-MARKS—UNFAIR COMPETITION.**

Complainant alleged that, by the use of an allegorical figure of Columbia, its tissue paper had become known to the trade as "Columbia paper," and sought to enjoin defendants. Defendants, by a cross bill, alleged, and the evidence showed, that, prior to complainant's use of the symbol, defendants had used the word "Columbia," without the symbol, and by reason thereof their paper had become known, and was asked for, as "Columbia paper," and that subsequently complainant began the use of the word and symbol. *Held* that, irrespective of the question of a technical trade-mark, complainant should be enjoined.

This was a suit by the Morgan Envelope Company against D. S. Walton and others, constituting the firm of D. S. Walton & Co., to enjoin alleged unfair competition in business.

Melville Church, for plaintiff.

Walter D. Edmonds, for defendants.

KIRKPATRICK, District Judge. The complainants, the Morgan Envelope Company, filed their bill in this court setting out that for more than 10 years last past, continuously, they had manufactured a superior quality of tissue paper, which has been known, identified, and called for as "Columbia," and which is known and referred to by such designation, "Columbia," in connection with a symbolic or allegorical representation of Columbia, and charging the defendants, D. S. Walton & Co., with the use of a similar design upon their wrapper of tissue paper, in contravention of complainants' rights, and in such manner as to constitute an unfair and fraudulent competition in business, and asking for an injunction to restrain the defendants from making use of said wrapper or label, or any colorable imitation, in connection with tissue paper not made by complainants. To this bill the defendants filed their answer, together with affidavits denying all the material allegations in the complainants' bill, and in order to obtain full relief touching the matters of the original bill (Morgan's



*L. & T. R. & S. S. Co. v. Texas Cent. Ry. Co.*, 137 U. S. 171, 11 Sup. Ct. 61; by leave of the court, filed their cross bill, in which they claimed for themselves the exclusive use of the label charged by the complainants to be a fraudulent imitation, and founded their right upon the appropriation and use of the word "Columbia" as applied to tissue paper, and the continuous use of the same for a period of 17 years prior to the filing of their bill. The defendants, in their cross bill, ask for the same relief against the complainants which had been asked against themselves in the original bill.

From the affidavits filed, these facts were disclosed: In 1883 D. S. Walton & Co., the defendants, were manufacturers of tissue paper, which, without other distinguishing mark, they placed upon the market labeled "Columbia," and that since that time they have continued to so label and sell it; that it has been known to the trade, and has been called for, as "Columbia paper"; that in 1885 or 1886 the complainants, being like manufacturers of tissue paper, adopted and placed upon their produce, without other distinguishing mark, a figure of the Goddess Columbia, with the name "Columbia" upon the shield, and the letters, "Columbia" upon the sides of the package, which paper has also been known to the trade and called for by the name "Columbia"; that in 1893 the defendants were induced to place upon their packages a figure of Columbia which is in all respects similar to that used by the complainants. There cannot be any question that under these circumstances there is grave danger that the goods may be mistaken the one for the other. If the question presented were the only one raised by the complainants' bill, I should not hesitate to grant them the relief asked for; but the prior application by the defendants of the word "Columbia" to the same product changes the situation of the parties. It cannot be said that Walton & Co. acquired a technical trade-mark in the word "Columbia," in view of the decision of *Mill Co. v. Alcorn*, 150 U. S. 460, 14 Sup. Ct. 151; but that they were the first persons, so far as the record shows, to apply the word to this article of production, cannot be disputed. By such application and continued use their paper became known to the trade and the public generally. It acquired a reputation for quality, and the name was a distinctive mark of excellence. The figure of "Columbia" afterwards added by the defendants cannot be regarded as more than a mere amplification of the word "Columbia" previously appropriated. It conveys no further or other idea than the word, and can be regarded only as a different way of expressing it. It is apparent that, inasmuch as none of the wrappers in controversy bear the names of the makers, the packages must be known and designated and called for by the users as "Columbia paper," whether the word "Columbia" be expressed in letters alone, or in a figure typifying "Columbia." So it would happen that, whether a purchaser wanted the package of the complainants or the defendants, he must ask for Columbia paper. It would be impossible for the seller to know which of the manufactured articles was desired, and the public would be rendered liable to have imposed upon it goods which they did not want. Such a condition must inevitably lead to confusion in the trade, disappointment to the general public, deception of ultimate purchasers, and be productive of unfair competition in trade. Orr

v. Johnston, 13 Ch. Div. 434; Sawyer v. Horn, 4 Hughes, 239, 1 Fed. 24. One cannot be permitted to practice deception in the sale of his goods as those of another, "nor to use the means which contribute to that end." Perry v. Truefitt, 6 Beav. 66. Irrespective of the question of trade-mark, inasmuch as Walton & Co. appear to have been the first to put up their paper with the distinguishing mark "Columbia," and as their goods were the first to become known to purchasers as "Columbia paper," no other person should be permitted to use that name as the sole distinguishing mark of a like article, whether expressed in letters or by figure, and in that manner mislead the general public into buying his goods as those of his competitor. If the word could not be used as a trade-mark, it is to be treated as a descriptive term, to the benefit of which they are entitled. Wilson v. T. H. Garrett & Co., 47 U. S. App. 250, 24 C. C. A. 173, and 78 Fed. 472.

The complainants charge in their bill that by reason of their symbol of Columbia their article has become known and asked for as "Columbia paper." The evidence discloses the fact that by that name alone the defendants' paper has previously been known and called for. The confusion which their bill was filed to abate was of complainants' own creation, and they were themselves the cause of the unfair competition in trade against which they ask relief. The prayer of the complainants' bill will be denied, and an injunction granted to the defendants on their cross bill, as prayed for.

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BOTANY WORSTED MILLS v. KNOTT.

WINTER et al. v. SAME.

(Circuit Court of Appeals, Second Circuit. July 21, 1897.)

1. SHIPPING—DAMAGE TO CARGO.

Negligence in loading and stowing at a port of call, whereby the ship gets down by the head, so that sugar stowed next to wool, with a temporary bulkhead between, drains forward, and damages the wool, is not negligence "in the management of the vessel," within the meaning of the Harter act, so as to relieve the owners from liability. 76 Fed. 582, affirmed.

2. SAME—BILLS OF LADING—EXCEPTIONS—LAW OF THE FLAG.

A provision in a bill of lading, containing an exception of damage from negligent stowage, that the contract should be governed by the law of the flag (English), is not enforceable in our courts, being against the public policy of this country. 76 Fed. 582, affirmed.

Appeal from the District Court of the United States for the Southern District of New York.

These were libels filed respectively by the Botany Worsted Mills and by Henry P. Winter and others against James Knott, owner of the Portuguese Prince, to recover for damage to a cargo of wool shipped from Pernambuco to New York, such damage having occurred by the drainage forward of wet sugar stowed next aft of the wool, and separated therefrom by a temporary bulkhead. The district court entered a decree for the libelants (76 Fed. 582), and the respondent has appealed.

J. Parker Kirlin, for appellant.

Lawrence Kneeland, for Botany Worsted Mills.

Wilhelmus Mynderse, for Winter et al.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

**PER CURIAM.** We agree in this case with the court below that the damage to the wool of the libellant was due, not to "fault or error in the management or navigation of the vessel," but to negligence in the loading or stowage of the cargo; and deem it unnecessary to add anything to the observations of Judge Brown upon the point. A majority of the court also concur in the conclusions of the court below that the exception in the bill of lading for liability for "damage by stowage, \* \* \* though caused by the negligence of the master," notwithstanding the provision that the contract should be governed by the law of the flag (English), did not relieve the owner of the steamship, such a stipulation being against the public policy of this country, and therefore not enforceable by its courts; and approve the decisions in *The Trinacria*, 42 Fed. 863; *The Glenmavis*, 69 Fed. 472; *The Iowa*, 50 Fed. 561. In this view of the case it is unnecessary to decide whether the prohibitions of the Harter act apply to a bill of lading issued at a foreign port. The decree is affirmed, with interest and costs.

LACOMBE, Circuit Judge, concurs in result.

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CHRYSTAL et al. v. FLINT et al.

(District Court, S. D. New York. September 9, 1897.)

**1. GENERAL AVERAGE—NEGLIGENT STRANDING—HARTER ACT.**

Under section 3 of the Harter act of February 13, 1893, providing that if the ship owner shall exercise due diligence to make the vessel seaworthy, neither the vessel nor her owner shall be responsible for faults or errors in her navigation or management, the ship owner has a right to contribution in general average for sacrifices made to save vessel and cargo stranded, although the stranding occurred through the negligence of the officers of the vessel.

**2. SAME—ALLOWANCE OF GROSS FREIGHT ON JETTISONED GOODS.**

In a general average adjustment to be stated "according to the established usages and laws" of the port of New York, the allowance of freight upon jettisoned goods is the full freight as per bill of lading. The recent practice of the English adjusters to allow only net freight in such cases has not been adopted in New York.

This was a libel by George Chrystal and others against Flint, Eddy & Co., to recover upon a general average bond.

Cowen, Wing, Putnam & Burlingham, for libellants.

Butler, Notman, Joline & Mynderse, for respondents.

**BROWN**, District Judge. In November, 1895, the British steamship *Irrawaddy*, upon a voyage from Trinidad to New York, stranded on the coast of New Jersey, through negligence in navigation. Up to the time of stranding it is admitted that she was properly manned and equipped, and seaworthy. In endeavoring to get her off the beach by working her propeller with reversed engines, her machinery was damaged by sanding and by water from leaks, which was allowed to flow into the engine room in order that it might be pumped out; and, on the sluices becoming choked, holes were bored in the bulk-

head to permit the water to pass to the pumps. With the aid of salvors, the vessel was finally floated on November 20th, after a jettison of a considerable quantity of cargo. She then completed her voyage and made delivery of the rest of the cargo to the consignees in New York, on their executing an average bond for the payment of all losses and expenses which should appear to be due from them, provided they were stated and apportioned by the adjusters "in accordance with the established usages and laws in similar cases."

An adjustment was afterwards made in New York which allowed in the general average account, (1) the salvor's compensation, (2) the value of the jettisoned cargo, and (3) to the ship owner, the gross freight on the cargo jettisoned, and (4) the damages to the ship by sanding and by the flow of water into the engine room. The respondents thereupon paid \$4,483.64, their full assessment, except the sum of \$508.29, charged against them for the last two items above named, which they refused to pay, on the ground that as the stranding was caused by negligence in navigation, the ship owners were debarred from any recovery of general average from the cargo; they also claim that if any freight is recoverable for the goods jettisoned, it is only the net freight, i. e., the gross freight less the stevedore's and other charges which would have been incurred by the ship owners on the actual delivery of the goods had they not been jettisoned. The difference, it is agreed, would in this case be \$13.65.

The above libel was filed upon the general average bond, for the recovery of the last two items in the general average adjustment above named, on the ground that as the ship owners are not responsible to the cargo owners for the negligent navigation of the ship under the provisions of the Harter act of 1893 (2 Supp. Rev. St. p. 81), such negligence does not now debar them from general average claims; and that gross freight is recoverable, because such is the established law and usage of this country and of this port. All the facts are admitted, except as to the custom in regard to charging gross freight, upon which point witnesses have been examined upon both sides.

The questions presented are important, because they enter largely into every case of a general average adjustment growing out of faults or errors of navigation; and it is essential that the rule which is to be followed in average adjustments in cases falling within the Harter act, should be finally determined.

There is no doubt of the ordinary rule, in the absence of statute or contract to modify it, that where the peril has been brought about by the fault of the ship owner or his servants in the navigation of the ship, the ship owner cannot recover from the cargo reimbursement by means of a general average for his expenses in rescuing the ship or cargo. The codes of the principal maritime countries so provide in express terms; and our law is the same. *Gourl. Gen. Av.* 15; *Lown. Gen. Av.* (4th Ed.) 34; *The Ontario*, 37 Fed. 222; *Ralli v. Troop*, Id. 888, 890; *Van den Toorn v. Leeming*, 70 Fed. 251. This rule is not enforced against the ship owner alone; it applies equally to the cargo owner, and to any other claimant of contribution by whose fault the necessity for the sacrifice or expense was caused. Several of the maritime codes expressly so state. *Germany*, § 704; *Sweden*, § 191;

Denmark, § 192; Spain, § 810. Lowndes summarizes the principle and the general rule as follows:

"The broad principle may be laid down that no one can make a claim for general average contribution, if the danger to avert which the sacrifice was made has arisen from the fault of the claimant, or some one for whose acts the claimant has made himself, or is made by law, responsible towards the co-contributors." Page 34.

Considering that the claim to contribution in general average rests only upon equitable principles, it is hardly conceivable that this rule of exclusion could be otherwise. For if one's own fault, or the fault of those for whom one is legally responsible, had made necessary the expenses he incurs to retrieve it, there is no principle of equity that can sustain his claim that other persons, not in privity with him, should help him bear the loss. It is the responsibility for the fault and for the consequent damage that makes the crucial distinction in these cases. All the maritime codes that exclude the ship owner from reimbursement in general average for the ship's fault, make him liable to cargo owners for the master's bad navigation. This exclusion is based on his liability to the cargo owner, which logically and necessarily excludes the ship owner's claim to contribution in two ways: First, because the obligation to indemnify would require the ship owner at once to restore to the cargo owner as damages whatever he might collect from him as general average; second, because this same obligation makes the ship owner's claim to contribution incompatible in its inception with the fundamental conditions of a general average claim, viz., that there must be, (1) a sacrifice, (2) a sacrifice voluntarily incurred, (3) a sacrifice incurred for the common benefit. But when the ship, through the master's fault, is legally responsible for all loss and damage, her expenses in rescuing the cargo from the peril which that fault has brought about cannot possibly be treated as a sacrifice, since such expenses are nothing more than the performance of a legal obligation; for the same reason they are not voluntarily incurred, in the legal sense, since the ship is legally bound to make the rescue and bear all the expense of it, or else pay the increased damages from omitting to do so; and so the expenses of rescuing the cargo are not ultimately for the cargo's benefit, but for the pecuniary benefit of the ship, in diminishing as much as possible the cargo damages for which the ship's liability is already fixed by reason of her fault. Thus the ship's liability for all the loss and damage arising from her fault, whenever this liability arises, necessarily excludes any equitable claim by her owner to an average contribution from the cargo, because the legal conditions of such a claim cannot in such a case exist; and because, if allowed, any such contribution must be at once repaid to the cargo owner as damages.

I have dwelt somewhat fully upon this liability of ship and owner, and its relation to general average claims against the cargo, because there is no doubt, I think, that the liability to indemnify the cargo owner is the sole ground of the exclusion of the ship owner's claim to general average compensation for his expenses in rescuing the adventure from a peril caused by bad navigation; and because it, therefore, seems necessarily to follow that in cases where all such liability

is abolished by law, as it is under the circumstances of this case by the Harter act, no such exclusion can be justified; and that where no such liability exists on the part of the ship or her owner, his right to a general average contribution from the cargo arises necessarily by the same principles of equitable right that apply in ordinary cases of general average.

Where due diligence has been exercised to make the ship seaworthy, and a common danger arises upon the voyage by "fault or error in the navigation or management of the ship," the third section of that act declares, that "neither the vessel nor her owner, agent, or charterer shall become or be held responsible for damage or loss resulting therefrom." The previous liability of the ship owner to the cargo owner for faults of navigation, is thus abolished in all cases coming within the act. In such cases, faults in the navigation or management of the ship are no longer, by construction of law, faults of the owner, as heretofore; and the ship and her owner are now no more liable to the cargo owner for his damages therefrom, than the latter is liable to the ship owner for the resulting damages to the ship. Both are alike strangers to the fault, and equally free from all responsibility for it; and hence all expenditures or losses voluntarily incurred for the common rescue are no longer made in the discharge of an individual legal obligation, or in diminution of a fixed liability resting upon one of the parties only, but are truly a sacrifice, voluntarily incurred, and for the common benefit, as much and as truly when made by the ship owner as when made by the cargo owner alone. On principle, therefore, in such cases, the one is as much entitled to a general average contribution for his sacrifices as the other.

In this country and in England it has been held that the mere fact that the common peril arose by bad navigation, or bad management of the ship, or that a remedy in damages therefor may exist against the ship owner, does not prevent recovery of general average compensation by a cargo owner against the ship and against other cargo owners for his sacrifices made for the common benefit. *Pacific Mail S. S. Co. v. New York, H. & R. Min. Co.*, 69 Fed. 414, affirmed 20 C. C. A. 349, 74 Fed. 564; *Strang v. Scott*, 14 App. Cas. 601, 609. And several of the maritime codes expressly so declare. German Code, § 704; Sweden, 1864, Act No. 144, Code, 191; Norway, § 72; Denmark, § 192. In *Strang v. Scott*, supra, Lord Watson in delivering judgment in house of lords says:

"The owners of goods thrown overboard having been innocent of exposing the *Abington* and her cargo to the sea peril which necessitated jettison, their equitable claim to be indemnified (by a general average contribution) for the loss of their goods is just as strong as if the peril has been wholly due to the action of the winds and waves."

Under this decision, if the ship owner be "innocent of exposing the ship and cargo to the common peril," as he is under the Harter act, or wherever a valid exemption from liability exists by the bill of lading, the ship owner's right to an average contribution must be sustained. Accordingly, in the subsequent case of *The Carron Park*, 15 Prob. Div. 203, Lord Hannen, then president of the probate di-

vision, sustained the ship owner's claim to contribution from the cargo in general average for expenses caused by negligent navigation, where by the terms of the bill of lading the ship owner was relieved of all responsibility for such negligence; and this upon the simple ground that "the relation of the goods owner to the ship owner has been altered by the contract that the ship owner was not to be responsible for the negligence of his servants." Upon similar clauses in the bills of lading, the same adjudications, and upon the same ground, have been made in the French court of cassation (*L'Amérique* [1878] 1 *Dalloz*, Rep. 479; *The Alex. Lawrence* [June, 1894] 10 *Rev. Int. du Droit Mar.* p. 147); and also in Belgium (*The Alacrity* [1895] 11 *Rev. Int. du Droit Mar.* 123), though the contrary seems to have been held in Holland (see *The Mary Thomas* [1894] *Prob. Div.* 108, 113, 116).

It is urged that the Harter act makes no allusion to general average, and was not designed to disturb the law on that subject. This might have been urged more plausibly as to the effect and intent of the negligence provisions in bills of lading. Several of the above adjudications as to the effect on general average of such clauses in bills of lading, were made long before the passage of the Harter act; and the history of that act shows that it was a part of its general intent to secure to ship owners under our law, and within the limits prescribed by our act, the benefits enjoyed by ship owners under such bill-of-lading exemptions by the foreign law. One of the benefits to the ship owner by the foreign law under such exemptions, as already adjudged when the Harter act was passed, was the right to a general average contribution; and the inference, if any, as to the actual intent of our act would be that it was designed to embrace that incidental consequence; at least, the contrary cannot be affirmed.

Quite aside, however, from the above adjudications, and from the question of any definite intent by congress to modify the law of general average, the ordinary rules of construction require that the exemption which the act is evidently designed to afford to the ship owner from his previous responsibility to the cargo owner, should be given its full natural scope and effect, without abridgment by any arbitrary or narrow construction that is not warranted by anything apparent in the context, or from the evident object of the statute. "The whole object of the act," says Mr. Justice Brown in *The Delaware*, 161 U. S. 459, 16 Sup. Ct. 516, "is to modify the relation previously existing between the vessel and her cargo," and to fix that relation, that is, a relation of nonresponsibility for damages or losses arising out of bad navigation. Such a statutory change in a broad principle of law must carry with it other changes as its necessary accompaniment. In abolishing the previous responsibility of the ship and owner, the intent of the statute must be presumed to be to abolish also whatever is immediately dependent upon that responsibility. In no other way can the statute have its fair and natural effect.

The application of this new relation of nonresponsibility under the Harter act to cases of general average, does not, in fact, make the least change in the principles of general average contribution. The rule remains as before, that he by whose fault, actual or constructive,

the ship and cargo have been brought into danger, cannot recover an average contribution for his expenses in extricating them. And so the counter rule remains as before, that the interest which, being without fault, makes sacrifices for the common rescue, is entitled to an average contribution from what is thereby saved. Prior to the Harter act, the ship owner, under our law, was constructively in fault for bad navigation, and hence fell within the former rule. The Harter act, by abolishing his constructive fault and freeing him from all responsibility, withdraws him from the former rule and entitles him to contribution under the latter.

In *Ralli v. Troop*, 37 Fed. 890, it was said that "to deny the owners the benefit of a general average contribution on the ground of negligence, would impose on them, in effect, a liability for the fire from which the statute exempts them (Rev. St. § 4282)." And so in the present case, to say that the ship owners shall bear at their own charge all the expenses voluntarily incurred by them in rescuing this ship and cargo from a common peril for which the statute says they shall not be responsible, and to give to the cargo owner all the benefits resulting to him from these expenses, without charge, by refusing to impose on him the ordinary contribution in general average always hitherto made to one not in fault, is, in effect, to make the ship owner responsible, pro tanto, for the peril and its consequences, contrary to the very letter and purpose of the statute; since the owner is often practically compelled to make these advances for the common safety, though not legally responsible for the fate of the cargo.

It is, indeed, the owner's duty to relieve ship and cargo in every peril so far as in his power; but not to do this at his own charge, unless the peril arose through his actual or constructive fault. The *Portsmouth*, 9 Wall. 682, 687. If the law denied contribution to him for sacrifices made for the common good when he was not in fault, the result plainly would often be disastrous to cargo. Maritime policy and necessity not only forbid any such rule, but ages ago they established the opposite rule; that compensation shall be made to those who, not standing in any relation of legal responsibility, make sacrifices for the common safety. The Harter act certainly was not designed to disturb that principle; and it requires that the owners in this case shall receive due contribution from the cargo.

2. Nor do I think, upon the proof, that any error was made in allowing contribution for the gross freight on the cargo jettisoned, without deduction for the slight expense which would have attended actual delivery.

The condition of the average bond upon which the action is brought is, that the losses and expenses shall be apportioned by the average adjusters "in accordance with the established usages and laws in similar cases." The general rule requires the adjustment of average to be made according to the port of destination, or where the voyage is ended, which in this case was New York. The evidence shows clearly that the long-established usage here has been to allow the gross freight; and where the bond adopts the local usage, it controls, even if the general law were otherwise. *Stewart v. Steamship Co.*, L. R. 8 Q. B. 88.



But the general law of this country, and largely elsewhere, except in England, seems to be in accordance with the custom here. Per Story, J., in *The Nathaniel Hooper*, 3 Sumn. 542, Fed. Cas. No. 10,032; *Insurance Co. v. Ashby*, 13 Pet. 331, 334; *The Ann D. Richardson*, Abb. Adm. 499, 507, Fed. Cas. No. 410; *Dix. Ins.* (2d Ed.) 148; *Gourl. Gen. Av.* 109, 112; 2 *Phil. Ins.* §§ 1301, 1368; 1 *Valin*, pp. 654, 655; *Code Commer.* art. 304; 2 *Valroger*, *Comm.* p. 366; 3 *Desjardins Dr. Mar.* p. 682; *Ulrich Grosse Har.* p. 59; *Italian Code*, § 576; *Nuova Cod. per Castagnola*, p. 435 (1896); 1 *Magen, Ins.* 289.

The same practice seems to have prevailed for a long period in England, but has been of late modified by the adjusters there. Some efforts have been made by protests, as appears from the evidence, to introduce here the recent English practice, but thus far with so little result as plainly not to amount to any change in the prevailing usage. In the amount of expense, though small, which the ship actually saves by not delivering the jettisoned cargo, could, as a rule, be accurately ascertained at a comparatively small cost, I see no good reason why the existing custom should not equitably be modified, and the deduction allowed. But under the usage so long and widely prevailing, I do not feel authorized to hold that the adjustment in this case is incorrectly made up. Most of the ship's expenses remain the same, whether a part of the cargo is jettisoned or not; such as for wages, provisions, insurance, wear and tear, pilotage, towage, wharfage, etc.; only the mere handling of the cargo seems to remain, and that was done formerly, and is to some extent still done, by the crew, so that the handling of the jettisoned cargo would have caused little, if any, additional expense to the ship. If stevedores are employed to unload the ship, as is now becoming general, the saving of the cost of handling the jettisoned cargo, is probably easily ascertainable; and when that becomes the established general method of business, the usage of adjusters in the allowance of freight, it would seem ought to be and probably will be modified accordingly.

Decree for the libelants for the two items claimed, with costs.

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THE R. H. WATERMAN and THE TRANSFER NO. 8.

PHILADELPHIA & R. R. CO. v. THE R. H. WATERMAN and THE TRANSFER NO. 8.

THAMES TOWBOAT CO. v. THE TRANSFER NO. 8.

(District Court, S. D. New York. July 21, 1897.)

**COLLISION—HORN'S HOOK—ROUNDING BEND—CROSSING LINES OF TRAFFIC—SIGNALS NOT ANSWERED—NAVIGATION OBSCURED—CO-OPERATION BY PRIVILEGED VESSEL.**

At Horn's Hook the channel of the East river diverges five points to the left up the Harlem river, and one-half point to the right to Hell Gate. Busy lines of traffic there cross each other, and the high ground of Horn's Hook prevents vessels that come down the Harlem river near the shore, and cross the course of those coming up, from being seen, on the flood tide, in time for safe maneuvers to avoid collision. *Held* that, whether inspect-

ors' rule 5 is strictly applicable to the case or not, the prevailing practice and reasonable prudence require that signals be given under such circumstances, indicating the presence of vessels, before they come in sight of each other; that any signals given should be noticed and properly answered; that No. 8, in this case, coming down the Harlem river heavily incumbered, was in fault for unnecessarily keeping close to the shore, and unduly hiding her approach, and also for undertaking the hazardous experiment of crossing the river and stopping between two tows, requiring the one to pass ahead of her, and the other astern, without a common understanding by signals from both; that the W. was also in fault for not observing No. 8's signals, nor co-operating with her, as she might easily have done, to avoid the collision, when the situation of No. 8 became desperate.

J. Armstrong and Pierre M. Brown, for the Maine.  
Carpenter & Park, for the R. H. Waterman.  
Henry W. Taft, for the Transfer No. 8.

BROWN, District Judge. The above libels grow out of a collision which occurred at about half past 7 a. m. December 7, 1896, near the mouth of the Harlem river, off Horn's Hook at Eighty-Ninth street, by which the libellant's barge Maine was damaged so that she afterwards sank. The Maine was the starboard boat of four barges that were going up the East river in a strong flood tide abreast of each other, in tow of the tug Waterman, on a hawser about 30 fathoms long. The tide at Horn's Hook was running probably from three to four knots, and the speed of the boats was about four knots more. They went up in about mid channel on the westerly side of Blackwell's Island, and when off Eighty-Fourth street, Transfer No. 8 was seen emerging from behind the point at Horn's Hook, heading in a southerly direction diagonally across the river, on a line about parallel with a line drawn from Horn's Hook to Blackwell's Island light, and about 200 feet above that line. Transfer No. 8 had two car floats in tow, one on each side of her 247 feet long and each loaded with cars. She had come down the Harlem river and had rounded to port across the stream, in order to go to the easterly side of Blackwell's Island, where the flood tide was not so strong as on the westerly side. A little to the starboard of the tug Waterman and her tow was the tug Genista, coming up with a schooner in tow on a hawser about 30 fathoms long, and overtaking the Waterman.

When No. 8 first became visible, the tug Genista was probably between the Waterman and her tow, and about 30 feet to starboard of the tow. She was gaining rapidly upon the Waterman, and as soon as No. 8 became visible, she gave her a signal of one blast, indicating that she would go ahead of No. 8. The pilot of No. 8 claims that he had just previously given a signal of two whistles, designed for the Waterman; that when the Genista's signal was heard he was giving signals to his engineer to slow and stop, because he knew that the Genista must go ahead of him; that the Genista very soon afterwards gave a second signal of one whistle, when a little ahead of the Waterman, which was heard by No. 8 and was immediately answered by the latter with one whistle; that No. 8 soon after gave two whistles to the Waterman; and that by these signals it was intended to bring No. 8 to a stop, and that the Genista with her tow should pass in front of

No. 8, while the Waterman with her tow should go astern of her. No. 8 came to a stop when a little more than half way across the channel towards Blackwell's Island; the Genista and her tow passed ahead and within 25 feet of her; but the Waterman's tow not being far enough to the westward to clear, the stem of the barge Maine struck the starboard side of No. 8's starboard float about 18 feet from her stern, and was so much injured that she afterwards sank, with an alleged damage of \$3,000 to the barge, and about \$2,500 to her cargo, for which the first above libel was filed.

The second libel was for expenses and damages alleged to have been sustained by the Waterman in injury to her propeller while endeavoring to save the Maine, as well as for the repair of damages to the other barges, and the loss of their use while being repaired.

I am of the opinion that this collision took place, primarily, from the lack of precautions on both sides that were reasonably necessary and incumbent upon each in order to avoid destructive collisions off Horn's Hook. In going past Blackwell's Island by the westerly channel, the Harlem river diverges five points to port around that point. The direct channel to the Sound, through Hell Gate, diverges about half a point to starboard. There is a large and constant traffic up and down the Harlem river around the Hook, and a still larger traffic past the Hook to the eastward, so that these lines of traffic cross each other, when boats on the flood tide go down as usual to the eastward of Blackwell's Island. The channel between Horn's Hook off Eighty-Ninth street and Mill Rock to the eastward, forming the mouth of the Harlem river, is less than 1,200 feet wide; and between Mill Rock and the flats off Ninety-Third street, there is only about 600 feet of available breadth of water. Vessels coming down the Harlem river in the middle of the channel, heading properly as did No. 8, for the line of Avenue B., cannot be seen by vessels coming up in mid channel below the Hook, until they are so near to each other that on a strong flood tide there is not reasonable and sufficient time and space for the observation and maneuvers necessary to avoid collision with any certainty, if signals are not exchanged before the vessels themselves are seen. When these vessels were first visible to each other, the Waterman was less than 1,300 feet from the point of collision, and Transfer No. 8, probably about half that distance. The collision happened therefore in about a minute and a half after No. 8 was first seen. It is manifest that this does not afford reasonable time or space for avoiding collision by tugs heavily incumbered with tows like those in this case; and the necessity of signals to give warning of the approach of vessels before they are seen rounding the Hook in either direction, and the necessity of a reply to such signals, seem to me clear.

Inspector's Rule 5 requires steamers approaching a bend in the channel where the view is obstructed, to give a long blast of the whistle, when within a half mile of it. The witnesses for No. 8 testify that this long blast was given by her somewhere between Ninety-Second and Ninety-Sixth streets. This blast, if given, was not heard by the Waterman, and no similar signal was given by her. In the Waterman's behalf it is contended, that the inspector's rule is not applicable, for the reason that there was no bend in the channel which the

Waterman was following that was obscured; since she was designing to go through Hell Gate to the right.

I think the inspector's rule does not literally embrace the Waterman's case, but does embrace vessels which like No. 8 are designing to round a bend in the channel way which they are pursuing. The weight of testimony, however, is to the effect that the use of such a signal is certainly customary with the larger vessels going up the East river on the flood tide and is practised by many tugs also; and the reasons for the inspector's rule are almost equally applicable to vessels going on either side of the Hook. The witnesses for the Waterman deny that there is any definite custom to give such a signal, though admitting it is often done. If such signals are omitted by vessels ascending with the flood tide, the situation of vessels coming out of the Harlem river becomes specially difficult and dangerous. For the duty of "keeping out of the way" is cast by law upon them, both because they have the other vessels on the starboard hand, and because the latter are going with the tide, and the former against it. I have no doubt, therefore, that the practice referred to originated in the recognized necessity for it; and that it is the duty of ascending vessels, if not to give such a signal independently, at least to keep a careful lookout for any such signals from vessels in the Harlem river that may be coming down unseen, and to answer them when heard. The pilot of the Genista says that before he saw No. 8 he was not attending to vessels in the Harlem river or to their signals; and the pilot of the Waterman says he was waiting on the signals between the Genista and No. 8. I must find therefore that No. 8 did give the long signal which several of her witnesses so positively testify to, though it was not noticed by the tugs; and that had this signal been noticed and answered by the Waterman, No. 8 would have checked her speed in time to allow the Waterman and her tow to pass ahead of her, as did the Genista and her tow. At the time the vessels were seen, I am not able to find, contrary to No. 8's testimony, that by reversing at once she would have been stopped in time to let the Waterman and her tow pass ahead of her; on the other hand it is evident that the Waterman might easily have gone to port under a starboard wheel, and have hauled her tow under No. 8's stern after she saw that No. 8 was coming ahead of her.

The case of *The Volunteer* and *The Syracuse*, 49 Fed. 477, cited in behalf of the Waterman, though in many respects similar to the present, differs in the following respects: (a) That there the vessels had exchanged signals of two blasts, each given in sufficient time; (b) that the *Syracuse*, which was going up, hauled far in towards the New York shore, so that at collision she was only 200 feet or less distant from it; and (c) the *Volunteer* was not embarrassed by the presence of other vessels. It was accordingly there held that the collision was wholly the fault of the *Volunteer*, which was coming down, in getting too near Horn's Hook and not keeping off sufficiently to port, as she might have done, to give the necessary room for the *Syracuse* to pass astern of her. In the present case there was no common understanding, through an exchange of assenting signals; the Waterman did not sensibly haul her tow to port as she might have done, and she did

not try to do so until within 200 or 300 feet of No. 8's float, which was too late to be of any use. The Waterman was going much faster than No. 8; and at a much greater distance than 200 to 300 feet it must have been perfectly manifest to her that No. 8 could not stop in time to permit the Waterman and her tow to pass ahead of No. 8; while the fact that the Genista and her tow were to cross the bow of No. 8 would certainly prevent No. 8 from going ahead enough to clear the tow of the Waterman, unless the tow was hauled to port. There was nothing in the Waterman's way to prevent this. She delayed making any attempt to do it until it had little effect on the tow before collision, and was of no use. This was a neglect of the most ordinary caution, irrespective of any question of whistles; and on this ground also I must find the Waterman to blame.

As bearing on the latter fault, I observe that the probabilities of the case agree with the testimony on the part of No. 8, that before the Genista's first whistle was given, No. 8 gave a signal of two whistles to the Waterman. The fact that No. 8 did not reverse at once when the Waterman was seen, but immediately stopped her engines and did not back with a jingle until a few seconds afterwards, makes it evident that she expected, as her pilot testifies, to go ahead of the Waterman and between the two tows; and with that intention, it is scarcely credible that the pilot should omit the usual signal of two whistles. When after this the Genista gave two signals of one blast each, and No. 8 answered her with one blast, the position of No. 8 was such, with her long and heavy tow crossing the river, as not possibly to permit the Waterman reasonably to suppose that that signal was designed for the Waterman also; or that No. 8 could keep out of the way of the Waterman and her tow by reversing and so going astern of the Waterman's tow. It was the plain duty of the Waterman, therefore, to starboard much earlier than she did; and a little starboarding would have avoided this collision. The Waterman was also in fault in delaying her signals. She gave none, until they were of no use.

Transfer No. 8, is, I think, also to blame in two respects. (1) In keeping so long near to the New York shore (within 200 feet) when rounding to cross the river under Horn's Hook; and (2) in undertaking the dangerous maneuver of stopping between the two other tows, with her own long and heavy tow.

Her own evidence shows that she went within about 200 feet of the Hook, to the northeast of it, on a course already taken obliquely about 6 points across the river, and 2 points down. Her reason for keeping so long near to the New York shore, while starboarding, was no doubt to keep in the weaker tide. But this is not sufficient justification for keeping far to the right of the middle of the channel between Horn's Hook and Little Mill Rock, when this course would so much longer obscure her from sight below the Hook. There was nearly 1,200 feet of available water there. She rounded within the westerly quarter of it, close in under the Hook; and this was no doubt one of the immediate causes of the collision, because it unnecessarily delayed the sight of the vessels to each other, and gave considerably less time and space for necessary maneuvers. The fact also that No. 8 got no an-

swer to her long whistle, was not a complete justification for the assumption that no vessels were approaching from below the Hook; since often such signals are not noticed or not answered. She had no right to increase the natural hazards by keeping a course close to the shore, hidden longer than was necessary behind the Hook and diminishing her own means of performing her duty to keep out of the way. She could have kept near the middle of the channel without the least danger of being carried by the flood tide on Little Mill Rock. In this close approach to Horn's Hook the case is similar to that of the Volunteer and her fault is the same.

(2) To undertake to avoid collision by coming to a stop in crossing so strong a tide, with a heavy tow 247 feet long between two other tows that were near together and which she must separate, so that the Genista and her tow should go ahead of her, and the Waterman with her tow go astern of her, was a hazardous experiment. It required not only very careful handling and judgment on her own part, which no doubt were here given, but it also required co-operation upon the part of both the other tugs having tows. As it was the duty of No. 8 to keep out of the way of both of the other tugs and their tows by her own maneuvers, she had no right to undertake a delicate and hazardous maneuver requiring co-operation by the Waterman, except on a previous common understanding by signals in time to make it effective and free from danger, unless the situation was already in extremis, and no safer alternative was apparent. Here there was co-operation on the part of the Genista, but not on the part of the Waterman; nor was there any common understanding by signals with the latter; and No. 8 did have the alternative of keeping more to port, which, though inconvenient to herself, she might have adopted, as it seems to me, without imperilling either herself or the Genista's tow. But if not and if she was in extremis from the time the tows were seen, it was partly by her previous fault in getting into that situation. *The Elizabeth Jones*, 112 U. S. 514, 5 Sup. Ct. 468.

I have, indeed, found that the Waterman might and ought to have co-operated to avoid collision, as soon as it was evident that No. 8 was crossing her bow and could not avoid her without her help, and I have held her in fault for not doing so; but as the primary duty was on No. 8 to keep out of the way, she must be held in fault both for unnecessarily prolonging the obscuration of the vessels to each other by keeping so near the shore and for unnecessarily undertaking a hazardous maneuver that she could not successfully accomplish alone, nor without a previous agreement by signals for co-operation on the Waterman's part, which was not obtained.

The damages must, therefore, be divided between the two tugs.

## THE MEXICAN PRINCE.

## STEINWENDER et al. v. THE MEXICAN PRINCE.

(District Court, S. D. New York. August 25, 1897.)

## 1. DAMAGE TO CARGO—ABSENCE OF SOUNDING PIPES—EQUIVALENT PROVISIONS—SEAWORTHINESS.

In a convertible steamer, built to carry fluids in bulk, as well as dry and perishable cargoes, a pipe line ran forward from the pump room, in the stern of the vessel, into and through the separated cargo compartments, with an offset from the main line in each, which could be opened and closed by a Kingston valve, operated by a spindle from the deck. Provision was made for testing these valves, and for ascertaining the presence of water in any compartment, and for removing it promptly, by means of the pumps and pipe line. No deck sounding pipes were fitted. Damage having occurred by water entering a compartment from the pipe line, *held*, that the provisions made were adequate to prevent damage to dry cargo from water ballast in an adjoining tank, if properly managed, and that the vessel was not unseaworthy by reason of the absence of sounding pipes.

## 2. SAME—HARTER ACT—FAULT IN MANAGEMENT.

The steamer sailed with her No. 2 tank full of water for ballast, and with the neighboring compartments full of coffee in bags. During the voyage this water ballast was removed through the main pipe line, but, owing to the failure to have the valve in the offset leading into No. 3 tank closed, water entered there, damaging the coffee. Those in charge omitted to test the valve by means of the pumps, or to count the turns of the spindle which opened and closed the valve, before using the pipe line to discharge the ballast. These tests would have shown that the valve was not shut. *Held*, that the damage arose from neglect in the "management of the ship," within the third section of the Harter act, and that the steamer was not liable therefor. The *Silvia*, 64 Fed. 607, *Id.*, 15 C. C. A. 362, 68 Fed. 230, and The *Sandfield*, 79 Fed. 371, followed and applied.

## 3. SAME—ALLEGED OBSTRUCTION OF VALVE ON SAILING—SEAWORTHINESS.

On the evidence, *held*, that it did not appear, as contended, that the valve was obstructed by pieces of wood at the outset of the voyage. *Held*, further, that such alleged obstruction, if it existed, would not have amounted to unseaworthiness, because accidental and temporary in character, and certain to be removed by application of the pumping tests prescribed by the shipowners' written instructions.

## 4. SAME—STOWAGE—PROXIMATE CAUSE OF DAMAGE—SEAWORTHINESS—FAULT IN MANAGEMENT.

*Held*, that the vessel was not unseaworthy in respect of her cargo by reason of the stowage of coffee in a compartment adjoining that in which water ballast was carried; that the pipe line, valve, and pumping arrangements were adequate to have prevented the damage, if properly managed; and that, therefore, the loss must be attributed to improper "management," and not to unseaworthiness.

Lawrence Kneeland, for Steinwender and others.

Edmund L. Baylies and Walter F. Taylor, for Elmenhorst and others.

Harrington Putnam, for Crossman and others.

Convers & Kirlin and J. Parker Kirlin, for the Mexican Prince.

BROWN, District Judge. The above three libels (consolidated) were filed to recover \$36,500 damages to 963 bags of coffee, part of the cargo of the steamship Mexican Prince, shipped at the way port of Rio Janeiro, upon a voyage from Buenos Ayres to New York, in

May, 1895. The damage was done by water, which was carried in No. 2 tank of the ship, and which through some neglect of proper attention to a valve in the pipe line connecting with starboard tank No. 3, in which all the damaged coffee was stowed, escaped into that compartment. There is no dispute as to the damage, or that it came about as above stated. The only questions presented are whether the steamship is relieved from liability for this damage either by reason of the provisions of the bill of lading, or under the third section of the act of 1893 (2 Supp. Rev. St. p. 81), known as the Harter act, the libelant claiming that the ship was unseaworthy in structure for the carriage of dry and liquid cargo at the same time, and also unseaworthy because the valve was negligently left open when the ship sailed.

The steamer was built in 1893, and is one of a recent class, known as convertible steamers, of which about 20 have been built, designed to carry liquid cargoes in bulk, as well as dry and perishable cargoes. She has a compartment for the stowage of dry cargo only, next aft of the fore peak; aft of this is a cofferdam or water-tight compartment formed of two bulkheads; and aft of this five separate compartments or tanks known as Nos. 1, 2, 3, 4 and 5, separated from each other by water-tight bulkheads running athwartships, and further divided by a longitudinal or fore and aft bulkhead over the keel, reaching from the skin of the vessel to the upper or main deck and dividing each of the five tanks in two, termed No. 1 port, No. 1 starboard, and so on respectively. Aft of No. 5 tank in the stern are the engine room, bunkers, stokehole, etc. The between-decks, next under the main deck, extend from the side of the ship only 10 feet into the tanks on each side. The between-decks form the top of that part of the tanks. Inside of the between-decks is an open space of 10 feet between them and the longitudinal bulkhead, where the tank rises higher to the main deck above. Each of the tanks is 38 feet fore and aft, and up to the between-decks is 20 feet wide on each side of the longitudinal bulkhead; above the between-decks, 10 feet wide. An 8-inch pipe line on each side of the longitudinal bulkhead runs into and through all the tanks, about 4 feet distant from the longitudinal bulkhead on each side, and a few inches above the floor of the hold. There is an offset from the main pipe line in each tank near the after bulkhead, which runs horizontally about 2 feet, and then turns perpendicularly and runs down between the frames of the ship and terminates in an oval shaped bell mouth, about three-quarters of an inch above the bottom plating. The bell mouths measure 8 inches fore and aft and 24 inches athwartships. The pipe lines are used for filling and emptying the tanks with liquid cargo through the offsets above named, as well as for pumping out any leakage that may get into any of the tanks. In each offset there is a Kingston valve, which is operated from the main deck by means of a spindle, the screw or thread of which is in the valve, which is completely opened or closed by 16 turns of the spindle, making a play of the valve up and down of about 8 inches. At all times except when in use for pumping, these valves are designed to be kept tightly closed.

The printed rules of the ship prescribed by the owners required the



tanks and valves to be tested with the pumps every day; and this was usually done at 9 a. m. The test is applied as follows: The pump is started and kept at work upon the main pipe line; the valve connecting with one tank compartment is then opened, all the other valves being closed; if there is water in that compartment it is at once pumped out and discharged over the ship's side, through a canvas pipe attached to the discharge pipe of the pump; if there is no water in that compartment, or after the water, if any, is pumped out, the pump sucks and forces out air which inflates the canvas pipe; this continues until the valve is closed, when a vacuum being created, the canvas pipe collapses. This collapse shows not only that that particular valve is tight, but also that all the other valves on that pipe line are tight; since otherwise air would continue to be pumped out, and the canvas pipe would not collapse. This process is applied to every tank compartment in succession. It is quickly done, 10 minutes being sufficient to test the 10 compartments and valves.

The steamer, having taken on board a part of her return cargo at Buenos Ayres and at Santos, left the latter port (60 miles from Rio), on the 25th of April, with tank No. 2 nearly full of water for ballast. On the way to Rio, in order to sweeten the water in tank No. 2, it was overflowed by forcing water into it through the pipe lines, for four hours, until all the water was supposed to be changed. On the morning of April 26th, at about 9 or 10 o'clock, on coming to anchor in the harbor of Rio, the water in No. 2 tank was lowered two or three feet, by being allowed to run out through the sea cocks. On both these occasions if No. 3 valve had not been tightly closed, No. 3 tank would have been deluged with water. On the contrary, that compartment remained perfectly dry up to May 1st, when the coffee in question was stowed in starboard No. 3 compartment, and the ship sailed from Rio at 3 or 4 p. m. of the same day.

After the loading had been completed at Rio, no water ballast being longer needed, and the emptying of water ballast in the harbor being prohibited, the master, on the evening of leaving Rio, ordered No. 2 tank to be pumped out at 6 o'clock the next morning, after making "sure that all the valves were shut." It was necessary that the valves in the other tanks should be tight in order to prevent flooding the other tanks while the water from No. 2 was running out down to the line of sea level, by its own head (10-12 feet), through the sea cocks, before the pumps were put on. Accordingly, on the next morning, the carpenter, between 6 and 6:30 a. m., after clearing the bilges, went to the spindle of each valve, in the first officer's presence, and turned it first up a little and then down hard. This was finished, he says, about 6:30 a. m. Adamson, the second engineer, says he opened No. 2 valve to let the water run out at about 6:15 a. m., and that he did not himself know whether the other valves had been tried before that. It does not appear who gave Adamson the order to open the valves of No. 2; so that though the first officer says he knows No. 2 valve was not opened until after the other valves had been tried, and that is most probable, it does not appear how the first officer knew it; so that it is not certain that there may not have been some mistake about it.

After the valves of No. 2 were opened the water was allowed to run out until 7:30 a. m., and it was during this interval that the water that caused the damage must have entered No. 3. At 7:30 a. m. the pumps were applied and by 11:30 a. m. the residue of the water was pumped out of No. 2. The same pumping would also remove at the same time the water that had previously entered No. 3. No. 2 tank was then washed out with a small hose, the pumps being still kept going until 5 p. m., when the valves were closed. Meantime, at about 1 p. m., all the other tanks and valves were tested with the pumps, according to the testimony of the first officer and first engineer, and the valves were found to be tight.

The damage to the coffee was discovered on the next morning, when, in order to correct a slight list to starboard, a transfer of bags from starboard to port was made by the captain's orders in No. 3 compartment; and after the removal of about 100 bags, all the bags below were found to be wet and dirty. No. 3 valve was soon tried, both by turning and by the pumps, and it was found to be tight, as it naturally would be, after the test made the preceding afternoon. On examining the mudbox connected with the starboard pipe line, two pieces of wood were found in it; one a piece of narrow hoop about an inch long, not material here; and another piece, which was of soft wood, about 16 inches long,  $\frac{1}{4}$  of an inch thick,  $\frac{3}{4}$  of an inch wide, and flat on both sides. This bore on the surface indented marks, as of pressure, fitting exactly the two edges of the Kingston valves, at a point about  $\frac{1}{4}$  of the way, or two inches, above the bottom; the valves being flat, and circular in outline, but a little wedge-shaped from top to bottom. The valve in No. 3 on subsequent daily tests proved to be tight and in order, until May 5th, when though tight, the spindle turned without affecting the valve, showing that it was broken; and on examination after arrival in New York, a piece of the bottom of the spindle  $2\frac{1}{2}$  inches long was found to be broken off, and the threaded part above to be somewhat bent, presumably from the heavy strain in various trials.

On the final hearing, the libelants have contended that the ship was not exempt from liability for this damage under the Harter act, because No. 3 valve, as they claim, was obstructed by this piece of wood when the ship left Rio, and that the ship at that time, therefore, was in an unseaworthy condition. This was not pleaded in reply to interrogatories in the answer calling for the particulars of alleged unseaworthiness, because it was not then known to the libelants; but as the evidence on that subject came out on the examination of the claimant's witnesses, without objection, it should be considered upon its merits.

I cannot, however, sustain the libelants' contention on this point for several reasons. The marks on the piece of wood might have been made by either of the valves on the starboard line, as all the valves are alike. There is no direct evidence that the piece of wood was ever under No. 3 valve; or, if it was, that it got there before the ship left Rio. The libelants' inferences rest wholly upon the testimony of Johnson, the carpenter, that on the morning of the 2d, after a half turn upon the spindle he turned it down hard, and only half a

turn. But if the bend in the swindle was prior to this damage, the hard turn may have been against that bend, instead of being against the piece of wood. On the libelants' theory, the piece of wood must have been sucked up with air from beneath the bell mouth, during a pump test of the valves while the ship was in Rio, and got lodged under the valve while it was open, or just as it was closing. But three witnesses say it could not be sucked up into the large bell mouth with air alone, but only with water behind it; and there was certainly no water in No. 3 tank at Rio; the first officer, moreover, says that before arrival at Rio he cleared out No. 3 tank carefully and that there was no such piece of wood there. Others say that without water the piece of wood could not be caught on the side of the pipe two inches above the bottom by the slowly-descending valve, but would be forced down to the bottom, and if it was then caught the pump test of that valve and of the other three valves would all have shown that there was a leakage. If the piece of wood caught under No. 2 valve none of these difficulties would exist; for this wood might easily have been in that tank; it would naturally be carried up the pipe with the last of the water when No. 2 was pumped out; and by floating on the water it would naturally catch at the side and be carried out at the next pumping. And even if the piece of wood did get under No. 3, it might have come, as the first officer suggests, from the other tank, or from being for some time in the pipe line, or from outside the valve, as Adamson suggests, when No. 3 was opened on May 2d, if the opening was of several turns, as was the customary practice, instead of half a turn, as Johnson states. Considering that the libelants' theory on this point requires that it must be found as a fact that this piece of wood was under No. 3 valve and that it got there while the ship was at Rio, I think the evidence and circumstances too doubtful, and the inference on these points too uncertain to sustain this contention by such positive findings.

But even if the alleged obstruction of No. 3 valve existed on leaving Rio, that would not constitute unseaworthiness. For, however it arose, the obstruction, if any, was accidental, of the most temporary character, and sure to be removed by suction upon the first test made with the pumps, and as well as by the exercise of reasonable diligence on any special occasion calling for care during the voyage. It would have been thus removed or else discovered in time to avert damage had the pump test been applied, as required by the owners' rules, either on the day of sailing or on the next morning, before the valves of No. 2 were opened. Reasonable prudence certainly required an actual test of the valves before opening No. 2 valves, considering the great mass of water that was to be sent through the pipes; and the master's order "to make sure that the valves were shut" perhaps imported this. If the pump test was not applied, the full 16 turns up and down should have been given as the only other means of detecting an obstruction. Either of these means was sufficient. Both were neglected; and after the water was started no sounding of the other tanks by the pumps was made, as might easily have been done. The cause of the damage, therefore, was negligence in the use of the means of safety provided by the owners and a neglect to observe their

written orders in that regard, and not any omission by the owners to provide for all the requirements of a seaworthy ship, and to put her in seaworthy condition. In other words, the fault arose wholly in the "management of the ship," at a port of call and subsequent thereto; it arose during the voyage, and not from anything the owners did or omitted to do, or any lack of diligence by them, to make the ship seaworthy at the commencement of the voyage. The third section of the Harter act, therefore, exempts them from liability, so far as respects this negligence. The case of *The Silvia*, 64 Fed. 607; *Id.*, 15 C. C. A. 362, 68 Fed. 230,—is quite analogous in this regard. In that case a port had been left open on sailing, through which water was likely to enter, to the damage of cargo in rough weather; and the cargo was afterwards damaged in that way. Although the hatches had been battened down, and ready access to the port was thereby embarrassed, the circuit court of appeals considered that sufficient time and opportunity still remained for reaching and closing the port by the use of reasonable diligence, and therefore ruled that the open port on sailing did not constitute an unseaworthy condition, and that the damage should be ascribed to negligence in not closing the port on the approach of rough weather; and that such negligence was "in the management of the ship" within the third section of the Harter act. See *The Sandfield*, 79 Fed. 371.

The other particulars of unseaworthiness charged are stowing the coffee "in a compartment where by reason of its construction it was possible for the cargo to be injured by water getting to it from another compartment," and also that "no means were provided to certainly prevent the access of such water, or to detect its presence."

The weight of evidence does not sustain either of these charges. The evidence leaves no doubt that this vessel was most thoroughly and perfectly constructed, upon plans approved by most competent experts. The means provided for detecting water in the cargo tanks were simple, quick and easy; and the means for the removal of water greatly superior to those on ordinary cargo steamers. It is a common practice in all modern steamers, and deemed unobjectionable, to carry dry cargo in compartments adjoining water-ballast tanks. Tank No. 2 was in this case in use for a short time for water ballast. The only distinguishing circumstance in that regard on this steamer is the pipe line, which, with its offsets, connects the different tanks. But these connections are of the highest utility and economy in the carriage of liquid cargo, and essential, therefore, to the service for which the ship was designed. In planning the ship to carry dry cargo also, I see no reason why it is not as legitimate to rely on valves in the offsets, and on proper attention to the valves to prevent the incursion of water or other liquid into the dry tanks, as it is in ordinary vessels to rely on the proper closing of ports and sea cocks for the same purpose. Through negligence in the use of any of these openings, damage may arise to cargo for which the shipowner must pay, except in so far as he is exempted by statute or by contract. The same principle is applicable to all. So long as such pipe lines and valves are reasonably adapted to the double service for which the ship is designed, and the use of them is so simple, easy and certain as to

require only ordinary diligence for the protection of dry cargo, as the proof shows in this case, the ship cannot be held unseaworthy in construction or in stowage, merely because damage may arise from inattention to the valves.

Much testimony was taken on the question whether a sounding pipe should not also have been provided for each tank, for the detection of water in the bottom, by a rod which could be inserted through the sounding pipe from the deck, whenever desired. Several experts examined by the libelants were of opinion that such sounding pipes should have been provided; a greater number were of opinion that the pipe line and Worthington pumps were more than an equivalent for such sounding pipes, and were not required either by reasonable prudence or by any existing regulations; and such is undoubtedly the weight of evidence.

Sounding pipes, moreover, are of comparatively recent use; and in stormy or wet weather, it is said, they cannot be advantageously used with facility. In cases like this, sounding pipes would not prevent the damage, but only discover the damage after it was done. There is no reason to suppose that sounding pipes would have been of the least use, or would even have been resorted to, had they been provided. Had there been any thought of testing the tanks for water during the hour on the morning of May 2d, when this damage was done, it would have been as easy to make that test by the pumps as by a sounding rod; the test by the pumps was not made, because it was not suspected that any valve was open so that any water could get into any one of the eight compartments in which cargo was stowed; sounding pipes, if provided, would not have been used, for the same reason; so that the absence of them cannot be supposed to have contributed to this damage, and would be therefore immaterial even if they had been required.

I am of opinion that this damage is covered by the exemptions of the third section of the Harter act, and that the libels must, therefore, be dismissed, with costs.

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#### GREEN v. COMPAGNIA GENERALE ITALIANA DI NAVIGATION.

(District Court, S. D. New York. July 24, 1897.)

##### 1. COLLISION—STEAM AND SAIL—NEGLIGENT LOOKOUT—CHANGE OF COURSE—SAILS ABACK—MEAGER TESTIMONY.

The steamer O., going at the rate of 14 knots, on a course S. W. x S.,  $\frac{3}{4}$  S., in a clear night at sea, came in collision with the bark S., previously closehauled, on a course E. N. E., on the starboard tack, going 3-4 knots. The bark's red light was seen a little on the O.'s port bow from one to three minutes before collision; the O. ported, but just before collision saw the bark's green light, and the port bow of the bark struck the steamer's starboard side aft of the bridge; the bark shortly before had been taken aback, and while aback the steamer's masthead light was seen on the bark's starboard beam; the steamer's colored lights were not noticed; the bark regained her course, either by luffing or by wearing round, and a hall "Light Ho" was given within one minute before collision. Held both in fault; the steamer for negligent lookout and lack of timely measures; the bark for careless management and change of course.

2. TESTIMONY TAKEN IN PERPETUAM REI MEMORIAM—SECTION 868, REV. ST.—SERVICE OF PROCESS NECESSARY.

Depositions in *perpetuam rei memoriam* under section 868, Rev. St., cannot be taken *ex parte* by a proceeding in equity without any service of process upon the defendants in interest, though they are out of the country. Such depositions, taken before the libel was filed, excluded. The chancery practice stated.

Carver & Blodgett, for libellant.

Ullo, Ruebsamen & Cochrane, for respondent.

BROWN, District Judge. The above libel was filed to recover the damages arising from a collision at sea, at about 1 o'clock in the morning of March 31, 1895, some 300 miles off the coast of Brazil, between the libellant's whaling bark, *Swallow*, bound north for provisions, and the respondent's steamship, *Orione*, bound from Genoa, Italy, to Montevideo. The night was clear. The *Swallow* was sailing slowly, closehauled on the starboard tack, making a course of about E. N. E., with the wind from the S. E., light and a little variable. The steamer's course was S. W. x S.,  $\frac{3}{4}$  S., and she was making about 14 knots per hour.

According to the testimony of the steamer's witnesses, all taken on commission, the red light of the bark was first seen from two to three minutes before the collision, a little on the steamer's port bow. Her helm was then put hard a-port (hard a-starboard in foreign phrase) so that the steamer's head turned gradually to starboard. The bark's red light continued to be seen until very shortly before the collision, when the green light appeared, and a few seconds thereafter, the port bow of the *Swallow* struck the port side of the steamer, a little aft of the bridge, and about 140 feet from her stem. The *Swallow* was damaged along her port side for some distance aft of the cathead. She subsequently reached Rio Janeiro where she was repaired. The steamer was not seriously injured.

The only witnesses from the bark that have been examined since the filing of the libel were Roudet, the fourth mate, and Da Lomba, who were on deck before the collision, and also the master, who did not reach the deck until a few moments after the collision. Roudet says that the masthead light of the steamer was seen 15 minutes before collision, several miles away, two points off the starboard beam, afterwards ahead, a little on the port bow, and just before collision on the starboard bow; that no change of course was made by the bark, and that she was struck by the steamer a glancing blow on the port bow, springing her mainmast and foremast. The colored lights of the steamer he did not notice at all.

It is plain that this does not account for the collision. To have the steamer's light two points aft of the bark's starboard beam, the bark must have been heading about west, and if the bark did not change her course thereafter the collision could not have happened.

The answers by the respondent's witnesses, in the depositions, are extremely brief and meager; and though her porting hard naturally agreed with seeing the red light on the port bow, and this harmonizes with Roudet's statement, there is no explanation why the bark's lights, either red or green or both, were not seen earlier from

the steamer; nor why a port light seen on her port bow should not have been avoided, if she had a-ported, as she states, even two minutes before collision; since in that interval, as she was going at 14 knots speed, she must have changed her heading at least six points; and it is impossible that the bark, going slowly, could by any slight change, after her red light was visible, have thwarted the effect of a change of six points by the steamer going 14 knots.

The cross-examination of Roudet, however, shows that the bark did not keep her course from the time the steamer's light was first seen; he says that when that light was seen the bark had been taken aback so that the light was seen aft of a-beam, or on the starboard beam; that after about 10 minutes maneuvering, during which time the bark was drifting backward, she regained her course of about E. N. E., so as to bring the steamer's light ahead or on the starboard bow. He states indeed that this was 15 minutes before the collision, but he also says that he reported "A light, Ho." The captain who was below heard this hail, and in a few moments came to the companion way, as he says, and directed the vessel to be kept close to the wind, then went back to his room, and before he had time to put on his trousers fully, the collision happened. This would indicate that the report of the light was less than a minute before collision, instead of 15 minutes; and that the change of the steamer's masthead light from the bark's port bow to her starboard bow was some time during this period of a minute before collision.

This agrees with the respondent's testimony. For such a change of lights, considering that the blow was on the bark's port bow, and that the steamer was crossing the bow of the bark at the moment of collision, from starboard to port, and that the contact with the steamer was aft of the bridge, could only have arisen from the bark's change by some swinging to port. The witness says that the masthead light, when reported, was one-half a point on the lee bow, and that that was the starboard bow; it was really the port bow. He had previously said that he first saw the steamer's masthead light, 15 minutes before the collision, two points off the starboard beam. On cross-examination he says the steamer's light was seen about a mile off, and two points off the lee beam, but that it did not remain on the beam as the bark had caught aback; that she kept sagging astern; that the main sail caught full again, and set the vessel ahead, and in about 15 minutes she had caught her course again. His testimony has many contradictions in detail. On redirect he again says the bark was aback when he first saw the steamer's light; that the bark kept sagging astern all the time; that then the main sail filled, and the vessel took its course, and that then the steamer bore right straight ahead; and that it was about 15 to 17 minutes from the time he first saw the steamer's light until the vessel came up to her course, and that she was aback 10 minutes.

The witness Da Lomba adds nothing trustworthy to the case. He says he saw the masthead light about a mile away 15 minutes before the collision; that the bark did not change her course at all; and he says nothing about her being taken aback. He also says it was 15 minutes from the hail "Light Ho," until the collision (which cannot

be correct) and he did not see any colored lights and did not look for them, but thinks the steamer's masthead light that he saw was red.

Upon this testimony on the bark's part, indefinite and confused as it is, there can be no doubt of great negligence both in her navigation and in the watch and report of the lights of the steamer. That she was taken aback, and went astern, and that she was a considerable time in getting on her course again must be deemed proved. It is not definitely stated whether she got back to her course again by luffing, which from the expressions "sagging" and "drifting back," I at first supposed was the case, or by wearing round. Roudet's statement that the steamer's light was first seen two points aft of the starboard beam, would indicate wearing round, and that the bark was then heading about west. No questions were asked the witness sufficient to explain the ship's behavior.

Upon such uncertainty and contradictions in the testimony in the libellant's behalf, and such obvious negligence in the management of the bark, no decree against the steamer would be warranted, if her own testimony gave a reasonable and probable explanation of the collision, and showed reasonable diligence and caution on her part. But the case shows that she must have kept a negligent lookout, or the bark's lights must have been seen much earlier, whether the bark regained her course of E. N. E. by luffing or by wearing round. In the former case, the bark's red light must have been visible from five to ten minutes before collision, and the bark's change of position, though constant and deceptive, must have been comparatively very slow, and could not have been sufficient to prevent the steamer from avoiding her, had timely notice been taken of the bark and had the steamer hard a-ported even a minute before collision, as a drawing of the situation will show. If the bark wore round, her red light could not have been seen till one or two minutes before collision, and her green light must have been visible for at least five minutes preceding; or else, if the bark regained her course of E. N. E., several minutes before collision, her previous changes in wearing round were immaterial. Upon the testimony so far, my conclusion, therefore, is that the steamer was negligent in lookout and in timely measures to avoid the bark; and that the bark was still more negligent in her management, as the signal, "Light Ho," just before collision proves, this signal being given so late probably from the fact that no attention was previously paid to the steamer, because of the endeavors of all on deck to bring the bark back to her course; and that upon all these circumstances, the steamer's testimony that just before collision the bark again changed sufficiently to show her green light, even though she had regained the course of E. N. E., several minutes before, ought not to be discredited, and that the bark, therefore, contributed to the collision by bad management and changes of course.

Besides the testimony above referred to, the libellant has offered in evidence four depositions of other seamen who were on board the bark, which were taken under section 866 of the Revised Statutes in the circuit court of Massachusetts in perpetuum rei memoriam in August, 1895, about three months before the present libel was filed. The reason for taking this testimony was, that the seamen were about



to depart on distant voyages and it was improbable that their testimony could be procured when wanted; the present respondent, being a foreign corporation and having no property in this country, it was impossible at that time to acquire jurisdiction by the filing of any libel either in rem or in personam, so that the depositions of the witnesses might be taken as in ordinary cases in the principal suit. For the same reason no service of process could be made upon the defendant, or any appearance obtained in the suit in equity to take the testimony in perpetuam rei memoriam. Accordingly, the proceeding to obtain the depositions was taken by petition, which was filed in Massachusetts on the 16th of August, 1895, setting forth the above facts, whereupon an order was entered ex parte for the taking of these depositions on the 20th day of August, before a notary public at New Bedford, the same to be returned and filed of record in the circuit court of Massachusetts.

The examination of witnesses was accordingly taken ex parte before the notary public named on the 20th day of August, and on the 23d of August the depositions were returned and filed in the office of the clerk of the circuit court of Massachusetts; and on the 31st of August a decree was entered in that court adjudging that said depositions should remain in perpetuam rei memoriam, to be used in case of the death of any of the witnesses, or their inability to attend on the trial of any suit for the collision damages.

The depositions thus taken were six in number, two of them being those of Roudet and Da Lomba who were subsequently examined as witnesses under the present libel. The other four witnesses could not now be found, so as to be produced and examined as witnesses in this action, and their depositions in the equity proceeding are offered in evidence, to which objection is made that they are incompetent. I am of the opinion that the objection must be sustained. The depositions were evidently not taken "according to ordinary usage" under the first clause of section 866 of the Revised Statutes. They can only come in, if at all, under the second clause of that section, which provides that:

"Any circuit court, upon application to it, as a court of equity, may, according to the usages of chancery, direct depositions to be taken in perpetuam rei memoriam, if they relate to any matters that may be cognizable in any court of the United States."

Giving to this clause its widest possible scope, as including any matter that may thereafter become a subject of litigation, the proceeding according to the express limitation of the statute must be "according to the usages of chancery." This provision is substantially the same as was enacted in the judiciary act of 1789. 1 Stat. 90, § 30. The "usages" referred to are evidently those of the English chancery, no different chancery practice being then or since established here, in that regard. Counsel have not referred me to any authority, however, nor have I been able to find any, for proceeding in equity under any circumstances by mere ex parte petition to take depositions in perpetuam rei memoriam, without any bill filed, or process issued or served on the defendants in interest. The subject is treated with some fullness in the principal works on chancery prac-

tice. They all require the filing of an original bill and the service of process in the usual manner upon the defendants interested. It is the right of the defendants to defeat, if they can, the complainant's claim to take such depositions, and to cross-examine the witnesses if the taking of depositions is allowed. The form of the prayer of the bill is the same as in ordinary bills, excepting the requirement that the defendants abide the decree of the court. See Hughes, Eq. Draftsm. (Am. Ed.) pp. 360-362. Story, Eq. Pl. §§ 299-306; 2 Daniell, Ch. Pl. & Prac. 1572-1574; Fost. Fed. Prac. § 279; Langd. Eq. Pl. §§ 201, 202. Ordinarily the complainant cannot proceed to take depositions at once. The defendant has 14 days in which to show cause against proceeding to take the depositions, and if sufficient cause is shown against it, the complainant is not allowed to proceed. 1 Madd. Ch. Prac. 187; Com. Dig. 471; Hughes, Eq. Draftsm. p. 361. Ordinarily, moreover, the defendant must answer before the testimony is taken; but if after being served with process he refuses to answer or absconds, the depositions have been allowed to be taken on those facts being proved. *Lancaster v. Lancaster*, 6 Sim. 439. This was allowed by Lord Eldon in the case of *Frere v. Green*, 19 Ves. 319, where he observed:

"There is no instance of such an examination before appearance, except after service of subpoena; and then, there being no appearance, the court, holding the defendant to be in contempt, has granted the examination."

This seems to be the utmost extent of the allowance of *ex parte* depositions, viz: where the defendants have been duly served with process, and have thereafter refused to plead, or absconded. As there was no process served in this case, nor any legal notice given to the defendants, I am obliged to exclude these depositions as irregular, and not "according to the usages in chancery." If such *ex parte* depositions could be thus taken, and afterwards brought into actions subsequently begun, much of the testimony in admiralty causes would naturally be taken in this way, and cross-examination, that necessary safeguard of the truth, would be lost.

Though I must exclude these depositions, therefore, as evidence in the action, I have nevertheless looked into them for the purpose of seeing, whether, regarding them merely as affidavits, they furnish a sufficient ground for a continuance of the cause, considering that the evidence on both sides is so meager and unsatisfactory. Roudet there states that he first saw the light of the steamer off the starboard beam, a little bit forward of the beam. When he saw it next, it was right straight ahead. Explaining this he says, "Our vessel caught aback, and in getting on our course again, and in catching the steamer, it was right dead ahead again, a little off the port bow."

Da Lomba says the first time he saw the light it was on the weather beam; next, right dead ahead. "The bark," he says, "was sailing by the wind, and sometimes she would fall off, and sometimes she would come up, and her sails were taken aback, and that caused her to go clear round in a circle to get on her course again, and while she was going round in a circle I saw this steamer's light on our starboard beam, and when she got on her course again, the steamer's light was almost dead ahead, a little on the port bow." Nothing of

this appears in Da Lomba's testimony taken in the present cause. Roudet says he saw the masthead light "two points on our starboard bow about five miles away, fifteen minutes before the collision, that the vessel was all the time on the starboard tack." He says nothing there of being taken aback. McComba, third mate, who was in charge of the navigation at the time of the collision, says he first saw the steamer's light off the starboard beam, 20 minutes or a half hour before the collision, while sailing on a course N. E.  $\frac{1}{2}$  E. closehauled, and that the light continued to appear upon the port bow (an impossible account). Explaining this he says, "that they were sailing by the wind closehauled, and that the wind was baffling, and the wind caught the sails aback, and she swung right around; that she went right around in a circle, the whole length of her, until she came round on her course again, and that she had not come on her course fully when he first saw the steamer's light, being then about eight points off her course." He says that the course N. E.  $\frac{1}{2}$  E. was regained in three or four minutes and that the steamer's light then bore a little on the port bow; that he saw the white light and the two side lights on the steamer about ten minutes before the collision, when she was two or three miles away; that the lights bore on the port bow all the time, and that the course of the bark was not changed. Pease, chief officer, states that he was below at the time of collision, but that he was on deck about ten minutes before, and saw the steamer's masthead lights and two side lights very near, two points off the lee bow. His subsequent testimony indicates that that was much less than ten minutes before the collision. Taber the second officer was below.

From this brief reference to the depositions excluded, it is evident that the testimony of these witnesses, even as the depositions stand and without any of the results of cross-examination, would contribute nothing to relieve the bark from the charge of bad management, but would plainly confirm it; the inconsistencies in the bark's testimony are repeated in these depositions, so that it would remain impossible to give credit to any precise details of their evidence to exempt the bark from blame; it shows a change of course of at least eight points after the steamer's light was first seen, and confirms the steamer's story that the bark's port light was shown and the evident failure of the bark to pay any attention to the steamer until just before collision. There is nothing sufficient to discredit the steamer's evidence of a change by the bark so as to show her green light just before collision. This might have happened through too strong a checking of a previous swing to starboard, or a purpose to prevent being taken aback again.

Decree for the libellant for one-half the damages.

## TAYLOR v. KERCHEVAL.

(Circuit Court, D. Indiana. September 28, 1897.)

No. 9,475.

**1. JURISDICTION OF FEDERAL COURTS — REMOVAL OF OFFICERS — EXECUTIVE FUNCTIONS.**

The national courts cannot rightfully interfere with executive action in any case where an executive officer is authorized to exercise judgment or discretion in the performance of an official act.

**2. EQUITY JURISDICTION—INTERFERENCE WITH EXECUTIVE ACTION.**

Courts of equity concern themselves only with matters of property and the maintenance of civil rights, and have no jurisdiction in matters of an executive or political nature; nor do they interfere with the duties of any department of the government except under special circumstances, and then only when necessary to the protection of rights of property.

**3. OFFICERS—POWER OF REMOVAL.**

The power to remove the incumbent of an office is incident to the power of appointment.

**4. DEPUTY MARSHALS—POWER OF MARSHAL TO REMOVE.**

An office deputy of a United States marshal has no vested right of property in his office or employment, under the act of May 28, 1896. He is employed by the marshal, and his tenure of office terminates with the expiration of the marshal's official term; and a court of equity has no jurisdiction to restrain the marshal from removing him.

**5. SAME—CIVIL SERVICE LAW—EXECUTIVE RULES.**

The rules promulgated by the president which place office deputies in the marshal's office in the classified civil service list are not a statute, nor have they the force of law. They are merely executive rules and regulations by authority of law, and are effective, if at all, only for the internal control and government of the civil service and the executive departments. The courts of equity have no jurisdiction or authority to enforce them.

Holstein & Hubbard, Henry Warrum, and J. M. Berryhill, for complainant.

Hawkins & Smith and Albert W. Wishard, for defendant.

**BAKER**, District Judge. This is a suit by the complainant, Charles P. Taylor, an office deputy employed in the office of the marshal of the district of Indiana, to enjoin the defendant, Samuel E. Kercheval, as such marshal, from removing him from his office or employment as such office deputy. The bill sets forth that the complainant is a United States deputy marshal for the district of Indiana, and is an office deputy; that in October, 1896, he was appointed to such office, and duly qualified as such officer by taking the required oath of office, and has since then discharged the duties thereof, and is still such United States deputy marshal; that on the ——— day of ———, 1896, in accordance with the order and direction of the president of the United States, the attorney general of the United States revised the existing classification of the offices and positions in the department of justice so as to include the office occupied by the complainant within the classified list of those entitled to the benefit of the civil service laws of the United States and the rules and regulations thereunder; that in November, 1896, the president of the United States, by an executive order, as provided by law, extended the

civil service laws, rules, and regulations to the position occupied by the complainant, and declared and provided that the operations of the said civil service laws, and the rules and regulations promulgated thereunder, should cover and include the position of office deputies of the United States marshals and incumbents thereof, and that, under the laws of the United States, the office and position of office deputy of the United States marshals are under the civil service laws, rules, and regulations, and are governed thereby; that in March, 1897, the defendant, Samuel E. Kercheval, became and was duly appointed and qualified as United States marshal for the district of Indiana, and is now such marshal; that the defendant proposes and threatens to remove the complainant from his said office and position, and to prevent him from exercising the duties thereof; that he has announced and declared his intention to oust and remove the complainant from his office and position as office deputy marshal, and has notified, threatened, and warned him that on August 1, 1897, he would remove him, and would thereafter refuse and decline to let him serve or act as such deputy, and would decline to recognize or treat him as such, and would appoint another in his place and stead; that the complainant has always faithfully, diligently, and promptly discharged the duties of his said office, and has not given any cause for his removal, and in fact no cause exists for such removal, and the defendant alleges no cause for such proposed removal other than that the complainant is a Democrat in politics, and he intends to have none but a Republican in the said office; that the defendant does not complain in any way as to the faithfulness and carefulness with which the complainant has always discharged the duties of said office, and bases his intended action solely upon the political ground aforesaid; that the defendant will, unless restrained and enjoined by the order of the court, carry out his threatened purpose, and remove the complainant from his office, whereby he will suffer great and irreparable loss and damage consequent thereon; and that the complainant has no remedy at law, and, unless the court will grant him relief, he is remediless in the premises. The complainant prays for a temporary restraining order, and, on the final hearing, for a perpetual injunction. To this bill the defendant has interposed a demurrer, and insists that it discloses no case for injunctive relief.

Under our system of government, however it may be in the parent country, all offices are created by law, and exist for the public good, and not for private emolument. Honesty, capacity, and fitness, and not partisan activity, should determine the right to hold office, because the former qualities, rather than the latter, will afford the people an efficient public service. And, in so far as the civil service law tends to the securing of a better civil service, it will commend itself to the people; and it ought to receive, and I doubt not it will receive, from the judicial department, all the aid which, under the distribution of governmental powers in our national system, can be accorded to it. However ready the courts may be to aid in securing a better and more efficient civil service, they may not do this by overpassing the proper limitations of judicial authority.

Lying at the threshold of every suit brought in a court of the United States is the question of jurisdiction. National courts of equity have no jurisdiction over causes of action when there is a plain and adequate remedy at law. Nor, under the distribution of powers in the federal constitution, have the courts of law jurisdiction of questions of a legislative or executive character. It was settled, upon great consideration, in the case of *Marbury v. Madison*, 1 Cranch, 137, that the national courts cannot rightfully interfere with executive action in any case where an executive officer is authorized to exercise judgment or discretion in the performance of an official act. It is only in cases where an executive officer is required to perform a mere ministerial duty, involving no exercise of judgment or discretion, that the courts may control or direct the performance of such ministerial acts. The same doctrine is affirmed in *Ex parte Hennen*, 13 Pet. 230, and has never been doubted or denied. The appointment and removal of officers or employés involve the exercise of judgment and discretion, and have never, so far as the court is advised, been regarded or held to be mere ministerial acts.

But the jurisprudence of the United States has always recognized the distinction between common law and equity, under the constitution, as matter of substance as well as of form and procedure; and this distinction has been steadily maintained, although both jurisdictions are vested in the same courts. *Fenn v. Holme*, 21 How. 481; *Thompson v. Railroad Co.*, 6 Wall. 134; *Cates v. Allen*, 149 U. S. 451, 13 Sup. Ct. 883, 977; *Mississippi Mills v. Cohn*, 150 U. S. 202, 205, 14 Sup. Ct. 75. It is firmly settled that courts of chancery concern themselves only with matters of property and the maintenance of civil rights. Such courts have no jurisdiction in matters of an executive or political nature; nor do they interfere with the duties of any department of the government except under special circumstances, and then only when necessary to the protection of rights of property; nor can they interfere to restrain criminal or immoral acts unless they affect or threaten to invade rights of property. In *re Debs*, 158 U. S. 564, 15 Sup. Ct. 900; *Luther v. Borden*, 7 How. 1; *Mississippi v. Johnson*, 4 Wall. 475; *State of Georgia v. Stanton*, 6 Wall. 50; In *re Sawyer*, 124 U. S. 200, 8 Sup. Ct. 482; *Holmes v. Oldham*, Fed. Cas. No. 6,643; *Muhler v. Hedekin*, 119 Ind. 481, 20 N. E. 700. "Neither the legislative nor the executive department," said Chief Justice Chase, speaking for the court, in *Mississippi v. Johnson*, *supra*, "can be restrained by the judicial department, though the acts of both, when performed, are, in proper cases, subject to its cognizance." And Mr. Justice Gray, speaking for the court in *Re Sawyer*, *supra*, said: "The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property." And it is clear that the complainant has in no just sense a right of property in his office or employment, for, if he had, congress would be powerless to abolish his office or to impair its tenure. To assume jurisdiction to control the exercise of executive or political powers, or to protect individuals in the enjoyment of purely political rights, would be to invade the domain of other departments of

the government, or to intrench upon the jurisdiction of the courts of common law.

In 2 Beach, Mod. Eq. Jur. § 670, it is said:

"The jurisdiction to determine the title to a public office belongs exclusively to courts of law, and equity has no jurisdiction over the appointment and removal of public officers, and will not interfere in cases of this character, even in a collateral or indirect proceeding, or in a bill to enjoin."

And the learned author cites cases too numerous to be inserted here, which fully support the text.

The same principle has been repeatedly announced by state courts of high authority. In *Fletcher v. Tuttle*, 151 Ill. 41, 37 N. E. 683, the supreme court of Illinois say:

"The question, then, is whether the assertion and protection of political rights, as judicial power is apportioned in this state between courts of law and courts of chancery, are a proper matter of chancery jurisdiction. We would not be understood as holding that political rights are not a matter of judicial solicitude and protection, and that the appropriate judicial tribunal will not, in proper cases, give them prompt and efficient protection; but we think they do not come within the proper cognizance of courts of equity."

To the same effect are *In re Sawyer*, supra; *State of Georgia v. Stanton*, supra; *Sheridan v. Colvin*, 78 Ill. 237; *Dickey v. Reed*, Id. 261; and *Harris v. Schryock*, 82 Ill. 119.

The general doctrine as to public officials is thus stated by the court of appeals of New York in the case of *People v. Canal Board*, 55 N. Y. 393:

"A court of equity exercises its peculiar jurisdiction over public officers to control their action only to prevent a breach of trust affecting public franchises, or some illegal act under color or claim of right affecting injuriously the property rights of individuals. A court of equity has, as such, no supervisory power or jurisdiction over public officials or public bodies, and only takes cognizance of actions against or concerning them when a case is made coming within one of the acknowledged heads of equity jurisdiction."

In the case of *Muhler v. Hedekin*, supra, the jurisdiction of a court of equity to enjoin the members of a common council of a city from, wrongfully and without authority of law, removing the water trustees of such city, was considered by the supreme court of Indiana in a learned opinion delivered by Mr. Justice Mitchell. The court there held that:

"Courts of chancery are not invested with power over the subject of removals of public officers, no matter in whom the power to make removals is vested."

It was declared that:

"The subject-matter of their jurisdiction relates to civil property. Injury to property, actual or threatened, is the foundation of chancery jurisdiction. It is not concerned with matters of a political nature. The general principle that equity possesses no power to revise, control, or correct the action of public, political, or executive officers or bodies is, of course, well understood."

After reviewing numerous authorities, the court further said:

"We by no means intend to assert that the duty may not be imposed upon the courts to determine whether or not the common council of a city may not have acted outside of its authority, when it has assumed to act upon matters not intrusted to it; or that courts will not, in proper cases and on proper ap-

plication, restrain inferior officers and bodies, and compel them to act within the limits of the law, when such officers or bodies are assuming to act upon matters not committed to their discretion; nor do we hold that an officer unlawfully removed or interrupted in the discharge of his official duties is remediless. What we mean to assert is that acts that are within the discretion of the governing body of a city, or acts which are absolutely void, and do not in some way affect or threaten individual property rights or the interest of taxpayers, are not subject to the control of courts of chancery. If, therefore, it were conceded that the common council of a city was about to proceed to hear charges preferred against an officer over whom it had no power or control whatever, with a view of adopting a resolution looking to his removal or expulsion from office, a case would not be presented for the exercise of the chancery powers of the court. Such a resolution would be without any effect whatever, and the law affords adequate means for the protection of one in office against mere harmless assumption, such as is supposed, without resorting to a court of equity."

If the marshal is vested with the power to remove his office deputies, a court of equity cannot interfere with his exercise of judgment and discretion in making such removal. If he is not possessed of such power, his act of removal is a mere harmless assumption, which will be treated as a nullity whenever and wherever drawn in question, without resorting to a court of equity. The court cannot assume that the attorney general or the president of the United States will not at once correct the wrongful act of the marshal when brought to his attention. The power and authority of the executive department are ample to correct all acts of usurpation or insubordination on the part of the marshal; and for this, if for no other reason, this court, as a court of chancery, is without jurisdiction.

Having reached the conclusion that the court is without jurisdiction, I might perhaps properly abstain from expressing any opinion upon other questions involved; but as those questions have been argued with learning and ability, and the court has been invited to do so, I will proceed to state my views briefly upon the merits of the controversy.

I think it too clear to admit of serious debate that prior to the act of May 28, 1896, the tenure of office of the deputy marshal was only co-extensive with that of the marshal, his principal, and expired when the term of the marshal expired, unless continued or enlarged by special provision of law. Such has been the understanding and practice of all departments of the government since the adoption of the constitution. The marshal was authorized to appoint one or more deputies, and their compensation, within certain limits, was a matter of contract between the marshal and the deputy. The deputy was empowered to act for the marshal, and his authority and power were limited by those of his principal. Provision was made for the payment of the deputy out of the fees which he earned, but those fees were due to and collectible by the marshal alone, and every official service or act of the deputy was performed in the name of the marshal. The bond of the marshal covered all official defaults and misfeasances, whether of the marshal in person or of his deputies. In the strictest sense, the deputy marshal was only authorized by the marshal to exercise the office or right possessed by him in his name, place, and stead.



In the judiciary act of September 24, 1789 (1 Stat. 73, 87), continued in force by sections 789 and 790, Rev. St. 1878, it is provided that:

"In case of the death of any marshal his deputy or deputies shall continue in office, unless otherwise specially removed, and shall execute the same in the name of the deceased, until another marshal shall be appointed and sworn; and the defaults or misfeasances in office of such deputy or deputies in the meantime, as well as before, shall be adjudged a breach of the conditions of the bond given by the marshal who appointed them; and every marshal or his deputy when removed from office, or when the term for which the marshal is appointed shall expire, shall have power notwithstanding to execute all such precepts as may be in their hands respectively at the time of such removal or expiration of office."

In *Powell v. U. S.*, 60 Fed. 687, it is ruled that a deputy marshal is not such an officer of the United States as can maintain a suit against the United States for services rendered by him, and that for such services he must look to the marshal who employed him, and for whom he rendered the services for which he brings suit.

And in *Douglas v. Wallace*, 161 U. S. 346, 16 Sup. Ct. 485, it is held that:

"The claims of deputy marshals against the marshals for services stand upon the same footing as those of an ordinary employé against his employer."

And if the position of a deputy marshal under the judiciary act of 1789 had been that of one holding office in his own right, instead of being a mere employé of the marshal, his situation would have been no more favorable.

The supreme court of the United States, in *Re Hennen*, 13 Pet. 230, 258, held that:

"All offices the tenure of which is not fixed by the constitution or limited by law must be held either during good behavior, or (which is the same thing 'in contemplation of law') during the life of the incumbent, or must be held at the will and discretion of some department of the government, and subject to removal at pleasure. It cannot for a moment be admitted that it was the intention of the constitution that those offices which are denominated 'inferior offices' should be held during life. And, if removable at pleasure, by whom is such removal to be made? In the absence of all constitutional provision or statutory regulation, it would seem to be a sound and necessary rule to consider the power of removal as incident to the power of appointment. This power of removal from office was a subject much disputed, and upon which a great diversity of opinion was entertained, in the early history of the government. This related, however, to the power of the president to remove officers appointed with the concurrence of the senate; and the great question was whether the removal was to be by the president alone, or with the concurrence of the senate, both constituting the appointing power. No one denied the power of the president and senate jointly to remove where the tenure of the office was not fixed by the constitution, which was a full recognition of the principle that the power of removal was incident to the power of appointment."

In the case of *Parsons v. U. S.*, 167 U. S. 324, 17 Sup. Ct. 880, there is an elaborate discussion of the power of the president to remove a district attorney of the United States before the expiration of the term for which he was appointed, and by and with the advice and consent of the senate to appoint his successor. In this case it was declared as the unanimous judgment of the supreme court that the president could lawfully remove a district attorney of the United States within the four years from the date of his commission, notwithstanding the stat-

ute explicitly provides that "district attorneys shall be appointed for a term of four years, and their commissions shall cease and expire at the expiration of four years from their respective dates." The statute was construed to mean that their tenure of office should not exceed four years, subject to the right of the president to remove them sooner. Even conceding the complainant to be an officer of the United States, and not an employé, the right of the president to remove him at any time is undoubted; and it would be an idle ceremony for the court to attempt to retain him in office when his removal rests exclusively in the discretion of the executive.

Such being the relation which a deputy bore to the marshal who appointed him, the question arises whether the act of May 28, 1896, has wrought any change in their relations in respect to the power of removal. In express terms, clearly, no change has been made, and an examination of that act will show that no change has been wrought by implication. The tenth section of that act provides as follows:

"Sec. 10. That when in the opinion of the attorney general the public interest requires it, he may, on the recommendation of the marshal, which recommendation shall state the facts as distinguished from conclusions, showing necessity for the same, allow the marshals to employ necessary office deputies and clerical assistance, upon salaries to be fixed by the attorney general, from time to time, and paid as hereinafter provided. When any of such office deputies is engaged in the service or attempted service of any writ, process, subpoena, or other order of the court, or when necessarily absent from the place of his regular employment, on official business, he shall be allowed his actual traveling expenses only, and his necessary and actual expenses for lodging and subsistence, not to exceed two dollars per day, and the necessary actual expenses in transporting prisoners, including necessary guard hire; and he shall make and render accounts thereof as hereinafter provided."

And the eleventh section of the act provides as follows:

"Sec. 11. That at any time when, in the opinion of the marshal of any district, the public interest will thereby be promoted, he may appoint one or more deputy marshals for such district, who shall be known as field deputies, and, who, unless sooner removed by the district court as now provided by law shall hold office during the pleasure of the marshal, except as hereinafter provided, and who shall each, as his compensation, receive three-fourths of the gross fees, including mileage, as provided by law, earned by him, not to exceed one thousand five hundred dollars per fiscal year, or at that rate for any part of a fiscal year; and in addition shall be allowed his actual necessary expenses, not exceeding two dollars a day, while endeavoring to arrest, under process, a person charged with or convicted of crime." 29 Stat. 182.

These sections provide for two classes of deputies, denominated, respectively, "field deputies" and "office deputies." We are not now concerned with field deputies. The marshal, under existing law, is required to recommend the appointment of one or more office deputies, stating the facts showing the necessity of their employment, when, if the attorney general is satisfied that such necessity exists, he may authorize the marshal to employ one or more office deputies at a salary to be fixed by the attorney general. All that the attorney general does is to determine whether office deputies shall be appointed, and to fix their compensation. When he has so determined, the marshal must appoint or employ such office deputies. The attorney general does not appoint or employ such deputies in any different sense than the congress does when it authorizes the marshal to em-

plôý deputies. It is clear that the appointment or employment of the office deputy is made by the marshal, just as certainly as such deputies were appointed by him before the act of May 28, 1896, became a law. It therefore follows that the marshal may remove his office deputies unless the rules and regulations of the civil service commission and their promulgation by an executive order have changed the law. *U. S. v. Eaton*, 144 U. S. 677, 12 Sup. Ct. 764.

It needs neither argument nor citation of authority to demonstrate that neither the president nor the civil service commission is clothed with legislative powers. Neither can change the law, either by repeal or by making a new enactment. And it is equally elementary that congress cannot delegate its legislative powers either to the president or the civil service commission. The rules promulgated which place office deputies in the marshal's office in the classified civil list are not a statute, nor have they the force of law. They are merely executive rules and regulations, promulgated by authority of law, and are effective, if at all, only as rules and regulations for the internal control and government of the civil service and the executive departments. The courts of chancery have no jurisdiction or authority to enforce such rules or regulations. Their enforcement lies within the domain of the executive departments, which possess ample power to enforce the proper observance of and subordination to the rules and regulations promulgated by the executive for the government of those employed in any executive department of the government. If the marshal, by the removal or threatened removal of the complainant, has violated, or is about to violate, those rules and regulations, there is ample power in the department of justice to redress the wrong, without any resort to a court of chancery. In the opinion of the court, the tenure of office or employment of the complainant terminated with the expiration of the official term of the late marshal, Hawkins, by whom he was employed; and this view is in accordance with the views held by the comptroller of the treasury and the present attorney general. It follows that the demurrer to the bill must be sustained, and, as the bill cannot be amended to state a good cause of action, it will be dismissed for want of equity, at complainant's costs.

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#### SMITH v. PENDERGAST.

(District Court, S. D. New York. June 24, 1897.)

#### PRACTICE—BOND ON APPEAL—DISMISSAL OF APPEAL—SURETIES LIABLE.

In December, 1882, the defendant, on appeal from a judgment in personam, executed a bond with sureties "to prosecute such appeal with effect and pay all damages and costs awarded against him as such appellant," etc. After various vicissitudes, including the appellant's bankruptcy and assignment, the death of the proctors on each side, and the appellant's death in 1890, no return of the record to the circuit court having been made, the respondent on motion procured a dismissal of the appeal, and the order entered in the circuit court directed that "the cause be remitted to the district court for final proceedings." To a motion for summary judgment thereupon against the sureties on the bond in the district court, it was objected that the bond did not provide for a payment by the

sureties in case of dismissal; that summary judgment upon the bond could not be had, or if so, the libelant's laches should preclude any recovery. *Held*: (1) That the provisions in the condition of the bond were distinct, and that the bond became operative against the sureties upon the failure of the appellant to "prosecute the appeal with effect" by procuring a return of the record as required by the rules; (2) that upon the remittitur filed, the district court was the appropriate one to enforce the bond; and that the admiralty practice warrants a summary proceeding against the sureties in such cases by order to show cause, upon which every legal and equitable defense available to the sureties can be examined and adjudged as fully as upon a plenary action; (3) that on its appearing that there had been no part payment, the laches were equal on each side, and did not debar summary proceedings on the judgment.

Franklin Leonard, Jr., for libelant.  
Benedict & Benedict, for sureties.

BROWN, District Judge. On the 10th of November, 1882, the libelant obtained a judgment against the defendant as owner of the bark "Thomas Fletcher," for seaman's wages, amounting with interest and costs to \$190.12. On the 2d of December, 1882, a notice of appeal to the circuit court was filed, and at the same time an appeal bond was filed to stay execution, which was executed by the above-named defendant as principal, and by George Bell and Charles F. Elwell as sureties, by which they bound themselves to the libelant in the sum of \$380.24, upon condition that the bond should be void if the libelant should "prosecute said appeal with effect, and pay all damages and costs which shall be awarded against him as such appellant, if he should fail to make said appeal good."

The return of the record to the circuit court not being procured to be made by the appellant as required by the rules, various motions succeeded, with orders of the circuit court granting time; but the conditions of those orders were not complied with, and no return of the record to the circuit court was ever filed.

On the 17th of March, 1883, the defendant, Pendergast, became insolvent and made an assignment of his property, and subsequently the defendant's proctor died. In March, 1887, the libelant's proctor died, and Pendergast, the defendant, died in March, 1890.

In ———, 1896, the libelant employed a new proctor to bring the litigation to a close, and in August upon notice to the sureties the appeal was dismissed in the circuit court for failure to procure the return, without costs; and upon a resettlement of the order on the 14th of November, 1896, the circuit court directed that "the cause be remitted to the district court for final proceedings." Upon the filing of a certified copy of this order in the district court, application was made for a summary judgment against the sureties in the bond upon an order to show cause, according to rules 21, 57 (Old Rule 144); on which order the application for judgment was strenuously opposed by the proctors for the sureties, on the grounds, that the bond could not be proceeded on in this court; that the bond does not provide for any payment in case of a dismissal of the appeal, but only for the payment of the damages and costs awarded by the appellate court on the appeal, none such being there awarded; that proceedings could not be had summarily, because the bond contains no clause to that effect; and finally, be-

cause the great laches of the libellant on the appeal should preclude any recovery against the sureties.

The affidavits presented on the above motion not giving any very satisfactory explanation of the long slumber of the appeal, nor showing on the other hand any payment of the judgment, in order to give opportunity for proof of any facts affecting the equities of the parties, or explaining the long pendency of the appeal, a reference was ordered to a commissioner, on which both parties have given evidence. From the commissioner's report it appears that no part of the judgment has ever been paid, and that there is no recognizable legal or equitable defense against the liability of the sureties upon their bond.

Upon exceptions to the report, and application by the libellant for summary judgment and execution against the sureties, the above objections are renewed; but upon consideration I cannot sustain any of them.

1. The appeal bond should be enforced in this court. When the cause was remitted by the circuit court to this court for final proceedings, and the order to that effect was filed in this court, the bond on appeal followed the cause into this court, and must be enforced here, if at all. *The Wanata*, 95 U. S. 600, 618.

2. The first clause in the condition of the bond has been broken, for the reason that the appellant "did not prosecute the appeal with effect," as therein provided. To prosecute the appeal with effect, it was necessary that the appellant should procure a return of the record of this court to be filed in the circuit court. See *The Brantford City*, 32 Fed. 324. The appellant having failed to do this, the obligation of the bond stands good; and the legal damages for this breach of the first clause in the condition of the bond are the amount of the judgment and interest, not exceeding, however, the penalty of the bond.

It is urged by the counsel for the sureties, that the condition of the bond, that the appellant "shall prosecute the appeal with effect and pay all damages and costs which shall be awarded against him as such appellant if he should fail to make said appeal good," are in effect but one single condition; and that the first clause is identical in meaning with the last. If this construction were correct, the words "prosecute said appeal with effect" would be mere surplusage. The counsel's contention is really to that effect, since it is claimed that no damages can be recovered upon this bond because the court of appeals has not awarded any damages by reason of the dismissal of the appeal.

I cannot so construe the condition of this bond. On the contrary the words "shall prosecute said appeal with effect" constitute a distinct clause, and are intended to cover precisely the case which has arisen here; namely, to prevent an appellant who takes an appeal from procuring any stay of proceedings during the time allowed for procuring a return without giving security therefor. To allow such a stay without security would be wholly contrary to the policy of the law, and to the ordinary practice. The words of this clause are adapted to this object; and it would be a most unreasonable construction to treat them as surplusage, so as to allow a temporary stay without any security at all, during which time, as happened here, the defendant might become insolvent.

The second clause of the bond provides for the case in which the appellant does prosecute his appeal with effect, by bringing the cause properly before the appellate court; and in that case it is agreed that the appellant shall pay all damages and costs awarded against him, if he shall fail to make his appeal good, that is, if he is not successful on his appeal.

In the case of *Drummond v. Husson*, 14 N. Y. 60, Selden, J., comments upon the form of an appeal bond formerly required by the Revised Statutes of New York, in order to stay proceedings (2 Rev. St. p. 595, § 28), which, though not identical, was very similar to the form of the present bond. "The condition of the bond," he says, "consisted of three branches; if the party either fail to prosecute, or the writ should be quashed or discontinued, or the judgment should be confirmed. These three contingencies, upon the happening of either of which the obligation to pay was to attach, are obviously entirely distinct." They are distinct here; and considering the object of the bond, namely, to stay execution on the judgment, and that that object was thereby attained, there can be no doubt that the proper rule of damages for the breach of this first condition of the bond is the amount of the judgment, with interest, not exceeding the penal sum of the bond. It is the same rule of damages that is expressly stated in the second clause of the bond for the breach of that clause.

3. The libellant is also entitled to proceed summarily against the sureties, although that provision is not expressly inserted in the bond. He is not driven to a plenary suit upon the bond by a new action.

In the admiralty practice, proceedings upon bonds or stipulations have always differed from the proceedings on bonds in the common-law courts, in being summary; and in this country these proceedings have usually been upon order to show cause.

See Sup. Ct. Rules Adm. Nos. 3, 4, 21; Dist. Ct. Rules S. D. N. Y. 21, 57 (Old Rule 144); *Holmes v. Dodge*, Abb. Adm. 60, Fed. Cas. No. 6,637; *Gaines v. Travis*, Abb. Adm. 422, Fed. Cas. No. 5,180; *The C. F. Ackerman*, 14 Blatchf. 360, Fed. Cas. No. 2,564.

Under this order to show cause every defense, legal or equitable, is ordinarily available to the sureties, that they might obtain in the defense of a plenary suit on the bond. Every substantial right is thus secured; while the delays incident to an independent suit on the bond are justly avoided. The proceedings in the case of *The Blanche Page*, 16 Blatchf. 1, Fed. Cas. No. 1,524, upon the mandate of the supreme court, upon a bond given on appeal from the circuit court to the supreme court, are in all respects analogous to the present case, in the allowance of a summary judgment against the sureties upon an appeal bond precisely similar in form to the bond in this cause.

Full opportunity having been given to the sureties in this case, and no cause being shown in law or equity, why they should not perform the engagement of the bond, judgment should be entered against them for the payment of the judgment entered on the mandate of the circuit court of appeals, but not exceeding \$380.24, the penal sum named in the bond.

4. It appearing that there has been no payment, and nothing more than mere delay on the libellant's part to procure a dismissal of the

pending appeal until 1896, there are no more laches on the respondent's part than on the part of the appellant, or his representatives; and the sureties, who are in privity with him as respects the appeal, can no more claim a discharge from their bond on account of the long pendency of the appeal, than the appellant could claim that the original judgment was discharged for the same reason.

Judgment may be entered as above with execution thereon.

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**MUTUAL RESERVE FUND LIFE ASS'N v. CLEVELAND WOOLEN MILLS.**

**PARKER v. SAME.**

(Circuit Court of Appeals, Sixth Circuit. October 11, 1897.)

Nos. 488, 489.

**1. INSURANCE—ILLEGAL STIPULATIONS—PUBLIC POLICY.**

A stipulation in a policy of life insurance that no suit in law or in equity shall be brought upon it except in the circuit court of the United States is contrary to public policy, and invalid.

**2. SERVICE OF PROCESS—FOREIGN CORPORATIONS—RESIDENT AGENTS.**

By Laws Tenn. 1875, c. 66, § 2, certain foreign corporations are required to file with a state officer a power of attorney authorizing the acknowledgment of service of process in behalf of said corporations in suit against them. *Held*, that this does not prevent serving them with process in the ordinary way where they have a resident agent, but provides an additional mode of obtaining jurisdiction.

**3. LIFE INSURANCE—FORFEITURE—NONPAYMENT OF ASSESSMENTS.**

Under the law of New York, nonpayment of an assessment on a life insurance certificate or policy operates as a forfeiture without any formal affirmative action by the association after the expiration of the credit stipulated by the contract and formal notice of the assessment.

**4. SAME—WAIVER OF CONDITIONS BY PAROL.**

An agreement in the terms of a policy that no change or alteration thereof shall be valid unless in writing may itself be changed by a parol agreement made in behalf of the company by a general officer, such as its secretary.

**5. SAME—FORFEITURES.**

Where the parol representations of an insurance company, made through its secretary to an assignee of a policy, are such as to induce the latter to omit strict performance through tenders of premiums, it would be inequitable to permit the company to exact a forfeiture due to its failure to comply with such representations.

**6. SAME—WAIVER BY AGREEMENT WITH ASSIGNEE—EFFECT AS TO BENEFICIARY.**

An agreement of an insurance company with the assignee of a policy, who holds it as security for a debt, to continue the policy in force after any default by the assured, and give the assignee an opportunity to pay the assessment, is operative as to the entire policy, and for the benefit of all who should be concerned, including the interest of the beneficiary in the surplus above the debt due to the assignee.

**7. SAME—ASSIGNMENT OF POLICY BY BENEFICIARY—ACKNOWLEDGMENT.**

A policy of insurance was issued to a resident of Tennessee. He assigned it in that state, and his wife signed a consent upon the assignment. *Held*, that her refusal to acknowledge her signature before a notary did not in itself invalidate the assignment.

**8. SAME—ASSIGNMENT BY INSURED.**

A certificate of insurance issued by an association organized under Laws N. Y. 1883, c. 175, and engaged in conducting an insurance business on the

co-operative or assessment plan, may, under section 18 thereof, be assigned by the assured without the consent of payees or beneficiaries having no vested right therein.

9. PLEADING—IMMATERIAL ISSUES.

The fact that a defendant takes issue, in his answer, upon an immaterial question of fact, does not prevent him from insisting at the trial that the allegation thus denied is immaterial.

### Appeals from the Circuit Court of the United States for the Eastern District of Tennessee.

In 1885, John H. Parker, of Cleveland, Bradley county, Tenn., was received as a member of a co-operative and assessment insurance association, incorporated under chapter 175 of the Laws of 1883 of the state of New York, under the corporate name of the Mutual Reserve Fund Life Association, and having its principal office in the city of New York. The policy or certificate of insurance was for the sum of \$10,000, and was payable to Mary K. Parker, wife of the insured. In January, 1890, this policy, as we shall hereafter designate it, was assigned by a writing indorsed thereon to the Cleveland Woolen Mills, a corporation of the state of Tennessee, for a recited consideration of \$10,000, though the real intent of the assignment was to secure to the Woolen Mills Company a large sum of money then due and owing to it by the assured. This assignment was by both Parker and his wife, and the genuine signatures of both appear thereon. On the 6th day of March, 1891, the association indorsed its consent to this assignment. Parker continued thereafter to pay the assessments made upon him until March 3, 1893, when a default occurred by a failure to pay mortuary call No. 66, which was due and payable on that day. This default appears to have been accidental, inasmuch as a fund was kept on deposit in a bank at Cleveland for the purpose of meeting such calls. By oversight, payment of this assessment was omitted until March 18, 1893, when a draft for the necessary amount was remitted by the Cleveland National Bank, in a letter stating that money had been deposited with the bank "to pay premium before due, but was overlooked at proper date." To this letter from the bank, the association replied, by letter addressed to John H. Parker, as follows: "Dear Sir: We have to acknowledge receipt at this office of your remittance of \$25.70, to be applied upon your policy 27,542, under call 66, and that of Mrs. Mary K. Parker, 88,772, amounting to \$10.65. This amount has been placed in the suspense account by reason of the fact that the remittance was not in transit until March 18th, and the thirty days allowed for the payment of call expired March 3d. We will require satisfactory application for reinstatement and certificate of health, blank for which purpose we inclose you herewith. In the meantime we are holding your remittance in suspense account, awaiting this information, or the money will be returned to you as you direct." Mr. Parker's health had failed when this default occurred, and he declined to submit to a medical examination; but, as future assessments were made, he caused remittances to be made by his banker for the purpose of meeting them. Call No. 67 was made March 13, 1893; No. 68, May 1, 1893; No. 69, July 19, 1893; and No. 70, September 16, 1893. In response to letters remitting funds for their payment, replies were received stating that the money had been placed "in suspense account," with that of call 66, and was held subject to Parker's order "or satisfactory medical examination." On November 10, 1893, a draft covering these four remittances was remitted by express to the Cleveland National Bank, which that bank declined to receive; and, on the same day, Mr. Parker was notified of this return of his money, and that the time had expired within which he might be reinstated on medical examination. The Cleveland Woolen Mills, becoming aware of the claim of the association that the policy had lapsed by nonpayment of call No. 66, filed an original bill in the state chancery court for the county of Bradley, October 1, 1894, to which it made defendants the said John H. Parker and wife, Mary K. Parker, and the Mutual Reserve Fund Life Association, for the purpose of having said policy reinstated, and its rights as assignee protected. This bill averred that when it applied, March 6, 1891, to obtain the consent of said association to



the assignment of said policy, it also asked that notices of assessments, as made from time to time, be sent to it, that it might arrange for the payment thereof in case the assured was unable to make such payments; that the association declined to do this, but agreed that, if Parker should make default, notice should at once be given the assignee, that it might pay the call and avoid forfeiture. The bill further averred that no notice of the failure of Parker to pay call No. 66 had been given according to this agreement, and that the company had fraudulently concealed from the complainant all knowledge of Parker's default, and was now claiming that the policy had lapsed. The bill tendered payment of any assessments not covered by the remittances theretofore made by the assured. At this stage of the cause, the Mutual Reserve Fund Life Association appeared and removed the suit to the circuit court of the United States. Before answers were filed, John H. Parker died; whereupon the Woolen Mills Company filed an amended and supplemental bill, averring this fact, and claiming payment of the policy. Mrs. Parker answered, and filed a cross bill against the Woolen Mills Company and the Insurance Association, setting out the facts heretofore stated, and averring that her signature and consent to the assignment of the policy had been obtained from her by the undue influence and coercion of her husband, and praying that the said Woolen Mills Company might be decreed to hold the proceeds of the policy, when collected, in trust for her use and benefit. Upon a final hearing, the circuit court decreed in favor of the Woolen Mills Company, and ordered that any surplus after the payment of the debt due by the assured to it should be held for and paid over to Mrs. Parker. From this decree both the Mutual Reserve Fund Life Association and Mrs. Mary K. Parker have appealed, and separately assigned error.

Theo. Richmond, for Mutual Reserve Fund Life Ass'n.

Frank Spurlock and Creed Bates, for Mary K. Parker.

J. B. Sizer and Tomlinson Fort, for Cleveland Woolen Mills.

Before TAFT and LURTON, Circuit Judges, and BARR, District Judge.

LURTON, Circuit Judge, after making the foregoing statement of facts, delivered the opinion of the court.

The first error assigned by the Mutual Reserve Fund Life Association is as to the action of the court in overruling a plea in abatement to the jurisdiction of the state court. The policy issued to John H. Parker contained a stipulation that no suit in law or equity should be brought upon it except in the circuit court of the United States. This provision intended to oust the jurisdiction of all state courts is clearly invalid. Any stipulation between contracting parties distinguishing between the different courts of the country is contrary to public policy, and should not be enforced. *Nute v. Insurance Co.*, 6 Gray, 174; *Amesbury v. Insurance Co.*, Id. 596; *Reichard v. Insurance Co.*, 31 Mo. 518; *Beach, Ins.* § 1272; *Bac. Ben. Soc.* § 443; *Insurance Co. v. Routledge*, 7 Ind. 25; *Steam-Shipping Co. v. Lehman*, 39 Fed. 704; *Slocum v. Assurance Co.*, 42 Fed. 235; *Scott v. Avery*, 5 H. L. Cas. 811, 839-844. The process by which the appellant association was brought into court was served upon the local agent representing the association at Cleveland, Tenn. The association also pleaded in abatement that it was a corporation of another state, doing business in Tennessee in accordance with chapter 66 of the Tennessee Acts of 1875, and that by section 12 of that act all such companies were required to file with the insurance commissioner of the state a power of attorney, authorizing the secretary of state to ac-

knowledge service of process for and in behalf of said companies in suits brought against them in the courts of the state. The contention of the appellant is, that as it had complied with this law, no process could be lawfully served upon its agents or officers, and this suit could only be brought by process served on the secretary of state. This section has not been construed by the supreme court of Tennessee. By sections 3516 and 3539, Rev. Code Tenn. (Mill. & V.), general provision is made for the service of process upon the resident agents of corporations in all actions growing out of the business of the corporation. Though foreign corporations are not specifically mentioned in these sections, yet they have been construed as conferring the right to commence a suit against a foreign corporation, doing business within the state, by service of process on any agent resident in the county where the suit was brought. By the third section of chapter 226, Tenn. Acts 1887, it was provided that process might be served "upon any agent" of a foreign corporation found within the county where the suit was brought. This act was construed as intending to enlarge, and not limit, the jurisdiction over such companies. *Telephone Co. v. Turner*, 88 Tenn. 265, 12 S. W. 544. We think a like construction should be given to section 12 of chapter 66 of the Acts of 1875. It was not the purpose of that provision to prevent such corporations from being served with process in the ordinary way where they have a resident agent, but to provide an additional mode of obtaining jurisdiction which might be available if such company had no resident agent. The plea in abatement was properly overruled.

The second, third, fourth, and fifth assignments of error may be grouped and considered together. They present the question as to whether the policy on the life of John H. Parker had lapsed or terminated by failure to pay mortuary call No. 66 within 30 days from February 1, 1893. Waiving any question as to the sufficiency of the notice of that call under the legislation of the state of New York, it is sufficiently established that a notice was received of that assessment, and that, under the stipulations of the policy, call No. 66 was due and payable March 3, 1893. This call was not paid or offered to be paid until March 18, 1893. The policy provided that the failure to pay any mortuary call within 30 days after notice should terminate the policy, and all former payments be forfeited to the association. Nonpayment operated as a forfeiture without any formal affirmative action by the association after the expiration of the credit stipulated by the contract and formal notice of the assessment. This seems to be well settled by the law of the state of New York, by which law this contract must be construed. *Roehner v. Insurance Co.*, 63 N. Y. 160; *Robertson v. Insurance Co.*, 88 N. Y. 541; *Fowler v. Insurance Co.*, 116 N. Y. 389, 22 N. E. 576. To meet this claim of forfeiture, the assignee of the policy, the Cleveland Woollen Mills, relies upon an agreement, which, it alleges, was made with it by the association, whereby the latter company agreed to give notice of any default by Parker in the payment of future assessments to the assignee, and allow payments by the assignee after such notice. In

March, 1891, the mill company sent Mr. F. T. Hardwick to New York for the purpose of obtaining the consent of the insurance association to the assignment of the Parker policy, and to make some arrangement touching the payment of future assessments. Hardwick went to the general office, and, after some explanation of the object of his visit, was referred to Mr. J. M. Stevenson, assistant secretary of the association, as the proper officer to confer with. The witness Hardwick says he had some difficulty in getting the company to consent to the assignment, because not upon their printed blanks, and not in the form in which they were in the habit of requiring such assignments. The matter of consenting to the assignment was taken under consideration by Mr. Stevenson, with the statement that he would confer with the counsel for the association. Upon Mr. Hardwick's third visit to the office, he succeeded in obtaining the consent he desired. This consent was indorsed on the policy by Mr. Stevenson, and signed by him as assistant secretary. With reference to the payment of future assessments, the witness says he asked "that notices of the maturity of assessments be sent to the mill company, so that they could pay the premium in case Parker did not," but that Stevenson "declined to send two such notices, but said they would send notices as usual to Parker, and, if he defaulted in the payment, they would notify the mill people, and they could pay, and after that time the notices would be sent to the mill people regularly." Hardwick says he asked to have this agreement put in writing, but that Stevenson declined, "saying, in substance, that this was a courtesy which they always showed their policy holders." He says, further, that he (Hardwick) "expressed some concern, and he (Stevenson) assured him that the mill people should have an opportunity to pay the premiums." "His manner was so reassuring that I relied on it, and came away feeling that they would do so." This whole matter of agreeing to give the mill company an opportunity of paying, or giving it notice, after a default should be made by Parker, is substantially denied by Stevenson. Hardwick and Stevenson were the only persons present, and the character of neither is in any way assailed. Neither is personally interested. Which shall be credited? The learned judge who heard the cause on the circuit accepted the statement of Mr. Hardwick, and we are disposed to likewise do so. The reasons which move us in this regard are these: Mr. Stevenson seems to testify more from his usual course of business than from a clear recollection. Doubting his authority to make such an arrangement, he is disposed to think he did not. On the other hand, Mr. Hardwick is clear and positive. The mill company had another policy in another company, which had been transferred by Parker to it, and Hardwick was also charged with the duty of obtaining from this other company a like consent to the assignment and an arrangement by which the policy could be kept up. This other company agreed to draw on the mill company for its premiums on the day due, unless previously paid by Parker. This arrangement was communicated to Stevenson, who, Hardwick says, "assured me that his company was quite as liberal to its policy holders as that or

any other good company." But, more than all, the subsequent conduct of the mill company impresses us with the belief that they were relying upon the arrangement testified to by Hardwick. In order to guard against a lapse of the policy by failure of Parker to pay future assessments, Mr. Hardwick was instructed to arrange with a New York city bank, in case the insurance company refused any arrangement for notices of assessments, to keep a deposit with it, and to have the bank tender payment "on or about the last day on which a premium could be paid without allowing the policy to lapse." This proposed arrangement was not carried out, says the president of the company, "because this agreement with Mr. Stevenson was reported to them by their agent, Mr. Hardwick." This failure to carry out this preconcerted plan, by which the assignee could have been protected, or to take any other steps in that direction, tends to confirm us in the opinion that Mr. Hardwick's memory is the more to be relied on. But it has been insisted that Stevenson had no authority to make the arrangement he did. This argument is based chiefly on the fourth paragraph of the policy, which is in these words:

"(4) No agent of the association has authority to make, alter, or discharge contracts, waive forfeitures, extend credit, or grant permits; and no alteration of the terms of this contract shall be valid, and no forfeiture thereunder shall be waived, unless such alteration or waiver shall be in writing, and signed by the president and one other officer of the association."

In addition to this clause in the contract itself, appellant refers to and points out certain provisions of the by-laws of the association providing for an executive committee of the directors, and prescribing in general terms the duties of the secretary. In respect to these by-laws, it is enough to say that nothing in them operates as an express limitation upon the authority of the secretary as a general officer to extend credit, as was done in this instance. Neither is there anything in the charter of the association or the general laws of New York which peculiarly bears upon the authority of such a general officer of a corporation as its secretary or assistant. Neither a contract of insurance nor any change or alteration thereof need be in writing. *Trustees First Baptist Church v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305; *Insurance Co. v. Shaw*, 94 U. S. 574; *Insurance Co. v. Norton*, 96 U. S. 234. Neither is it competent for the parties to disqualify themselves from ability to agree by parol to any contract which, under the law, need not be in writing, and an agreement in the terms of a policy that no change or alteration thereof shall be valid unless in writing indorsed thereon may itself be charged by parol. "Parties to contracts cannot disable themselves from making any contract allowed by law in any mode in which the law allows a contract to be made. A written contract can be changed by parol, and a parol one changed by writing, despite any provision in the contract to the contrary." *Insurance Co. v. Norwood*, 32 U. S. App. 490-499, 16 C. C. A. 136, and 69 Fed. 71; *Insurance Co. v. McCrea*, 8 Lea, 513; *Dale v. Insurance Co.*, 95 Tenn. 38-48, 31 S. W. 266; *Pechner v. Insurance Co.*, 65 N. Y. 195. "A written bargain is of no higher legal degree than a parol one. Either may vary or discharge

the other, and there can be no more force in an agreement in writing not to agree by parol than in a parol agreement not to agree in writing. Every such agreement is ended by the new one which contradicts it." *Insurance Co. v. Earle*, 33 Mich. 143, 153.

There is nothing in the charter of this association, nor in the statute law of New York, disabling this association from making any alteration in the terms of this contract in respect to extension of credit or waiver of forfeiture which it might see fit to make. It follows, therefore, that the association might agree to an extension of credit in respect to either annual dues or mortuary assessments if it saw fit. Parol agreements, very general in their terms, for an extension of credit in the payment of dues, premiums, and assessments to insurance companies, both life and fire, have been upheld by the courts of the state of New York. In *Howell v. Insurance Co.*, 44 N. Y. 276, 285, there was evidence as to an agreement between the insurance company and the assured at the time of the payment of the first annual premium; that thereafter, "if anything should happen to the assured to prevent his paying such premium on the day whereon the same became payable, the said policy should not thereby become null and void, but should continue in full force for a reasonable time thereafter, so that the said premium could be paid." The assured died while one annual premium was due and unpaid, and a tender was made of this premium within a reasonable time after the death of the assured. Concerning the legal effect of this evidence, the court of appeals of New York said:

"It was not an agreement that the policy might be revived after it had become forfeited and become null and void. It was an agreement to continue the policy in force after the 15th of July in any year, for a reasonable time, to enable the premium to be paid. Instead of requiring prepayment of the premium, it gave a credit for a reasonable time. It was not an agreement which would allow an insurance upon the life of a dead man, but it continued the policy in force, so that there was no forfeiture of the policy or termination of the insurance, provided that payment was made within a reasonable time, no matter whether the person whose life was insured was dead or alive. Hence, if there was no other agreement than the one here alluded to, there could be no reason for saying that the policy was not in force at the time of the death of Mr. Howell."

In *Dilleber v. Insurance Co.*, 76 N. Y. 567, 572, 573, a forfeiture for nonpayment of a premium was insisted upon. For the plaintiff there was evidence that in April, 1860, the assured went to the general office, and found there a general agent of the company and its president, and said to them "that he wanted to give up his policy, that he could not pay it"; that thereupon one or both of these officers said: "You cannot; you must not give up this policy, Mr. Dilleber; you must keep it alive. If you can't pay it when it becomes due, we will give you what accommodation is necessary." During the next 15 years the assured paid his annual premiums, sometimes by note and sometimes by cash, but with no uniform regard to the day of maturity. His premium for 1875 fell due December 22, 1875, and was tendered December 24th, and refused, and the assured died January 1, 1876. This evidence was held competent, notwithstanding the policy contained a provision that any consent or agree-

ment whatever not signed by the president and secretary, and bearing the seal of the company, which affected the terms of the policy, should be void. As to this agreement the court said:

"The evidence was competent for the consideration of the jury, and not insufficient to sustain the verdict. In the first place, the parties representing the defendant upon that occasion were the president and general agent of the company, and must be held to have had ample authority to make such an agreement as the plaintiff relies on. In *Bliss on Life Insurance* (section 275) it is said: 'The company will be bound by the acts of the president and secretary performed in its office, whether such acts are in writing or verbal, whether they make a contract, waive a forfeiture, or give a consent;' and so are the adjudged cases. *Trustees First Baptist Church v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305; *Id.*, 28 N. Y. 153; *Howell v. Insurance Co.*, 44 N. Y. 276; *Marcus v. Insurance Co.*, 68 N. Y. 625; *Leslie v. Insurance Co.*, 63 N. Y. 27. In the next place, it was proper to show this arrangement by parol, notwithstanding the language of the policy in regard to a writing. *Carroll v. Insurance Co.*, 10 Abb. Prac. (N. S.) 166; *Kolgers v. Insurance Co.*, *Id.* 176; *Howell v. Insurance Co.*, 44 N. Y. 285. In consequence of it, the insured yielded to the request of the officers of the defendant, consented to retain the policy; and by virtue of it the company then received his promissory note, which they afterwards collected, and for each one of fourteen years received with more or less regularity the stipulated premium upon the policy. Therefore the agreement was supported by a sufficient consideration. *Bodine v. Insurance Co.*, 51 N. Y. 117; *Dean v. Insurance Co.*, 62 N. Y. 642; *Howell v. Insurance Co.*, 44 N. Y. 276. Standing by itself, it fairly permitted a conclusion that the arrangement then made related to the entire life of the policy, or until such earlier time as the defendant should notify the insured that the parol agreement must end, and in the future the condition as written in the policy be strictly complied with. *Trustees First Baptist Church v. Brooklyn Fire Ins. Co.*, 28 N. Y. 153. Indeed, it is not easy to see what other inference could be drawn from it. The words of the officers of the company can hardly be limited to the payment of a premium then four months past due, or to the note given on that occasion, for that was put in suit in September next after it was given, or to the next succeeding premium, but they apply rather to the policy as an instrument to be 'kept alive' or in force from year to year, notwithstanding delay in payment of premiums. This conclusion is very much strengthened by inferences fairly to be drawn from the conduct of the parties. It may well be inferred that the company had waived a strict compliance with their written contract, and they also aid in the proper construction of the agreement of the parties made in April, 1860. Indeed, the conduct of both parties from the time of that transaction seems to indicate that they regarded it as part of the arrangement of insurance, and the insured was not in fault in trusting to its continuance. The company was bound by it, and could not, in good faith, insist upon a strict compliance with the condition of payment until, before a premium became due, they gave the insured notice that they should exact it. Common fairness required so much. They cannot, when their own interest seems to demand it, waive a condition, and, after reliance upon it by the insured, withdraw the waiver without notice. The arrangement proven is not unlike that conceded to have been made in the case of *Howell* against this defendant (44 N. Y. 283), and which was found sufficient to uphold a verdict.

There remains only the question as to whether the agreement made by Mr. Stevenson is to be regarded as an agreement made by the corporation. As to the effect of the clause restricting the authority of agents of the association, it is clear that that does not embrace general agents or general officers. *Bac. Ben. Soc.* § 426; *Association v. Stapp*, 77 Tex. 517-523, 14 S. W. 168; *Marcus v. Insurance Co.*, 68 N. Y. 626; *Hastings v. Insurance Co.*, 138 N. Y. 473-479, 34 N. E. 289. In the case last cited, the defense was that the policy was not

in force at death of assured, by reason of the nonpayment of a premium. To meet this, evidence was offered of a conversation between the secretary of the company and assured, in which the secretary said to the assured, who was one of its medical examiners, that the company would carry him and give him credit for premiums due and to become due thereafter. The trial court thought as this promise was made by the secretary when not in or at the general office of the company, but while in another state, that he had no power to bind his company. To this the court of appeals said:

"We cannot concur in this view. The secretary is one of the general managing agents of a corporation, and, when in the discharge of the duties of his office, he represents the corporation itself. To waive prompt payment of a premium about to fall due is an act within the general powers of the secretary of a life insurance company. The president or other general officer of a corporation has power, *prima facie*, to do any act which the directors could authorize or ratify. *Conover v. Insurance Co.*, 1 N. Y. 290; *Booth v. Bank*, 50 N. Y. 396; *Leslie v. Lorillard*, 110 N. Y. 519, 18 N. E. 363; *Holmes v. Willard*, 125 N. Y. 75, 25 N. E. 1083; *Patterson v. Robinson*, 116 N. Y. 193, 22 N. E. 372; *Rathbun v. Snow*, 123 N. Y. 343, 25 N. E. 379; *Railroad Co. v. Dixon*, 114 N. Y. 80, 21 N. E. 110; *Mor. Priv. Corp.* §§ 251-253. There was no reason, and we are not referred to any controlling authority, for holding that the valid exercise of his powers depends upon the particular place where he may be at the time. The true test of his authority to bind the corporation is not whether he acts in the general office or in a distant state, but whether, at the time, he is engaged in the discharge of the general duties of his office, and in the business of the corporation."

See, also, *Steen v. Insurance Co.*, 89 N. Y. 315.

The New York cases are not peculiar in respect of the validity to be attached to agreements by a general agent changing the express terms of a policy of insurance by parol. Of the many cases dealing with this question, and in line with those cited from New York, we need cite but the following: *Insurance Co. v. Norton*, 96 U. S. 234; *Insurance Co. v. Unsell*, 144 U. S. 439-449, 12 Sup. Ct. 671; *Insurance Co. v. Norwood*, 32 U. S. App. 490, 16 C. C. A. 136, and 69 Fed. 71; *Insurance Co. v. Earle*, 33 Mich. 153; *Insurance Co. v. McCrea*, 8 Lea, 513; *Dale v. Insurance Co.*, 95 Tenn. 38, 31 S. W. 266. See, also, *Bac. Ben. Soc.* § 426.

In *Insurance Co. v. Unsell*, cited above, an agreement for indulgence in prompt payment of premiums was sought to be made out by the general conduct of the company in dealing with the assured. Justice Harlan adopts the language of Justice Bradley in *Insurance Co. v. Eggleston*, 96 U. S. 577, where it was said by Justice Bradley, in speaking for the court:

"We have recently, in the case of *Insurance Co. v. Norton*, 96 U. S. 234, shown that forfeitures are not favored in the law, and that courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or any agreement to do so on which the party has relied and acted. Any agreement, declaration, or course of action on the part of an insurance company which leads a party insured honestly to believe that, by conforming thereto, a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract. The company is thereby estopped from enforcing the forfeiture."

Returning to the facts of the case at bar touching an extension of credit, what the secretary said was in substance this:

"We will continue to send notices to Parker, and cannot undertake to send you notices also. But, if Parker fails to pay any assessment, we will extend the time within which such assessment can be paid long enough to give you notice and an opportunity to pay in a reasonable time, and thereafter we will send notices of calls to you."

Aside from any weight to be attached to this as an agreement for an extension of credit under certain circumstances, it would operate as a fraud to permit an assertion of a forfeiture under the facts of this case. The assignee could have guarded against a lapse of the policy by making tenders from time to time through a New York bank, and Hardwick was instructed to make such an arrangement in default of some agreement for its protection with the insurance company. Relying upon the arrangement made with the secretary of the company at its general office, no other arrangement was made. To repudiate this agreement would now defeat the policy. The act of the association through Stevenson has induced the assignee to omit strict performance through tenders made by an agent. Under such circumstances it would be inequitable to permit the forfeiture to be exacted. *Leslie v. Insurance Co.*, 63 N. Y. 27, 33; *Pratt v. Insurance Co.*, 55 N. Y. 505, 511; *Pitney v. Insurance Co.*, 65 N. Y. 6, 22; *Bridger v. Goldsmith*, 143 N. Y. 424, 38 N. E. 458; *Insurance Co. v. Norwood*, 32 U. S. App. 490, 16 C. C. A. 136, and 69 Fed. 71; *Insurance Co. v. Eggleston*, 96 U. S. 577; *Insurance Co. v. Norton*, Id. 234; *Insurance Co. v. Unsell*, 144 U. S. 439, 12 Sup. Ct. 671.

The debt due from Parker to the woolen-mills company is now less than the amount of the policy held as collateral, and it is assigned as error that the assignee should be allowed a decree against the company for any greater sum than the debt remaining unpaid. The policy itself provides that an assignee of a policy who holds as a creditor can recover only to the extent of his bona fide indebtedness. It is a mistake to assume that the assignee has been allowed as a creditor to recover any greater sum than the remainder of its indebtedness. The legal title of the policy is in the woolen-mills company, and the decree provides that the surplus shall be held in trust for Mrs. Mary K. Parker, the original beneficiary, who is also a party to the litigation. Unless the insurance company is injured, we cannot see how it can complain; and it is not injured if it is liable to Mrs. Parker for so much of the policy as is not consumed in the payment of Mr. Parker's debt. The contention is, that as between the insurance company and Mrs. Parker, the policy has lapsed. There is nothing in this. The agreement with the assignee to continue the policy in force until it could pay any assessment which Parker failed to pay operated to keep the contract of insurance alive as to the entire policy, and for the benefit of all who should be concerned. The money due on the call due March 3, 1893, and all subsequent calls, was tendered to the company, and is still in its hands, subject to its disposition, or was tendered by this bill. The policy was therefore in force when the assured died, and the decree has been so molded



as to protect Mrs. Parker as beneficiary of the surplus and the insurer against further liability to her.

We come now to the cross appeal of Mrs. Mary K. Parker, and the assignment of errors in her behalf. Mrs. Parker's cross bill was filed for the purpose of setting up her title, upon the ground that her signature and consent to the assignment thereof had been procured by undue influence and coercion. Her insistence is that the woolen-mills company, for the purpose of obtaining payment of the debt due by her husband, claimed that the debt was criminally incurred by a misappropriation of the assets of the company under his control as the treasurer of the corporation; that her husband, under fear of prosecution, made the assignment, and, by representations to her that they would be ruined if she refused to join him in the assignment, obtained her signature thereto. She further charges that she was to acknowledge the assignment privily before a notary public, and understood that until she did so the assignment was incomplete and invalid. It is further charged and shown that, after Mr. Parker and his wife had signed the assignment of the policy indorsed therein, it was delivered to the assignee, who subsequently sent a notary to take her acknowledgment. The cross bill then alleges that, having recovered from her fright, she refused to acknowledge her signature, and demanded that the policy should be returned to her, which demand was refused. Her prayer is that the said woolen mills be decreed to hold any recovery against the insurance association in trust for her benefit. The assignment of an insurance policy, in which a married woman is the beneficiary, may be made without privy examination, such as is necessary under the law of Tennessee to convey title to the land of a married woman. *Scobey v. Waters*, 10 Lea, 551, 563; *Webster v. Helm*, 93 Tenn. 322, 24 S. W. 488. Her refusal to acknowledge her assignment before a notary public does not in itself invalidate it. We are not prepared to admit that the allegations of the cross bill nor the evidence bearing upon her assignment are sufficient to make out a case of either undue influence or coercion. The claim against John H. Parker was for a shortage in his accounts as treasurer of the corporation, of which he was an officer. That her husband feared prosecution is likely, but that the officers of the corporation threatened him with prosecution or contemplated criminal proceedings is not satisfactorily established. That his wife, under the circumstances, should be moved to aid him in settling such a debt, and that he alarmed her by expressing his fears of prosecution, hardly makes a case of coercion or undue influence. That she was actuated by compassion for her husband, and moved by her love for him and anxiety on his account, is probable. But we are not prepared to say that she has made out a case of legal coercion or duress, or one which would justify a court in holding that she did not act freely and understandingly. But, aside from this, we are of opinion that her consent was not essential to the assignment of this policy. The association issuing this policy was organized under chapter 175 of the New York Acts of 1883, and was engaged in conducting an insurance business on the co-operative or assessment plan. Rev. St. N. Y. (8th Ed.)

p. 1704; Laws 1883, c. 175. By section 18 of that act it is provided as follows:

"Membership in any such corporation, association or society shall give to any member thereof the right, at any time, with the consent of such corporation, association or society, to make a change in his payee or payees, or beneficiary or beneficiaries, without requiring the consent of such payees or beneficiaries." Rev. St. N. Y. (8th Ed.) p. 1709.

Mrs. Parker had no vested interest in this policy, and the assured, under this provision of the law governing this contract, had the right to change the beneficiary. There was no contract between the member and payee by which any interest was vested in Mrs. Parker. The original designation of Mrs. Parker as the beneficiary was in the nature of an inchoate or unexecuted gift, and left the member free, under the provision of the law above quoted, to change the payee at his pleasure, with the consent of the company. That Mrs. Parker paid some of the assessments is not material, as it is not shown that she did so with her separate estate, or under any contract by which she was to acquire a vested right. The case of *Smith v. Society*, 123 N. Y. 85, 25 N. E. 197, has no application to the facts of this case.

But it is said that the woolen-mills company took issue upon the question of undue influence and coercion, and should not be allowed to shift ground, and now say that that issue was immaterial. In general terms, the answer denied that Mrs. Parker was entitled "to any of the relief sought in her cross bill," and also insisted that it could not be affected by any of the facts upon which the cross bill relied. But, aside from this, we think that taking issue upon an immaterial question of fact does not operate as an estoppel, and that it is not too late to insist that Mrs. Parker's joining in the assignment was not necessary to the title of the assignee under the member's assignment.

The matters we have considered are conclusive of the case, and render unnecessary a consideration of other questions. The decree of the circuit court must be affirmed, each appellant paying one-half the costs.

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#### UNION MILL & MINING CO. v. WARREN et al.

(Circuit Court, D. Nevada. September 13, 1897.)

No. 636.

#### QUIETING TITLE IN FEDERAL COURTS—STATE STATUTES.

Under the statute of Nevada relating to actions to quiet title to real property, it is not necessary for the plaintiff, in bringing a suit in equity for that purpose in the federal court of Nevada, to set out specifically the character of his own title, or of the alleged title of the defendant, but it is always sufficient simply to allege that plaintiff is the owner and in possession of the property, describing it, and that the defendant is unlawfully asserting a claim thereto adverse to him.

This was a suit in equity by the Union Mill & Mining Company against George Warren and others to quiet title to certain lands in Nevada. The cause was heard on demurrer to the bill.

W. E. F. Deal, for complainant.

Robert M. Clarke, for defendants.

HAWLEY, District Judge (orally). This is a suit in equity to quiet title to certain lands and water situate in Storey county, Nev. The amended bill alleges that complainant is "the owner in fee, in the possession, and entitled to the possession, \* \* \* of 320 acres of land," particularly describing it, "together with all the waters of Six-Mile Canon creek, flowing or to flow to, over, or through said land"; that the defendants claim an estate or interest therein adverse to complainant; that the claim of the said defendants, and each of them, is without any right whatever; that the said defendants, and each of them, has no estate, right, title, or interest whatever in said land or premises, or to said waters of said Six-Mile Canon creek, or any part thereof; that the claim of the defendants operates as and is a cloud upon the title of complainant to said land and premises, and to the waters of said Six-Mile Canon creek, and causes complainant irreparable injury, and defendants threaten, to continue, and do continue, to set up and claim said title to said land and premises and to said waters, adverse to complainant. To this bill the defendants interposed a demurrer, upon the following grounds:

"(1) The bill of complaint does not state facts sufficient to constitute a cause of action. (2) The bill of complaint does not show that defendants have done or caused to be done any act or thing which casts a cloud upon the title of complainant to the land described in the bill of complaint. (3) The bill of complaint does not show that complainant has ever appropriated, or is the owner of, or has any right to or use of, the water of said Six-Mile Canon creek. (4) The bill of complaint does not show that defendants have appropriated or diverted, taken, or used the waters of said Six-Mile Canon creek, or any part thereof, or in any manner deprived complainant of the same, or the use thereof. (5) The bill of complaint does not allege or show the nature of defendants' claim, or what it is that constitutes the cloud."

This demurrer cannot be sustained. No authorities have been cited by counsel in its support. The allegations of the complaint are sufficient to constitute a cause of action to quiet title to the property in controversy. The statute of Nevada provides:

"An action may be brought by any person in possession, by himself or his tenant, of real property, against any person who claims an estate or interest therein, adverse to him, for the purpose of determining such adverse claim, estate, or interest."

Under these provisions, of themselves clear, the supreme court of this state has repeatedly held that it is not necessary for a plaintiff to set out specifically the character of his own title, or of the alleged title of the defendants; that it is always sufficient simply to allege that plaintiff is the owner and in possession of the property, describing it, and that the defendants are unlawfully asserting a claim there-to adverse to him. The only case that lends any support whatever to the views contended for by defendants' counsel is that of *Blasdel v. Williams*, 9 Nev. 161 (from which I dissented), which was directly overruled in *Mining Co. v. Marsano*, 10 Nev. 370, 378. See, also, *Golden Fleece Gold & Silver Min. Co. v. Cable Consolidated Gold & Silver Min. Co.*, 12 Nev. 312, 320; *Rose v. Mining Co.*, 17 Nev. 25, 52,

27 Pac. 1105. Numerous state decisions, rendered under statutes similar to the statutes of this state, have held such averments in the complaint to be sufficient. *Curtis v. Sutter*, 15 Cal. 259, 262; *Head v. Fordyce*, 17 Cal. 149; *Rough v. Simmons*, 65 Cal. 227, 3 Pac. 804; *Wall v. Magnes*, 17 Colo. 476, 480, 30 Pac. 56; *Amter v. Conlon*, 22 Colo. 150, 43 Pac. 1002; *Tolleston Club v. Clough* (Ind. Sup.) 43 N. E. 647.

In *Curtis v. Sutter*, Mr. Justice Field, in delivering the opinion of the court, after stating that the statute of California (from which our statute was copied) enlarges the class of cases in which equitable relief could formerly be sought in quieting title, and that it authorizes the interposition of equity in cases where previously bills of peace would not lie, said:

"Under the statute of this state, it is unnecessary for the plaintiff to delay seeking the equitable interposition of the court until he has been disturbed in his possession, by the institution of a suit against him, and until judgment in such suit has passed in his favor. It is sufficient if, whilst in the possession of the property, a party out of possession claims an estate or interest adverse to him. He can immediately, upon knowledge of the assertion of such claim, require the nature and character of the adverse estate or interest to be produced, exposed, and judicially determined, and the question of title be thus forever quieted. It does not follow from the fact that the suit is brought in equity that the determination of questions purely of a legal character in relation to the title will necessarily be withdrawn from the ordinary cognizance of a court of law."

But the question is set at rest, so far as the national courts are concerned, by the decision of the supreme court of the United States in *Ely v. Railroad Co.*, 129 U. S. 291, 9 Sup. Ct. 293. The averments in the complaint in that case are identical with this case in so far as they relate to the land. The prayers for relief are alike. The complaint in that case was demurred to, and the demurrer was sustained in the lower court, and affirmed by the supreme court of the territory of Arizona, upon the ground that the action must be treated as a suit in equity only, and that the complaint made out no case for equitable relief. The court shows that this ground would undoubtedly be correct in cases arising in states where the distinction between actions at law and suits in equity is preserved, but that it has no application in states where such distinction does not exist. The court then quotes the statute of Arizona, which is identical with the statute of this state, except it leaves out the qualification that the party, in order to bring the suit, must be in possession of the property. With reference to the sufficiency of the complaint under this statute, the court said:

"The manifest intent of the statute, as thus amended, is that any person owning real property, whether in possession or not, in which any other person claims an adverse title or interest, may bring an action against him to determine the adverse claim and to quiet the plaintiff's title. It extends to cases in which the plaintiff is out of possession, and the defendant is in possession, and in which, at common law, the plaintiff might have maintained ejectment. An allegation, in ordinary and concise terms, of the ultimate fact that the plaintiff is the owner in fee, is sufficient, without setting out matters of evidence or what have been sometimes called 'probative facts,' which go to establish that ultimate fact; and an allegation that the defendant claims an adverse estate or interest is sufficient, without further defining it, to put him to a dis-

claim or to allegation and proof of the estate or interest which he claims, the nature of which must be known to him, and may not be known to the plaintiff. These conclusions accord with the decisions of the courts of California and Indiana under similar statutes, from one of which the present statute of Arizona would seem to have been taken. *Payne v. Treadwell*, 16 Cal. 220, 242-247; *Statham v. Dusy* (Cal.) 11 Pac. 606; *Heeser v. Miller* (Cal.) 19 Pac. 375; *Railroad Co. v. Oyler*, 60 Ind. 383, 392; *Trittipo v. Morgan*, 99 Ind. 269. The result is that the complaint in this case is sufficient to authorize the court to determine the claim of the defendants and the title of the plaintiff, and also, if the facts proved at the hearing shall justify it, to grant an injunction or other equitable relief."

In *Mining Co. v. Kerr*, 130 U. S. 256, 260, 9 Sup. Ct. 511, the court, in discussing the same question, said:

"The first issue to be determined is whether the complaint is sufficient to authorize the admission of evidence impeaching the validity of a patent, or to sustain a judgment annulling it. This question was directly presented in the case of *Ely v. Railroad Co.* (recently decided by this court) 129 U. S. 291, 9 Sup. Ct. 293. That was an action commenced in a territorial court under the statutes of that territory, almost literally the same as the statutes of Utah under which this action arose, and the prayer for relief was precisely the same in both complaints. The court held in that case that the rule enforced in the circuit and district courts of the United States, that a bill in equity to quiet title or remove clouds must show a legal and equitable title in the plaintiff, and set forth the facts and circumstances on which he relies for relief, does not apply to an action in the territorial court founded upon territorial statutes, which unite legal and equitable remedies in one form of action. The complaint in the present case, in compliance with the requirements of the practice act of Utah territory, states in concise language the two ultimate facts upon which the claim for relief depends,—that the plaintiff is in possession of the property, and that the defendant claims an interest therein adverse to him. These are sufficient to require the nature and character of the adverse claim on the part of the defendant to be set up, inquired into, and judicially determined, and the question of title finally settled."

It is deemed to be unnecessary to specifically notice the criticism of defendants' counsel as to the alleged ownership in fee to the waters of Six-Mile Canon creek, or to state what evidence it will be necessary for complainant to introduce in order to establish a right to the land and water. It is enough to say that the ultimate facts are sufficiently alleged. The demurrer is overruled.

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UNION MILL & MINING CO. v. WARREN et al.

(Circuit Court, D. Nevada. September 13, 1897.)

No. 637.

INJUNCTION—THREATENED TRESPASS—SUFFICIENCY OF BILL.

A bill to enjoin the commission of a threatened trespass is sufficient, without alleging any overt act towards the invasion or destruction of complainant's rights, if it alleges threats to commit the trespass, and that it will be committed unless enjoined, and will cause irreparable injury to complainant.

W. E. F. Deal, for complainant.

Robert M. Clarke, for defendants.

HAWLEY, District Judge (orally). This is a suit in equity for an injunction to enjoin defendants, and each of them, from entering

into or upon complainant's land and premises, or any part thereof, and from taking, removing, or in any wise interfering with, the tailings and residues situate thereon, and from diverting or using, or in any wise interfering with, the waters of Six-Mile Cañon creek. The substantial averments of the amended bill of complaint are that the complainant is the owner in fee, in the possession, and entitled to the possession of 320 acres of land situate in Story county, Nev. (particularly described); that it is the owner, in the possession, and entitled to the possession and the exclusive right to all the waters of Six-Mile Cañon creek flowing or to flow over, through, and upon said land; that there are large deposits of tailings and residues from the working of ores containing gold and silver upon said land, which said tailings and residues were collected and saved by artificial means by the predecessors in interest and grantors of complainant for more than 15 years prior to the commencement of this suit; that the principal value of said land is, and consists of, the said tailings and residues; that the said defendants, and each of them, without any right, lay claim to a portion of said land (describing the portion), together with all said tailings and all deposits on said land, and also the exclusive right to the waters of Six-Mile Cañon creek; that said defendants, and each of them, threaten to enter into and upon complainant's land, and threaten to take, work, and reduce the said tailings and residues, and to take and use the waters of said Six-Mile Cañon creek for such purposes, and threaten to extract from said tailings and other residues the gold and silver contained therein, and to appropriate the same to their own use; that said defendants will, unless enjoined and restrained therefrom by the injunction of this court, take and use the waters of said Six-Mile Cañon creek for said purposes, and extract from said tailings and other residues the gold and silver contained therein, which, unless prevented by injunction, will work irreparable injury and wrong to complainant, and cause irreparable damage; that said defendants, and each of them, are insolvent, and wholly unable to respond in damages which will result from their wrongful and injurious acts. It further alleges the commencement of a suit against defendants to quiet the title to said lands and water rights. To this bill the defendants demur (1) upon the general ground that the complaint does not state facts sufficient to constitute a cause of action; (2) "it does not appear that defendants, or either of them, have taken or appropriated, or attempted to take or appropriate, any of the tailings and residues mentioned in the complaint, or that defendants, or either of them, have diverted, appropriated, or used, or deprived complainant of the use of, the water of said Six-Mile Cañon creek."

The first point of the demurrer is settled adversely to defendants in *Mining Co. v. Warren* (No. 636; just decided) 82 Fed. 519.

The contention of the defendants upon the second point is that, in order to entitle complainant to an injunction, it must first show that an actual trespass has been committed by the defendants upon its property; that there must be some overt act committed by the defendants towards the invasion into, or destruction of, the rights of the

complainant, independent of threats by word of mouth, before the extraordinary powers of a court of equity by injunction can be called into motion. Under ordinary circumstances, courts will not and should not grant an injunction to prevent a trespass. The exercise of this power requires caution, deliberation, and sound judicial discretion. It should never be extended except in cases of irreparable injury, when courts of law cannot afford adequate remedy. The right must be clear, the injury impending and threatened, so as to be averted only by the protective preventive process of injunction. It is not an essential prerequisite to an injunction to show that defendant is insolvent; but, to set the equity jurisdiction in motion, the injury must be irreparable, or the defendant insolvent, or the injunction be necessary to avoid a multiplicity of suits. In the present case it is alleged that the tailings, which have been accumulating for several years, contain gold and silver, and constitute the principal value of the land. The defendants threaten to work these tailings, and convert the gold and silver contained therein to their own use. This would necessarily be destructive of the estate, and work irreparable injury to complainant. It stands in the same category as the extraction or removal of valuable ores from a mining claim, or coal from a coal mine, or the boring of gas wells on lands where gas exists, etc. In all such cases it is held that the acts committed or threatened, looking to the accomplishment of such purposes, work an irreparable injury to the complainant; that an action for damages is inadequate, because the damages could not be measured. In all cases where the mischief complained of is irremediable, and tends to destroy the substance of the property, an injunction will be granted in order that the property may be preserved from destruction. The reasons which apply to such cases are analogous to suits brought to restrain waste by enjoining the cutting down of trees which constitute the principal value of the land. It has been held in such cases that, in order to justify the issuance of an injunction, it must be alleged either that the defendant laid the ax at the root of the tree, or that he threatened to do it. 2 Madd. Ch. c. 281. The principle involved is similar in some respects to actions brought by a landlord against a tenant to restrain the commission of waste. In *Tayl. Landl. & Ten.* § 691, it is said:

"A landlord need not wait until waste is actually committed; for, if he ascertains that the tenant is about to commit any act which would operate as a permanent injury to the estate, the court will interfere and restrain him from doing such act. And whether he begins, or threatens, or shows an intention to commit waste, an injunction will be granted."

But coming more directly to the precise point involved herein are the following cases, which speak in clear language upon this subject, and show that the complaint in the present case is sufficient:

In *Gibson v. Smith* (decided in 1741) 2 Atk. 183, Lord Chancellor Hardwicke said:

"The plaintiff may certainly come into this court to restrain the defendant from opening the mines, even if he has only threatened to do it; nor is it necessary the plaintiff should have waited until the waste is actually committed."

In *More v. Massini*, 32 Cal. 592, 594, the second count of the complaint alleged that complainant was the owner of the land; that he was in possession; that the defendants threatened to enter thereon, and to quarry and remove asphaltum therefrom; and that they would do so unless restrained. The court, with reference to these averments, said:

"The second count states a good cause of action. The gravamen is a threatened trespass upon land. The trespass is in the nature of waste, and it will be committed unless the defendant is restrained. Should the threat be fulfilled the plaintiff would be deprived of a part of the substance of his inheritance, which could not be specifically replaced. In the class to which this case belongs, no allegation of insolvency is necessary. The injury is irreparable in itself."

In *Mining Co. v. Dodds*, 6 Nev. 261, 264, the court held that a complaint which alleged that plaintiff was the owner and entitled to the possession of lands; that there were improvements thereon; that defendants were in possession, and threatened to destroy, and would, if not enjoined, destroy, such improvements; and that defendants were insolvent and unable to respond in damages,—was sufficient to support an order enjoining defendants from removing the improvements or committing waste. In *High, Inj. § 18*, it is said:

"The remedy by interlocutory injunction being preventive in its nature, it is not necessary that a wrong should have been actually committed before a court of equity will interfere, since, if this were required, it would in most cases defeat the very purpose for which the relief is sought, by allowing the commission of the act which complainant seeks to restrain. And satisfactory proof that defendants threaten the commission of a wrong which is within their power is sufficient ground to justify the relief."

The demurrer admits the allegations of the complaint, and if, upon the trial, the complainant proves the allegations contained in its bill to be true, it will be entitled to an injunction. The demurrer is overruled.

#### FINANCE COMMITTEE OF PENNSYLVANIA v. WARREN.

KENNEDY et al. v. SAME.

(Circuit Court of Appeals, Seventh Circuit. October 4, 1897.)

Nos. 372, 373.

#### 1. EQUITY—COMPENSATION OF MASTER.

The compensation of a master in chancery should be measured by the amount of work done, the time employed, and the responsibility assumed, having also in view the magnitude of the interest involved. It should be reasonable,—perhaps liberal,—but not exorbitant.

#### SAME—EXCESSIVE ALLOWANCE—SALE OF RAILROAD.

A master was appointed to sell a railroad 112 miles long under a mortgage securing \$1,380,000 in bonds, and which was subject to a prior mortgage of \$300,000. The road was purchased by the bondholders for \$250,000. The master had no extraordinary duties to perform, and the entire period of his service was only two months, the actual time employed probably not exceeding 10 days. *Held*, that an allowance of \$4,000 was not justified, and that any sum over \$2,500 would be excessive.

#### 3. SAME—APPOINTMENT OF MASTER.

A master in chancery, being an officer of the court, should be selected and appointed by the court. Any arrangement or agreement by the parties



for selecting the master and fixing his compensation, in advance of his appointment, is improper, in disrespect of the court, and should not be tolerated.

**Appeals from the Circuit Court of the United States for the Southern District of Illinois.**

These appeals present the question whether the amount allowed the special master for his service in the sale of the railway in question was excessive. The Jacksonville, Louisville & St. Louis Railway Company on May 1, 1890, executed its mortgage or trust deed to the Finance Committee of Pennsylvania, as trustee, upon its railway extending from Jacksonville to near Mt. Vernon, in the state of Illinois, a distance of 112 miles. The trust deed was given to secure bonds to the amount of \$1,380,000, payable in the year 1940, with semi-annual interest; and was subject to a prior mortgage of \$300,000. Upon default in payment of interest and taxes a bill was filed on the 7th day of December, 1893, for a foreclosure of the trust deed and a sale of the property, which resulted in a decree, entered on the 23d day of April, 1896, finding the amount of unpaid interest to be \$172,500, and directing a sale of the railway (subject to the prior mortgage, and to an issue of receiver's certificates amounting to \$115,000), upon public notice, providing that no bid for less than \$250,000 should be accepted, and appointing Phillip Barton Warren, the appellee, special master to conduct the sale, with the usual powers of masters in such cases. On June 10, 1896, the property was sold by the special master to Robert F. Kennedy and Joseph H. Dunn, a committee representing and purchasing in behalf of the bondholders, and for the sum of \$250,000. The sale was confirmed, and the special master, by direction of the court, executed and delivered a deed to the purchasers. On the 27th of August, 1896, the special master, by petition, applied to the court to determine and assess the amount of compensation due him for his service, claiming the sum of \$5,000 therefor. Upon that petition evidence was taken with respect to the service performed, which service consisted in drafting and causing to be published the notice of sale, attending the sale, making report to the court, drawing and executing a deed to the purchaser, and receiving from the parties the bonds, to be stamped by him with the appropriate proportion of the bid applicable to those bonds. Evidence was taken with respect to the allowances to masters upon sales of railway in the Southern district of Illinois and in other districts, and also to the effect that prior to the decree there was some friction between counsel for the respective parties with regard to the appointment of special master and to his compensation; and it was asserted upon the one side and denied upon the other that there was agreement between counsel that, in case of the appointment of Mr. Warren, the appellee, as special master, his compensation should be fixed at the sum of \$1,500. The court allowed the master for his service the sum of \$4,000, from which decree the Finance Committee of Pennsylvania, the trustee, and Kennedy and Dunn, the purchasers under authority conferred by the decree of foreclosure, appealed.

Henry A. Gardner, for appellants.

Buford Wilson, for appellee.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

JENKINS, Circuit Judge, after stating the facts, delivered the opinion of the court.

The eighty-second rule in equity prescribed by the supreme court provides that "the compensation to be allowed to every master in chancery for his services in any particular case shall be fixed by the circuit court in its discretion, having regard to all the circumstances thereof." Our review of the decree complained of is therefore necessarily limited to the question whether the discretion of the court has been improvidently exercised. A master in chancery occupies,

\* it is true, a position of responsibility and of trust. The court looks to him to execute its decree thoroughly, accurately, and in full response to the confidence extended to him. His compensation should be measured accordingly. He should be remunerated for the actual work done, and the time employed, and the responsibility assumed. The amount of compensation should be fixed with due regard to the magnitude of the interests involved, and to the responsibility of the position. The amount of such compensation, while it should be reasonable, and perhaps liberal, should not be exorbitant. Possibly, much ground for complaint would be avoided if the amount of compensation could be determined by some fixed standard. Yet so various and dissimilar are the services performed, and the character and extent of the responsibilities assumed, that it might work injustice to deal with such matters by any ironclad rule. The service here would seem not to have been arduous. It was all performed within a period of two months, and the time actually employed in it could not well have exceeded 10 days. The service consisted in the preparation and publication of notices of sale, attendance at the sale, the execution of a deed, the ascertainment of the proportionate amount of the bid applicable to each outstanding bond, and the stamping of such amount upon each bond. The railway in question was a small affair, being only 112 miles in length, and manifestly unremunerative. The road was bonded for about \$14,000 a mile, and could not pay interest upon its bonded debt. The court was obliged to issue receiver's certificates to the amount of \$115,000 to keep the road in proper repair, and to provide for outstanding liabilities for recent operation of the road, chargeable upon the corpus of the property in priority to the mortgage. It was understood to be and was necessarily the case that the bondholders must, for their own protection, buy in the road; and, manifestly, their committee would be, as in fact it was, the only bidder at the sale. The responsibility assumed by the master was, therefore, not great. The evidence offered in respect to the value of the service dealt largely with the amount of allowances to masters upon the sale of railways in that and other federal districts. The peculiar circumstances surrounding those cases are not disclosed, and, unless there were some extraordinary conditions existing of which we are not informed, we fear that some of these allowances were excessive. While we cannot agree with the ruling in *Middleton v. Telegraph Co.*, 32 Fed. 524, that compensation in such cases should be measured by the standard of judicial salaries,—which are not infrequently meager,—we are also of opinion that the rule seemingly approved in *Railway Co. v. Heath*, 10 Blatchf. 214, Fed. Cas. No. 4,516, to treat stocks or bonds passing through the hands of the master as so much money committed to his keeping, and allowing him a percentage thereon, in analogy to the commission allowed to the clerk of the court or to an executor or administrator for receiving and paying out money, or to a broker for the purchase and sale of stocks or bonds, might, in many instances, work out an exorbitant compensation. We are reluctant to disturb a decree of this character, when much must be largely rested in the discretion of the court below. We cannot, however, but regard

the amount allowed as excessive in view of the circumstances surrounding this case.

In a case in the Eastern district of Wisconsin, involving the sale of the street-railway system of the city of Milwaukee, with more lines of railway than the one in question, the road was sold for \$5,000,000. The master dealt with bonds to the amount of nearly \$9,000,000, and with a considerable amount of money. He was obliged to go to New York with respect to the stamping upon each of these bonds the proportionate amount of the bid; and other services, not required in the case here, were performed by him. There the sum of \$3,500 was allowed by the court. In the case of the sale of the Louisville, New Albany & Chicago Railroad, in the district of Indiana, the road was 512 miles in extent, was sold for \$3,000,000, and the master dealt with bonds to the amount of over \$8,000,000, and was likewise required to go to the city of New York in the discharge of his duties. In that case the like sum of \$3,500 was allowed. In both these cases we think the amount was fair and liberal, but not excessive. The case in hand was not nearly so important as the cases referred to; the responsibility was not nearly so great. We think that an allowance of \$2,500 for the services rendered would have been a full and liberal compensation, and possibly too much. We are of opinion that any greater sum must be deemed excessive.

There was evidence pro and con with reference to an alleged agreement between counsel representing one of the complainants below and counsel for the appellants here with respect to the person who should be appointed master, and the compensation which should be paid him. We have not considered that evidence in respect to the amount of compensation, and we refer to it only to say that courts ought not to regard any such arrangement between counsel, made in advance of the appointment of the master. It is not to be tolerated that parties to a suit may hawk such employment about the street, and award it to the lowest bidder. The master is an officer of the court. He is appointed by and should be selected by the court, and not by the parties. The office is one of dignity and responsibility, and, while it is proper that the master should receive from the parties in interest all proper suggestions with reference to the manner in which he should comply with his duty, it still remains that he must determine for himself how his duty should be performed, and he owes it to the court that its orders should be carried out strictly and impartially, and not in favor of one interest against another. He occupies a quasi judicial position. He is not the servant of, nor bound to obey the orders of, any party to the suit; and he should not become a mere dummy, to be used by interested parties to effect their purposes. When his services have been performed, it would, of course, be agreeable to the court, and relieve it of responsibility, if the parties interested could agree with the master upon an amount of compensation satisfactory to both. But in advance of the appointment such agreements are improper, and in disrespect of the court.

The decree will be reversed, and the cause remanded for further proceedings in the court below in conformity with this opinion.

## UNITED STATES v. HOPKINS et al.

(Circuit Court, D. Kansas, First Division. September 20, 1897.)

**1. MONOPOLIES AND RESTRAINTS OF TRADE.**

In a suit to restrain alleged violations of the law of July 2, 1890, against trusts and monopolies affecting interstate commerce, the existence of an illegal combination among the defendants is to be determined not alone from what appears on the face of the preamble, rules, and by-laws of their association, but from the entire situation, and the practical working and results of their methods of doing business, as disclosed by the evidence.

**2. SAME—LIVE-STOCK EXCHANGE.**

The defendants were members of a voluntary, unincorporated exchange or association at Kansas City, and had agreed to be bound by its articles of association, rules, and by-laws. Their business consisted in receiving, buying, selling, and handling, as commission merchants, live stock received at the Kansas City stock yards from, and sold for shipment to, various states and territories. These stock yards furnished the only available public market for that purpose for an exceedingly large area, including many states and territories. One of the rules of the association fixed a minimum rate of commissions to be charged by members of the association, and prohibited the employment, by any commission firm or corporation, of more than three persons to travel and solicit business, and prohibited the sending of prepaid telegram or telephone messages quoting the markets; and another rule shut out all dealings and business intercourse between members and nonmembers. Persons attempting to carry on business without joining the exchange were systematically blacklisted and boycotted, and thus effectually prevented from securing or transacting business. *Held*, that the association was an illegal combination to restrict, monopolize, and control that class of trade and commerce.

**3. SAME—REASONABLENESS OF RESTRAINTS.**

The act of congress is aimed against all restraints of interstate commerce, and its purpose is to permit commerce between the states to flow in its natural channels, unrestricted by any combinations, contracts, conspiracies, or monopolies whatsoever. The reasonableness of the restrictions in a given case is immaterial.

**4. COMMERCE BETWEEN THE STATES.**

The fact that the place of business of an association is located upon both sides of the line dividing two states is in itself of no material importance in determining whether the business transacted by it is commerce between the states.

**5. SAME.**

The shipments of live stock from growers, dealers, and traders in various states and territories to the defendants was solicited by the latter chiefly through personal solicitation of traveling agents, and through advertisements. The course of business involved frequent loans to shippers in other states, secured by chattel mortgages on herds, and frequent drafts drawn by shippers on the defendants, and discounted at their local banks in other states on the strength of bills of shipment attached thereto. Shipments were made to Kansas City, and the loans or drafts paid from proceeds of sale, and the balance remitted to the shippers. Sales at Kansas City were made for shipment to markets in other states, as well as for slaughter at packing houses near by. The traffic was of immense proportions, and defendants were active promoters, and frequently interested parties, and gathered in for sale and slaughter millions of cattle, sheep, and hogs; and their rules and regulations covered the entire business, and extended over the whole field of operation. *Held*, that defendants were engaged in commerce between the states, and were subject to the provisions of the law of July 2, 1890, against trusts and monopolies.

**6. SUBJECTS OF INTERSTATE COMMERCE.**

The live stock shipped to defendants from other states through their solicitation and procurement, to be sold to a large extent for reshipment to

other states, or, if the market should be unsatisfactory, for reshipment for sale at markets in other states, does not cease to be the subject of interstate commerce as soon as it reaches Kansas City or is there unloaded, nor until it has been so acted upon that it has become incorporated and mingled with the mass of property in the state.

7. SAME—SUBJECTS OF INTERSTATE COMMERCE.

Live stock shipped from various states to the yards of a stock-yards association in another state, by the solicitation and procurement of the members thereof, to be there sold, or to be reshipped to other states, if the market should be unsatisfactory, does not cease to be a subject of interstate commerce as soon as it reaches such yards and is there unloaded, nor until it has been further acted upon so as to become mingled with the mass of property in the state.

The bill in this case is presented under the act of congress of July 2, 1890 (26 Stat. 209).

It charges that each of the defendants, about 300 in number, are members of a voluntary, unincorporated association, known and designated as the "Kansas City Live-Stock Exchange," and have adopted articles of association and rules and by-laws whereby they have agreed that they will faithfully observe and be bound by the same; that the government of said association is vested in a board of 11 directors, and its officers, consisting of a president, vice president, secretary, and treasurer; its place of business is in a building situated on the line between the states of Missouri and Kansas, and that defendants transact business partly in one state and partly in the other; that substantially all of the business transacted in the matter of receiving, buying, selling, and handling live stock at the Kansas City Stock Yards is carried on by defendants and other members of said exchange, as commission merchants; that a large proportion of such live stock is shipped from the states of Kansas, Nebraska, Colorado, Texas, Missouri, Iowa, and Arkansas, and the territories of Oklahoma, Arizona, and New Mexico, and is sold by the defendants to the various packing houses in Kansas City, Mo., and Kan., and also for shipment to other markets; that a vast number of live stock is thus annually received and sold; that said Kansas City market is a public market, and supplies a large number of packing houses in Kansas City, Kan., and Kansas City, Mo., and other cities in different states of the Union; that the Kansas City market, next to Chicago, is the largest live-stock market in the world; that, under the practice and custom at said yards, the live stock there received is delivered to commission merchants, who receive, handle, sell, or reship the same for the consignors and owners thereof to other states and territories, charging a commission for their services; that, in the course of business at said yards, said stock is moved and shifted from one state to the other, according to the convenience of said Kansas City Stock-Yards Company; that a large portion of said stock is incumbered by mortgages, executed by the owners thereof to the defendants, members of said exchange, who advance large sums of money to growers and owners of cattle to provide the means to feed and prepare it for the market; that, when such cattle are ready for shipment, they are consigned to the defendants and other members of said exchange, who have made such advancements, and the amount thereof and interest is deducted from the proceeds of sale; that 90 per cent. of the members of said exchange make such advancements; that said stock yards accord to owners and shippers of live stock the only available means at that place for handling, selling, and reshipping live stock; that, by reason of its situation, said Kansas City Stock Yards are the only available public market for the purchase and sale of live stock for an exceedingly large territory of the United States, and the only available means for the exchange of interstate traffic between the states and territories named, the stock being sold in said yards to be shipped to other states of the Union; that it is the custom among a large number of cattle growers and shippers who consign live stock to the Kansas City Stock Yards to draw drafts on the commission merchants to whom such stock is consigned, and, attaching the bill of lading issued by the carrier therefor, to draw money on said drafts from local banks, and, when presented to the consignees, said drafts are paid by

them in Kansas and Missouri, and the proceeds remitted to the banks in the various towns and cities where the live stock was shipped; that by reason of the fact that said yards are in the states of Missouri and Kansas, and the live stock handled and sold therein is at times in Kansas, and at others in Missouri, and are transported from different states to be sold and shipped to other states, said business is interstate in character, and can only be controlled by federal legislation, as a part of commerce between the states. The bill further charges that, if the person or partnership to whom live stock is consigned at Kansas City is not a member of said exchange, he is not permitted to sell or dispose of such live stock on the Kansas City market, for the reason that the defendants and all other commission merchants doing and controlling the business at said yards are required by the rules of said exchange to refuse to buy live stock or in any manner deal with a person who is not a member of said exchange, and in all such cases the owner of the live stock is compelled to reship the same to some other market, and, by reason of said unlawful combination, is prevented from delivering said live stock to the Kansas City Stock Yards; and the sale of the same is thereby hindered and delayed, extra expense and loss entailed to the shipper, and an obstruction placed upon the marketing of such live stock; that among other rules for the government of said exchange are the following:

**"Rule IX. Commissions.**

"Section 1. The commissions charged by members of this association for selling live stock shall not be less than the following named rates:

"Sec. 2. Six dollars per car load for single-deck car loads of hogs or sheep, and ten dollars per car load for double-deck car loads of the same: provided, members of this exchange may, after charging commissions as above provided, pay a regular sheep salesman on these yards a sum of money contingent on number of sheep sold. Said sheep salesman may be in the employ of other members of the exchange.

"Sec. 3. Fifty cents per head for cattle of all ages. In car loads of twenty-four or more, not more than twelve dollars per car load; ten dollars per single-deck car loads, and eighteen dollars per double-deck car load of veal calves.

"Sec. 4. Fifty cents per head for cattle, and twenty-five cents per head for calves, and ten cents per head for hogs and sheep in mixed car loads, but not to exceed twelve dollars per car-load. Fifty cents per head for cattle and twenty-five cents per head for calves driven into the yards; and ten cents per head for hogs and sheep for sixty head or less. More than that number shall be charged for at car load rates.

"Sec. 5. Fifty cents per head for buying cattle for stockers or feeders: provided, such charges shall not exceed twelve dollars per car load. Six dollars per single-deck car load for buying sheep, and ten dollars per double-deck car load. All purchases paid for by a commission house or shipping clearance made by same shall be deemed a purchase, and charged for as above provided.

"Sec. 6. Not less than four dollars per single-deck and five dollars per double-deck car load for buying live hogs, and not less than three cents per head for hogs bought by the head.

"Sec. 7. No member or commission firm or corporation represented herein shall do business for a yard trader or speculator on this market for less charges than one-half the regular commission.

"Sec. 8. No firm shall handle the business of a nonresident commission house for less than full commissions, except said consignments be made direct to said nonresident commission house from one of the following named markets: Chicago, Ill.; East St. Louis, Ill.; St. Louis, Mo.; Omaha, Nebraska; Wichita, Kans.; Denver, Col.; Pueblo, Col.; St. Joseph, Mo.; Sioux City, Ia.; Peoria, Ill.; Milwaukee, Wis.; and Ft. Worth, Tex.

"Sec. 9. No member of this exchange or firm or corporation represented herein shall cause or allow to be shipped in his or its name any kind of live stock for the purpose of violating any of the provisions of this rule.

"Sec. 10. No agent, solicitor, or employé shall be hired except upon a stipulated salary, not contingent upon commissions earned (save as provided in section 2 of this rule). No solicitor shall be employed except as a bona fide traveling agent, who shall not solicit consignments local to his own neighbor-

hood only, nor to secure his individual trade. Nor shall any agent, solicitor, or employé be hired who is employed by any other party or parties, or who is actively engaged in other business (save as provided in section 2 of this rule). Members of this exchange must file with the secretary, within five days of employment, the names and addresses of their solicitors. More than three solicitors shall not be employed at one time by a commission firm or corporation. Members of a commission firm or corporation—resident or nonresident of Kansas City—may travel as solicitors, but must be registered as one of the three allowed each firm or corporation. It shall be a violation of this rule for any solicitor representing or claiming to represent a commission firm or corporation in any other market to solicit for any Kansas City firm; and members shall be held accountable for the acts of any solicitor who, under the guise of soliciting for a branch house, solicits for a Kansas City firm or corporation.

"Sec. 11. Any member of this association or firm or corporation represented herein, sending or causing to be sent a prepaid telegram or telephone message quoting the markets, giving information as to the condition of the same, shall be fined not less than \$100 nor more than \$500. If said fine be not paid within three days, said firm or member shall be suspended until said fine is paid: provided, however, that prepaid messages may be sent to shippers quoting actual sales of their stock on the day made; also, to parties desiring to make purchases on this market.

"Sec. 12. Any member of this exchange or firm or corporation in which he may be a partner, violating any of the provisions of this rule, shall be fined not less than \$500, nor more than \$1,000, for the first offense. If said fine be not paid within three days, said member or firm may be suspended from membership until same is paid. For a second offense, said member or firm may be expelled from membership in the exchange.

"Sec. 13. From such fines and special assessments, the exchange shall pay a reward of \$500 to any party or parties furnishing sufficient evidence to convict any member of a violation of any of the provisions of this rule, and said reward shall be paid immediately after conviction.

"Sec. 14. For the purpose of making effective section 12 of this rule, when the treasurer shall not have on hand from fines collected the sum of \$500, the directors shall levy a special assessment, pro rata, on each commission firm or corporation buying or selling live stock in this market who is a member of the exchange; and they shall continue to levy such special assessments in such amounts as will keep a fund of \$500 constantly on hand for this purpose. Said fund shall be kept as a special fund, and shall be used for no other purpose.

"Sec. 15. Each firm or corporation represented in this exchange shall be held responsible for any violation of this rule by any party doing any portion of a commission business in its name, and any penalty imposed for violation of the foregoing shall be on account of such party. If not paid within three days, the firm or corporation doing said business shall sever its business connections with such party within ten days. No firm or corporation shall thereafter do any business for such party until said fine is paid.

#### "Rule XVI. Limitations.

"Section 1. No member of the Kansas City Live-Stock Exchange shall transact any business with any person violating any of the rules or regulations of this exchange, or an expelled or suspended member, after notice of such violation, suspension, or expulsion has been issued by the secretary or board of directors of the exchange."

The bill further charges that the defendants, by the adoption of said articles of association, have confederated and conspired together in violation of the laws of the United States, and particularly of the act of congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," and to monopolize the business of buying and selling live stock at the Kansas City market, and to illegally fix and establish a minimum price for buying and selling the same, and have further, in restraint of trade and commerce between the states, confederated together to prevent and restrain the free transmission of information regarding the state of the market by telegraphic messages, and have restricted the free employment of agents and solicitors in the prosecution of business at said stock yards; that

the purpose of defendants in organizing said exchange is to prevent the shipment of any live stock to the Kansas City market, unless shipped to the Kansas City Stock Yards, and to defendants or other members of said exchange, and the further purpose was to compel shippers to pay to defendants and their associates the commissions provided for in rule 9, and to prevent the shipment and sale of property on said market unless such commissions were so paid. The bill further charges that it was also the purpose of said defendants and their associates to monopolize the business of receiving, handling, and selling live stock received at said market, and also to prevent its sale by any person not a member of said exchange, and to obstruct and retard the owners of such live stock in the sale of the same on the market at Kansas City. Thereupon the complainant prays for a decree dissolving said exchange, and for an injunction against said defendants, restraining them from enforcing or acting pursuant to the rules and by-laws of said association.

The defendants, for answer to said bill, admit the organization of said defendants into an association known as the "Kansas City Live-Stock Exchange," and aver that similar associations, under the names of "Boards of Trade" or "Exchanges," exist in practically every city of importance in the United States, devoted to the buying and selling of stocks, bonds, grain, live stock, petroleum, and all other products, with similar rules for government and transaction of business, in order that competition between the members may be fair and reasonable; that said methods are sanctioned by the experience of the commercial world, and tend to develop trade and commerce, and not to restrict the same. The preamble of their organization is as follows: "We, the undersigned, for the purpose of organizing and maintaining a business exchange, not for pecuniary profit or gain, nor for the transaction of business, but to promote and protect all interests connected with the buying and selling of live stock at the Kansas City Stock Yards, and to promulgate and enforce amongst the members correct and high moral principles in the transaction of business, have associated, ourselves together, under the name of 'Kansas City Live-Stock Exchange,' and hereby agree each with the other that we will faithfully observe and be bound by the following rules and by-laws, and such new rules, additions, or amendments as may from time to time be adopted in conformity with the provisions thereof, from the date of organization, by the election of a board of directors and other officers, as prescribed by rule 1." The defendants deny that through their membership substantially all of the business of buying and selling live stock at Kansas City is carried on. On the contrary, any person desiring to sell live stock at said city is under no obligation to employ a commission merchant, but is at full liberty to act for himself, and the stock-yards company extends to such person all the privileges and facilities afforded by it; and persons desiring to purchase live stock at the yards may, and they constantly do, purchase direct from the owners and very much the largest part of the cattle purchased for feeding is bought without the employment of any commission merchant. The only restriction upon members of the exchange is that contained in rule 16, viz. that they will not deal with a person as a commission merchant who violates the rules of the exchange, or who is a suspended or expelled member thereof. It is further averred that the Kansas City market is not a public market, but is of a private character merely. Defendants further aver that with the exception of the firm of Greer, Mills & Co., which was first suspended from membership in the exchange for nonpayment of a fine imposed for a violation of the rules thereof, and which subsequently voluntarily withdrew from said exchange, all of the commission merchants at said yards are members of the exchange. Defendants further aver that, whenever drafts are drawn on a commission merchant, they are paid either at the place where payable by the terms thereof, or on presentation to the drawee; and that such place of payment is either in the state of Kansas or Missouri, according as the particular transaction is closed. Defendants are informed by counsel, and believe, that the exercising of their occupation is not commerce between the states, within the meaning of the constitution or laws of the United States; that it is not true that a consignor of live stock is not permitted or cannot sell the same at said yards, or that the members of said exchange refuse to deal with a nonmember thereof. It is not true that any person shipping live stock to said yards, and refusing



to employ a member of said exchange, is compelled to reship the same to some other market. Defendants deny that there is any unlawful combination among them, or that any person is prevented from delivering stock to the Kansas City Stock Yards, or that the sale thereof is hindered or delayed, or expense or loss to the shipper entailed, or any obstruction or embargo placed upon the marketing of any live stock. Defendants deny that any of the rules of said association are in restraint of commerce between the states, or otherwise. Defendants deny that they have confederated together, in violation of the laws of the United States, to monopolize the business of buying and selling live stock at said yards, or to illegally fix a minimum price for buying and selling such live stock, or to restrain the free transmission of information respecting the state of the Kansas City market by telegraphic messages, or restrict the free employment of agents or solicitors in said business; that experience has shown that, to the success of such an organization, it is absolutely essential that there should be a uniform schedule of commissions, and that all members should observe the same; and that, by permitting evasions or violations of such schedule, a condition is created by which irresponsible persons might and would bring about a state of unhealthy cutting of prices,—a practice unfair to shippers and purchasers, and ruinous to responsible persons who carry on the occupation of commission merchants fairly. They have no desire to prevent any person from acting as a commission merchant at Kansas City, but they admit that it is not to the interest of the public or shippers to employ nonmembers, and that individually and collectively the provisions of their articles of association are invoked for the purpose of preventing the success of any competitor, either in his efforts to destroy said exchange, or to succeed in driving the competitors of such parties from the field.

The act of congress of July 2, 1890 (26 Stat. 209) under which this proceeding is brought, provides as follows:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. \* \* \*

"Sec. 2. Every person who shall monopolize, or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor. \* \* \*

Section 4 gives to circuit courts of the United States jurisdiction to prevent and restrain violations of the act, and makes it the duty of the district attorney, under directions of the attorney general, to institute proceedings in equity to restrain such violations.

W. C. Perry, U. S. Atty.

Karnes, Holmes & Krauthoff, McGrew, Watson & Watson, and Hutchings & Keplinger, for defendants.

FOSTER, District Judge (after stating the facts). It will be observed that the answer of the defendants denies and puts in issue the allegations of the bill charging a combination or conspiracy or contract in restraint of trade or commerce, and denies any monopoly or attempt to monopolize or combination to monopolize any part of the trade or commerce among the several states, and denies that the business for which the exchange was organized, and in which its members are engaged, comes under the class of commerce or trade among the states.

The first question, whether there is any combination in restraint of trade or commerce, or a combination to monopolize any part of trade or commerce, on the part of the defendant association, is to be determined, not alone from what appears upon the face of its preamble, rules, and by-laws, but from the entire situation and the prac-

tical working and results of the defendants' methods of doing business, as disclosed by the testimony in the case. The defendant association is located at Kansas City, on the line between Kansas and Missouri, in the immediate vicinity of the Kansas City Stock Yards, and in close association therewith, being tenants of said stock-yards company. Said yards, with, perhaps, the exception of the yards at Chicago, are the largest in the country, and handle great numbers of live stock. These yards, the packing houses, and this exchange are all situated at the gateway through which flows the great stream of commerce of several states and territories, and among all the business tributary to this locality probably none is as important as the live-stock business and the various industries connected therewith. The defendant association is entirely voluntary in form, and does not directly require any person engaging in the live-stock commission business to become a member; but it will be observed that rule 16 prohibits any member from dealing with any person violating any of the rules or regulations of the exchange, or an expelled or suspended member, after notice of such suspension has been issued by the secretary or board of directors. In practice, as amply appears from the testimony of many witnesses, this rule shuts out all dealings and business intercourse between members and nonmembers of the association. It is shown beyond cavil that the entire membership of the association regards a commission merchant attempting to do business at the Kansas City Stock Yards without joining the exchange as one violating this rule, and treat him accordingly. And this construction is a natural one, for a compliance with the rules of the exchange requires a party to subscribe to its rules and by-laws, and to pay a membership fee (which is now \$2,500), to pay his assessments, and observe all other requirements, including the fees and commissions fixed for handling live stock; and it may well be said that any dealer or broker does business in violation of these rules who does business at all and fails to join the association. The testimony discloses several instances of parties attempting to enter the field, and do business there, without joining the exchange; and in every instance, unless protected by the courts, they have been compelled to abandon the undertaking. All parties now engaged in the business are members of the exchange, except Greer, Mills & Co., who are making a fight in the courts to maintain their business, and are temporarily protected by injunction. It appears from the testimony that any person or partnership attempting to carry on business independent of the association is invited to apply for membership, and if he fails to do so, or if rejected, and attempts to proceed, his name is written on a blackboard kept for public use in the exchange building, and all members are warned against dealing with him. This admonition is strictly obeyed, and such person is boycotted. The outcome is inevitable. The combined opposition of three hundred men against one can produce but one result. Almost every purchaser or vendor of live stock, including the great packing houses, does business through commission merchants, and nearly the entire volume of live stock received at the yards is consigned to and con-

trolled by these merchants, members of the exchange. In vain does the outside dealer offer attractive bargains for the sale or purchase of stock; they will have no intercourse with him. This state of affairs is known and circulated among stock growers and shippers, and they dare not ship their stock to this boycotted broker or firm. These facts are established and amplified by a multitude of witnesses. The object and purpose of the exchange is written across its face, where all can read. It is to control and monopolize the entire business of buying and selling live stock at the Kansas City Stock Yards. It is clearly a combination to restrict, control, and monopolize that class of trade and commerce. The defendants declare that the rules, regulations, and prices for doing the business are all reasonable and fair and for the best interests of buyer and seller. Possibly that is so, although it is not apparent, looking at the interests of the stock grower or purchaser, why the number of solicitors of business should be limited to three for each firm, or why there should be a restriction on telegraphic information as to the state of the market, or why he should be compelled to pay a commission of 50 cents a head on cattle when he paid 25 cents before the exchange was organized, or why there should be discriminating charges on stock from different localities.

Counsel for defendants have, with commendable zeal and industry, submitted for our consideration the rules of a great number of exchanges and boards of trade throughout the cities of the United States, dealing in corporate stocks, grains, live stock, and various other things, and contend that they are essential, if not indispensable, to the commerce and business interests of the country, and that to grant the prayer of this bill would be the deathblow of those institutions. Courts cannot shut their eyes to the results of their judicial conclusions, but how far such results should control those conclusions depends on several conditions, not necessary to discuss here; nor would it be proper to consider here what effect this act of congress may have on these organizations, or any of them. I may be permitted to say, however, that the methods and aims of many of these exchanges and boards of trade are not altogether beneficial to the business and commerce of the country. That they are beneficial to the members, and perhaps to the locality, may be admitted. It must also be admitted that a properly conducted agency or medium through which the vendor and vendee may readily sell and buy everything that enters into commerce or trade is demanded by the business interests of the whole country; but this agency should not be permitted to tamper with or in any way impede or restrain the natural flow of the stream of industry or commerce. The crying complaint of to-day, and the great menace to the welfare of the people, is the tendency of wealth to monopolize and control, by trusts and combinations, the products and industries of the country; and it must be confessed by every thoughtful observer that many of the so-called stock and produce exchanges are among the most potent instruments for the accomplishment of these purposes by speculators and adventurers. Men who add nothing to the productive wealth of

the country grow rich or poor by gambling on the wealth produced by others. Men are daily selling, through these exchanges, millions of bushels of corn, wheat, and other produce, who neither have nor expect to have a bushel; and others are buying millions, who never expect to receive a bushel. Both sides are tampering with the normal prices fixed by the law of supply and demand, and attempting, by false and dishonest means and methods, to serve their ends. The courts have uniformly condemned this class of business as illegal, and, though it is under the ban of the law, it still flourishes. The remedy must be looked for in legislation, and not in the courts alone.

This act of congress is aimed against all restrictions of interstate commerce, and we need not discuss the reasonableness of such restrictions. It is evidently the purpose of the law to permit commerce between the states to flow in its natural channels, unrestricted by any combinations, contracts, or conspiracies, or monopolies whatsoever. *U. S. v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 17 Sup. Ct. 540; *U. S. v. E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249; *Leisy v. Hardin*, 135 U. S. 107, 10 Sup. Ct. 681; *Walling v. Michigan*, 116 U. S. 454, 6 Sup. Ct. 454; *Robbins v. Taxing Dist.*, 120 U. S. 490, 7 Sup. Ct. 592.

But one material question remains in the case: Is the business in which the defendants are engaged commerce between the states? The circumstance that their place of business is located on both sides of the line between the states of Kansas and Missouri is, in my opinion, a fact of no material importance in the solution of this question; no more than would be the fact that the business of a farmer or manufacturer was so located, and that he passed from one state to the other for his convenience in the transaction of his usual business. The method of business of the defendants is as follows: The shipment of live stock from growers, dealers, and traders in Kansas, Colorado, Nebraska, Missouri, Texas, New Mexico, Arizona, Oklahoma, and other states and territories is solicited by the commission merchant in various ways, but largely by the personal solicitation of agents who travel about the country and interview the stock men. Frequently the commission man makes loans of money on the herds, secured by chattel mortgage. The consignment of the stock is made to the commission man or firm at the Kansas City Stock Yards, and there unloaded. Frequently the shipper draws on the consignee through his local bank with the bill of shipment attached; and, when the stock is sold, the loan on the cattle, or the draft on the consignee, as the case may be, is paid out of the proceeds, and the balance remitted to the shipper. While the broker is soliciting consignments of stock for sale, he is also on the alert for purchasers. He sells the stock without regard to its destination. Some is reshipped to other markets in other states, notably to Chicago and St. Louis. Much of it, especially hogs, is slaughtered at the large packing houses near by, in Kansas and Missouri. Is this business, so conducted, interstate commerce, or merely an incident or aid to such commerce?

Commerce among the states has been defined as follows:

"Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation and

the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities." *County of Mobile v. Kimball*, 102 U. S. 691; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 5 Sup. Ct. 826.

In *Re Greene*, 52 Fed. 113, Judge Jackson says:

"In the application of this comprehensive definition, it is settled by the decisions of the supreme court that such commerce includes, not only the actual transportation of commodities and persons between the states, but also the instrumentalities and processes of such transportation; that it includes all the negotiations and contracts which have for their object, or involve as an element thereof, such transmission or passage from one state to another."

In *U. S. v. E. C. Knight Co.*, 156 U. S. 13, 15 Sup. Ct. 254, Mr. Chief Justice Fuller, speaking for the court, says:

"The regulation of commerce applies to the subjects of commerce, and not to matters of internal police. Contracts to buy, sell, or exchange goods to be transported among the several states, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purpose of such transit among the states, or put in the way of such transit, may be regulated, but this is because they form part of interstate trade or commerce."

It has been repeatedly held by the supreme court that a person soliciting orders for goods or freights to be shipped from one state to another, and express agents transporting goods from state to state, are engaged in commerce between the states, and a local tax or license cannot be imposed for transacting such business. *Walling v. Michigan*, 116 U. S. 446, 6 Sup. Ct. 454; *Pickard v. Car Co.*, 117 U. S. 34, 6 Sup. Ct. 635; *Robbins v. Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. 592; *Asher v. Texas*, 128 U. S. 129, 9 Sup. Ct. 1; *McCall v. California*, 136 U. S. 104, 10 Sup. Ct. 881; *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 10 Sup. Ct. 958; *Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. 851; *Brennan v. City of Titusville*, 153 U. S. 289, 14 Sup. Ct. 829; *Minnesota v. Barber*, 136 U. S. 313, 10 Sup. Ct. 862. It has also been held that telegraphy between the states is interstate commerce. *Leloup v. Port of Mobile*, 127 U. S. 640, 8 Sup. Ct. 1380; *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1; *Telegraph Co. v. Texas*, 105 U. S. 460. The question of what constitutes commerce between the states, and thus protected by the constitution, and that which is merely an incident or aid to such commerce, and exempt from federal control, has been much considered by the federal courts, and sometimes the line of distinction is difficult of discernment. Having a watchful regard for the police powers of the states, and the right of taxation, the federal courts have carefully discriminated in these cases, so that the general government should take nothing to itself not fairly delegated by the constitution. *Nathan v. Louisiana*, 8 How. 73; *Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. 851; *Budd v. New York*, 143 U. S. 517, 12 Sup. Ct. 468; *Kidd v. Pearson*, 128 U. S. 1-20, 9 Sup. Ct. 6; *U. S. v. E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249; *Munn v. Illinois*, 94 U. S. 113; *In re Greene*, 52 Fed. 113; *Henderson v. Mayor etc.*, 92 U. S. 259; *Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 14 Sup. Ct. 1087; *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 17 Sup. Ct. 532.

Perhaps a fair test of the character of defendants' rules and by-laws would be presented by these questions: Could a state, by leg-

isolation, impose on this traffic the restrictions and regulations demanded by these rules and by-laws? Could it limit the number of agents a merchant should have soliciting business in other states? Could it restrain telegraphic communication between points in different states? Could it make a discrimination in rates for handling stock shipped from different localities outside of the state? It is indisputable that all the live stock shipped to these defendants for sale from states other than Kansas and Missouri, after it has entered the current of commerce between the states, continues and remains the subject of such commerce until the transportation is terminated, and the property becomes a part of the general property of the state. It is also well settled that, while this property is the subject of interstate commerce, no state, municipality, or other power but congress can impose taxes, restrictions, or regulations upon it, except so far as is proper, in the exercise of police regulations, for the protection of the health, morals, and person of the citizen, and except for proper charges and regulations for the use of local instruments as aids or incidents to such commerce, such as docks, bridges, wharves, elevators, ferries, pilotage, etc., when congress has not acted in the matter.

In the case of *Bowman v. Railway Co.*, 125 U. S., at page 497, 8 Sup. Ct. 704, Mr. Justice Matthews lays down this principle in the following language:

"It is also an established principle, as already indicated, that the only way in which commerce between the states can be legitimately affected by state laws is when, by virtue of its police power and its jurisdiction over persons and property within its limits, a state provides for the security of the lives, limbs, health, and comfort of persons, and the protection of property, or when it does those things which may otherwise incidentally affect commerce,—such as the establishment and regulation of highways, canals, railroads, wharves, ferries, and other commercial facilities; the passage of inspection laws to secure the due quality and measure of products and commodities; the passage of laws to regulate or restrict the sale of articles deemed injurious to the health or morals of the community; the imposition of taxes upon persons residing within the state or belonging to its population, and upon avocations and employments pursued therein, not directly connected with foreign or interstate commerce or with some other employment or business exercised under authority of the constitution and laws of the United States; and the imposition of taxes upon all property within the state, mingled with and forming part of the great mass of property therein. But, in making such internal regulations, a state cannot impose taxes upon persons passing through the state, or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce; nor can it impose such taxes upon property imported into the state from abroad, or from another state, and not yet become a part of the common mass of property therein; and no discrimination can be made by any such regulations adversely to the persons or property of other states; and no regulations can be made directly affecting interstate commerce."

*Bowman v. Railway Co.*, 125 U. S. 465, 8 Sup. Ct. 689, 1062; *License Cases*, 5 How. 504; *Passenger Cases*, 7 How. 283; *Nathan v. Louisiana*, 8 How. 73; *Freight Tax Case*, 15 Wall. 232; *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681 (Original Package Case); *Henderson v. Mayor*, 92 U. S. 259; *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 Fed. 567; *Guy v. Baltimore*, 100 U. S. 434; *Railway Co. v. Becker*, 32 Fed. 849; *Plumley v. Massachusetts*, 155

U. S. 461, 15 Sup. Ct. 154; *Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 14 Sup. Ct. 1087; *U. S. v. Addyston Pipe & Steel Co.*, 78 Fed. 712; *Packet Co. v. Keokuk*, 95 U. S. 80 (wharfage); *Welton v. Missouri*, 91 U. S. 275; *Walling v. Michigan*, 116 U. S. 446, 6 Sup. Ct. 454; *Coal Co. v. Bates*, 156 U. S. 577, 15 Sup. Ct. 415; *In re Rahrer*, 140 U. S. 545, 11 Sup. Ct. 865; *In re Minor*, 69 Fed. 233; *Scott v. Donald*, 165 U. S. 58, 17 Sup. Ct. 265; *Pittsburg & S. Coal Co. v. Louisiana*, 156 U. S. 590, 15 Sup. Ct. 459; *Hooper v. California*, 155 U. S. 648, 15 Sup. Ct. 207; *Emert v. Missouri*, 156 U. S. 296, 15 Sup. Ct. 367.

Counsel for defendants contend that their business is only an aid or incident to commerce,—something in the nature of personal service; but it is not apparent that a combination for services may not be a restraint or monopoly of commerce, under the act of congress. *U. S. v. Trans-Missouri Freight Ass'n*, 166 U. S. 312, 17 Sup. Ct. 540. But the business of defendants is more than personal services; it is not merely a local instrumentality in aid of commerce. Defendants are active promoters, and frequently interested parties, in this immense traffic. They reach out over many states and territories by their solicitors and advertisements, and gather in, for sale and slaughter, millions of cattle, sheep, and hogs, and their rules and regulations cover the entire business, and extend over the whole field of operation. Touching the question of what are aids or incidents to commerce, as well as police powers of the states, the following cases are in point: *Packet Co. v. St. Louis*, 100 U. S. 423; *Vicksburg v. Tobin*, Id. 430; *Packet Co. v. Catlettsburg*, 105 U. S. 559; *Parkersburg & O. R. Transp. Co. v. City of Parkersburg*, 107 U. S. 691, 2 Sup. Ct. 732; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 5 Sup. Ct. 826; *Huse v. Glover*, 119 U. S. 543, 7 Sup. Ct. 313; *Hall v. De Cuir*, 95 U. S. 485; *Cooley v. Board*, 12 How. 298; *Packet Co. v. Aiken*, 121 U. S. 444, 7 Sup. Ct. 907; *Sands v. Improvement Co.*, 123 U. S. 288, 8 Sup. Ct. 113; *Monongahela Nav. Co. v. U. S.*, 148 U. S. 312, 13 Sup. Ct. 622; *St. Louis v. W. U. Tel. Co.*, 148 U. S. 92, 13 Sup. Ct. 485; *Munn v. Illinois*, 94 U. S. 113; *Budd v. New York*, 143 U. S. 517, 12 Sup. Ct. 468; *New York, L. E. & W. R. Co. v. Pennsylvania*, 158 U. S. 431, 15 Sup. Ct. 896; *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 17 Sup. Ct. 532.

The defendants further contend that when this live stock reaches Kansas City, and is unloaded into the stock yards, it ceases to be the subject of interstate commerce. This proposition, however, covers but one point in the controversy, for several of the rules and by-laws of defendants have more than a local operation, and extend beyond state lines. Does this stock, once upon the stream of commerce, cease to be such when unloaded at Kansas City? Could the state of Kansas tax these cattle in the stock yards?

The defendants cite the case of *Brown v. Houston*, 114 U. S. 623, 5 Sup. Ct. 1091, and *Coal Co. v. Bates*, 156 U. S. 577, 15 Sup. Ct. 415. In the former case the coal which was subjected to taxation had reached its destination,—i. e. the state of Louisiana,—and was there offered for sale in great or small quantities to suit the purchaser. The court says:

"It might continue in that condition for a year or two years, or for only a day. \* \* \* We do not mean to say that if a tax collector should be stationed at every ferry and railroad depot in the city of New York, charged with the duty of collecting a tax on every wagon load or car load of produce or merchandise brought into the city, that it would not be a regulation of and restraint upon interstate commerce, so far as the tax should be imposed on articles brought from other states. We think it would be, and that it would be an encroachment upon the exclusive power of congress."

Bearing upon this question is the case of *Brown v. Maryland*, 12 Wheat. 419; also, *Leisy v. Hardin*, 135 U. S. 108, 10 Sup. Ct. 684. In this case, Mr. Chief Justice Fuller, speaking for the court, says:

"That the point of time when the prohibition ceases, and the power of the state to tax commences, is not the instant when the article enters the country, but when the importer has so acted upon it that it has become incorporated and mixed up with the mass of property in the country, which happens when the original package is no longer such in his hands; that the distinction is obvious between a tax which intercepts the import as an import on its way to become incorporated with the general mass of property, and a tax which finds the article already incorporated with that mass by the act of the importer."

This live stock is shipped from different states for immediate sale, and, if the market at Kansas City is not satisfactory, it is to be shipped to another market. I cannot believe it ceases to be the subject of interstate commerce when unloaded into the stock yards. Sections 4386 and 4387 of the Revised Statutes humanely prohibit any railroad company whose road forms any part of a line over which animals are conveyed from one state to another from confining them in cars over 28 consecutive hours without unloading them for rest, water, and food for at least 5 consecutive hours. Under the act of congress of May 29, 1884, establishing a "Bureau of Animal Industry," and the act of March 3, 1891, for the inspection of live cattle, hogs, etc., the general government has established inspectors at the Kansas City Stock Yards, assuming that such stock comes within the purview of said acts of congress. While realizing the importance of the issue involved in this case, and the responsibility of making application of the "Anti-Trust Act" to a new order of facts, I am impelled to the conclusion that, under the facts and the law applicable thereto, the prayer of this bill should be granted.

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#### HENNESSEY v. BUDDE et al.

(Circuit Court, S. D. New York. August 26, 1897.)

#### 1. VIOLATION OF INJUNCTION—FINDING OF REFEREE.

The finding of a referee, upon conflicting evidence, that an injunction defendant has not violated the injunction, will not be disturbed.

#### 2. SAME—COSTS OF REFERENCE.

Where an injunction complainant has proceeded to a reference in a proceeding to punish the defendant for a violation of the injunction, he should, if unsuccessful, pay the costs of the reference.

John A. Straley, for the motion.

S. L. Pincoffs, opposed.



LACOMBE, Circuit Judge. As the case stood when it was sent to the referee, there was such a conflict of evidence on the face of the affidavits that complainant was not entitled to an order punishing the defendants, or either of them, for contempt. Had the matter stopped there, the application would have been denied, without costs. Hoping, however, to make out a case of violation of the injunction, complainant proceeded to the reference, and, if unsuccessful, should pay the costs thereof.

Before the referee, complainant, irrespective even of Duffy's testimony, made out a prima facie case, but upon all material points defendants' witnesses flatly contradicted those called by the complainant; and the court sees no reason to overrule the conclusions of the referee, who saw the witnesses and heard their testimony. The objections to report are overruled, report confirmed, and order to that effect entered, providing that complainant pays the referee's fees and expenses of the reference. Referee's fee is fixed at \$75

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CALIFORNIA SAFE-DEPOSIT & TRUST CO. v. YAKIMA INV. CO. et al.

(Circuit Court, D. Washington, S. D. July 5, 1897.)

1. IRRIGATION COMPANIES—PREFERRED DEBTS—EQUITY RULE OF PRIORITY.

The modern rule of equity, giving preference and priority to debts incurred in the operation of railroads over existing mortgages, has its foundation and justification in, and has been evolved from, conditions peculiar to the nature of railroad franchises; and it is a serious question whether it may properly be extended to cases where the mortgaged property consists of canals and works for irrigating land.

2. SAME—LATERAL DITCHES—COST OF CONSTRUCTION.

Claims for services in the construction of lateral ditches extended from time to time, as required in the actual operation of conducting water to the different tracts of land to be irrigated by an irrigation company, will be treated as cost of original construction, and not preferential debts, even under the equity rule applicable to railroads.

Charles E. Shepard, for petitioners.

D. J. Crowley, for receivers.

O. F. Paxton, for plaintiff.

HANFORD, District Judge. Now, on this 5th day of July, 1897, this cause having been brought on for hearing upon the petitions of H. K. Owens and George J. McLean to establish their respective claims as preferred creditors of the defendant company, pursuant to a stipulation in writing, whereby the parties have consented that said cause may be heard and determined as to the claims of said petitioners, at Seattle, and the court having heard and considered the pleadings of the parties, and the evidence, and arguments of counsel, and being now sufficiently advised in the premises, doth find as follows:

(1) The petitioner H. K. Owens is a civil engineer, and skilled in his profession.

(2) At a time prior to the appointment of the receivers, to wit, in the month of June, 1893, said petitioner H. K. Owens was employed by the defendant the Yakima Investment Company as a consulting

engineer, and in that capacity rendered services in constructing and extending the main canals and lateral ditches and other irrigating works of said defendant, and continued in the service of said defendant in said capacity until the 31st day of December, 1894.

(3) The contract of employment of said petitioner Owens was verbal, and was made by and between said petitioner and Paul Schulze, president of the defendant company, in behalf of said company; and it was thereby promised and agreed by the defendant that said petitioner should be paid for his services at the rate of \$250 per month.

(4) From the month of June, 1893, to December 31, 1894, said petitioner was at all times subject to orders from the managing officers of the defendant, and ready to render whatever services he should be called upon to perform as an engineer; but he was not continuously engaged in the service of the defendant, and at times during said period he was otherwise employed.

(5) On the 7th day of November, 1894, upon a statement of account between said Paul Schulze, as president of the defendant company, and acting for said company, and the petitioner, it was agreed that the sum of \$1,400 was then due to the petitioner from said company for his services rendered to the defendant pursuant to said contract of employment, and several certificates of indebtedness, amounting in the aggregate to the sum of \$1,400, were then duly issued to him. And on the 31st day of December, 1894, pursuant to an agreement then made between the said president of the defendant company and said petitioner as to the amount of indebtedness from the defendant to said petitioner for his services in the months of January, February, and March, 1894, a certificate of indebtedness in the sum of \$600 was duly issued to him.

(6) Upon a final adjustment between the managing officers of the defendant and said petitioner the amount of indebtedness of the defendant to said petitioner for his services pursuant to said contract was agreed upon, and fixed at the sum of \$2,500, including the sums for which certificates were issued, as above set forth.

(7) Said petitioner has not been paid any part of the sums due to him as aforesaid, and the defendant is now indebted to him in the sum of \$1,400, with interest thereon at the rate of 7 per cent. per annum from the 7th day of November, 1894, and in the further sum of \$600, with interest thereon at the rate of 7 per cent. per annum from the 31st day of December, 1894, and in the further sum of \$500, with interest thereon at the rate of 7 per cent. per annum from the 1st day of May, 1895.

(8) In consideration of the indebtedness of the defendant to the several persons named therein, said defendant company on divers different days in the year 1894 issued the several certificates of indebtedness set forth in the petition of George J. McLean, amounting in the aggregate to the sum of \$490.85, and at a time prior to filing his petition herein said petitioner McLean became the lawful owner of each of said certificates.

(9) No part of the indebtedness of the defendant evidenced by said certificates has been paid, and the amount thereof, with legal

interest from the dates of said certificates, respectively, is lawfully due to said petitioner McLean from the defendant.

(10) Of the amount claimed by the petitioner McLean, \$34.53, and no more, is due to him for wages earned by him in the service of the defendant.

(11) Said petitioners have not acquired any lien upon any part of the property of the defendant company.

It is the decision of the court that these claims are not preferential debts, but the petitioners are entitled to have judgment in their favor for the amounts due to them, respectively, as found and specified above, and to have said amounts paid out of any surplus moneys which may come into the hands of the receivers, or be paid into the registry of the court, over and above what may be necessary to pay the costs and expenses of the proceedings herein, and the amount of the principal and interest due and to accrue upon the receivers' certificates, authorized by orders of this court, and the principal and interest due to the plaintiff upon the mortgage in suit.

The modern rule of equity, which gives preference and priority to debts incurred in the operation of railroads over mortgages existing at the time of incurring such debts, as defined in the case of *Fosdick v. Schall*, 99 U. S. 235, 256, and extended in the cases of *Miltenberger v. Railroad Co.*, 106 U. S. 286-314, 1 Sup. Ct. 140, *Union Trust Co. v. Illinois M. Ry. Co.*, 117 U. S. 434-481, 6 Sup. Ct. 809, and *Union Trust Co. v. Morrison*, 125 U. S. 591-613, 8 Sup. Ct. 1004, rests upon necessity, and has been evolved from conditions peculiar to the nature of railroad franchises. Railways are public highways, and it is not optional with their owners to operate them or not. They must be kept going, to entitle the owners to a continuance of their franchises, and the necessary expenses of operation must be paid. It is a serious question whether or not the same rule may be properly applied in cases where the mortgaged property consists of canals and works for irrigating land. It is unnecessary, however, for me to pass upon this question at present, as the limitations of the rule exclude the claims of these petitioners as preferential debts. The services of the petitioner Owens, for which compensation is due, were all performed in the original construction of the defendant's irrigating works. In the case of McLean, only a trifling amount of \$2.20 of his claim is for labor performed in work that may be denominated operation. An attempt was made by counsel, in the argument, to make a distinction between the construction of lateral ditches from the main canals, on the ground that the laterals are extended from time to time, as required in the actual operation of conducting water to the tracts to be irrigated. But in the light of the authorities I must hold that the difference is not sufficient to distinguish the case from other cases in which the general rule has been limited in its application so as to exclude debts for cost of original construction. In the case of *Railroad Co. v. Hamilton*, 134 U. S. 296-306, 10 Sup. Ct. 546, 547, the supreme court of the United States, in its opinion by Mr. Justice Brewer, held emphatically that:

"A recorded mortgage, given by a railroad company on its roadbed and other property, creates a lien, whose priority cannot be displaced thereafter directly

by a mortgage given by the company, nor indirectly by a contract between the company and a third party for the erection of buildings or other works of original construction."

The facts of that case afford ground for contending with quite as much reason as in the case now under consideration that the labor for which compensation was claimed should be classed as work necessary in operation, but in the opinion of the court words seem to have been carefully selected to include all structures and additions made after the road had been put in operation in the same category as the original main line of railway, and the broad rule laid down in the sentence above quoted is just as applicable to this case as to the one in which the decision was made. I rest my decision upon the authority of that case.

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GUARANTEE CO. OF NORTH AMERICA v. MECHANICS' SAV. BANK & TRUST CO.

(Circuit Court of Appeals, Sixth Circuit. July 6, 1897.)

No. 349.

On Petition for Rehearing. The opinion on the original hearing is reported in 80 Fed. 766.

Reargued before TAFT and LURTON, Circuit Judges, and HAMMOND, J.

HAMMOND, J. We have carefully considered the petition for rehearing filed by the appellant in this case, which is overruled. It only presents again for rehearing questions that have been fully and thoroughly considered by the court, and which need no further attention from it. It is only asking for a reargument of what has already been fully argued and decided. There is one matter, however, which requires our attention, relating to a request by counsel for a correction of the opinion in the matter of the misquotation of the language of the teller's bond in the brief of counsel for the appellant. Of course, not the least imputation was intended of improper or unfair misquotation by counsel. The opinion states that it was "by manifest misprision," which language was deemed sufficient to guard against the possibility of any such imputation. Counsel for the appellee, in his brief, while treating of this matter, and at the argument, most thoroughly disclaimed any intention of suggesting even such a thing as an improper misquotation by counsel, and the court now directs, through profound respect for the sensitiveness of learned counsel on this subject, that this memorandum by the court shall be filed as an addendum to the original opinion, to go with it into the records and the books. It goes without saying that counsel for the appellant are incapable of any such offense, and, indeed, as now appears by the certificate of the clerk of the court, it was not a misquotation at all. The trouble arose from an error in transcribing the record. The bond of the teller in fact contains the precise language as quoted by counsel for the appellant, but in transcribing it into the record in some way the words upon which the

controversy turned were left out of the bond as it appeared in the record. It is now stated that there was a stipulation by counsel correcting the error of the record, and restoring those words to the bond, but this stipulation was never until now called to the attention of the writer of the opinion. It is not now in the record as it came to his hands. As he recollects the argument, it proceeded on the same line of assumption that counsel for the appellant had mistakenly quoted the bond in his brief, but counsel then thought he was correct in his quotation and the matter would be looked into. No further attention being called to it, it passed out of the mind of the writer of the opinion. But, taking the actual language of the bond as it now appears, we are of opinion that it should not change the result which we reached, and our judgment is the same now as at the time the original opinion was filed upon this point. Petition overruled.

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HARTFORD FIRE INS. CO. et al. v. PEEBLES' HOTEL CO.

(Circuit Court of Appeals, Sixth Circuit. October 5, 1897.)

No. 511.

1. FIRE INSURANCE—POLICIES IN SEVERAL COMPANIES—ELECTION TO REPAIR—ACTION FOR DAMAGES—PARTIES.

The P. H. Co. insured its building in several fire insurance companies. The policies were for distinct sums, and constituted separate contracts. Each policy contained the usual clause requiring an apportionment of loss between all the insurers, and gave an option to the insurer to repair or rebuild. A partial loss occurred, and all the companies, by a joint notice, elected to repair and rebuild. After the work was completed, the assured brought an action against the companies jointly, alleging breach of contract, in that neither materials nor workmanship was up to standard, and recovered a joint judgment against them. Upon the question of misjoinder of parties defendant, *held*, that the intent to jointly repair and rebuild, as indicated by the notice and subsequent joining in the work, operated to make the obligation to do so joint or several, at the option of the assured.

2. SAME—EFFECT OF PRORATING CLAUSE.

*Held*, further, that the prorating clause had no bearing upon the liability of the companies to the assured when sued for a breach of contract to repair or rebuild.

3. SAME—MEASURE OF DAMAGES.

*Held*, further, that the amount of money indemnity stipulated to be paid under the alternative clause of the policies ceased to be any standard for the measure of damages resulting from breach of the rebuilding agreement.

4. SAME.

*Held*, further, that, after election by an insurer under such a policy to repair or rebuild, the measure of damages is the cost of repairing or rebuilding where there has been a total failure, or the difference between the work as done and its value if done according to the standard of that existing before the fire.

In Error to the Circuit Court of the United States for the Eastern District of Tennessee.

This was an action at law by the Peebles' Hotel Company against the Hartford Fire Insurance Company, the Phoenix Insurance Company of Hartford, the American Fire Insurance Company, the Virginia Fire & Marine Insurance Company, the Georgia Home Insur-

ance Company, the Lancashire Insurance Company, and the Royal Insurance Company, to recover damages alleged to have resulted from the failure of defendants to employ suitable workmanship and materials in repairing a building damaged by fire, the defendants having elected to repair under provisions contained in their policies respectively. In the circuit court there was a verdict and judgment against all the companies in the sum of \$16,000, and the defendants sued out this writ of error.

Lewis Shepherd and Wm. L. Frierson, for plaintiffs in error.

Dickey & Peebles and Brown & Spurlock, for defendant in error.

Before HARLAN, Circuit Justice, and TAFT and LURTON, Circuit Judges.

LURTON, Circuit Judge. An hotel building owned by the defendant in error was insured in several fire insurance companies for a sum aggregating \$38,500. Each policy was for a distinct sum, and constituted a separate contract, though each contract contained the usual clause requiring an apportionment of loss between all the insurers. While this concurrent insurance was in force, an accidental fire occurred, by which the property was partially destroyed. There was disagreement as to the amount of the loss, and an ineffectual effort at settlement by arbitration. Each policy contained a provision under which the insurer might, at its option, repair or rebuild upon electing to do so within a prescribed time after receipt of proofs of loss. Availing themselves of this option, the several companies jointly gave written notice in this language:

"Peebles' Hotel Co., City—Gentlemen: Owing to the fact that the appraisers originally chosen to appraise the loss and damage on your hotel building, at the corner of Chestnut and Carter streets, Chattanooga, Tenn., have failed to come to any agreement as to the amount of loss and damage, and in view of the fact that your company refused to go into any new appraisalment with appraisers other than those originally chosen, we are now compelled to avail ourselves of the privilege granted by the conditions of our policies to repair and rebuild your building the same as before the fire, and you will please accept this as notice of our intention to repair and rebuild. We therefore call upon you for plans and specifications to be furnished us for the use of the contractor whom we shall elect; and, in order that this business may be facilitated and the work put under way at the earliest day practicable, we beg to suggest that these verified plans and specifications of the building, as it stood the day of the fire, be furnished within a reasonable time from this date. We reserve the right, if the plans herein called for are not furnished within a reasonable time, to proceed with the reinstatement of the building with such material, work, and labor as is shown by the portions of the building still standing."

Plans and specifications were furnished, and a contract entered into by the companies jointly for the restoration of the building. When the contractor had completed his work, joint notice was given by the insurers of the completion of the building. The defendant in error thereupon brought this action against the insurers jointly, alleging a breach of contract to rebuild and restore the building, upon the ground that neither the materials used nor the workmanship was up to the standard of that in the damaged building. A demurrer based upon an alleged misjoinder of parties defendant was overruled, with leave to raise the same question by plea. Issues

were formed upon pleas filed, and the cause submitted to a jury, who found for the defendant in error, and assessed damages at \$16,000, upon which verdict there was a joint judgment against all of the defendant companies. This writ of error has been sued out by each of the plaintiffs in error to reverse this judgment.

The single question presented by the assignments of error is that there was a misjoinder, and the contention is that the defendant's right of action was against each company singly for a breach of its contract to repair and rebuild, and that, under the apportionment clause found in each policy, there could be no recovery against a particular company for any greater sum than the proportion which its policy bore to the whole amount of concurrent insurance. This is a purely technical objection. If all that is claimed be conceded, the plaintiffs in error, as between themselves, are liable to contribute one to another for any excess of payment over its proportion. Upon the other hand, if the apportionment clause has any bearing when the option to rebuild has been exercised, innumerable difficulties would arise in the proper assessment of damages. Seven different suits would have been necessary, thus increasing the costs sevenfold. Different juries would assess the total damages at different amounts, and there would be no known method of apportioning the damages equitably among the insurers. The apportionment clause in each policy is substantially the same, and is in these words:

"This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by the expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property; and the extent of the application of the insurance under this policy, or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon, or attached or appended hereto."

Clearly, this has no bearing upon the liability of a company when sued for a breach of its contract to repair or rebuild, and a plaintiff would be entitled to the full amount of his damages against such company, leaving it to seek contribution from any other company having insurance on the same property. *Morrell v. Insurance Co.*, 33 N. Y. 429; *Henderson v. Insurance Co.*, 48 La. Ann. 1176, 20 South. 658. Whether we regard an election to rebuild as the substitution of one contract for another, or as but another mode of paying the loss which has occurred, is immaterial; for upon such an election the contract becomes one for rebuilding or repairing, and is governed by the principles applicable to engagements of that kind where the consideration has been paid in advance. After such an election, no action will lie on the policy to recover the money indemnity therein stipulated. For a total failure to repair or rebuild, or where the repairing or rebuilding does not result in the restoration of the building to a condition substantially like that existing before the fire, the action is for a breach of the contract to repair or rebuild; and the measure of damages will be the cost of repairing or rebuilding where there has been a total failure, or the difference between the work as done and its value if done according to the

standard of that existing before the fire. The amount of money indemnity stipulated to be paid under the alternative clause of the policy ceases to be any standard for the measure of damages resulting from a breach of the rebuilding agreement. *May, Ins.* (3d Ed.) §§ 423, 433, 433a; *Morrell v. Insurance Co.*, 33 N. Y. 429; *Beals v. Insurance Co.*, 36 N. Y. 522; *Heilman v. Insurance Co.*, 75 N. Y. 7; *Wynkoop v. Insurance Co.*, 91 N. Y. 478; *Ostr. Ins.* §§ 202, 203; *Association v. Rosenthal*, 108 Pa. St. 475, 1 Atl. 303; *Stamps v. Insurance Co.*, 77 N. C. 209. The prorating clause contemplated a money indemnity. The option to rebuild affords the insurer a mode of adjustment whereby all extravagant claim of loss may be avoided. When once resorted to, the whole character of the contract is changed. The election is not to repair or rebuild a proportion of the building, but to rebuild or repair absolutely, so that the insured shall be indemnified in full. From this it must follow that the liability for a breach of the contract to repair or rebuild must be equally unlimited. This rule is conceded where there is but one insurer, and we see no reason why it is not equally applicable where several insurers, either severally or jointly, elect to rebuild. Of course, there can be but one satisfaction, and the right of contribution would protect the paying company from an undue proportion of the burden as between themselves.

Having settled these principles, we come to their application to the question of misjoinder. That the plaintiff below might have sued these insurers separately is most obvious from the singleness of the contract of insurance it had with each. This right to separately sue any company electing to rebuild could not be defeated by the action of the concurrent insurers in jointly electing to rebuild, nor by the subsequent act of joining in a contract to restore the premises. But in the case before us the several companies manifested an intent to join in the restoration of the property. This was evidently desirable. No one of them was sufficiently interested to assume the entire burden of repairing as a mere means of avoiding its separate liability to pay a money indemnity. This intent to jointly repair and rebuild, as indicated by the notice of election and by the subsequent joining in the work of repairing and rebuilding, operated to make the obligation of repairing and rebuilding joint or several, at the option of the assured. "Wherever an obligation is undertaken by two or more, or a right given to two or more, it is the general presumption of law that it is a joint obligation or right. Words of express joinder are not necessary for this purpose; but, on the other hand, there should be words of severance, in order to produce a several responsibility or a several right. Whether the responsibility incurred is joint or several, or such that it is either joint or several at the election of the other contracting party, depends (the rule above stated being kept in view) upon the terms of the contract, if they are express, and, when they are not express, upon the intention of the parties as gathered from all the circumstances of the case." 1 *Pars. Cont.* (6th Ed.) 11; 1 *Beach, Cont.* §§ 668, 671, 672. That such a joint undertaking to rebuild operates to



give the assured the right to maintain either a joint or several action has been decided in two well-considered cases. *Morrell v. Insurance Co.*, 33 N. Y. 429-447; *Henderson v. Insurance Co.*, 48 La. Ann. 1176, 20 South. 658. The case of *Good v. Insurance Co.*, 43 Ohio St. 416, 2 N. E. 420, has been cited as holding the reverse of this position. The facts of that case were very peculiar, and the opinion is not strictly an authority upon this point. The conclusion we have reached meets the justice of this case, and violates no settled rule of procedure. The judgment is accordingly affirmed.

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PEIRCE v. CLAVIN.

(Circuit Court of Appeals, Seventh Circuit. October 4, 1897.)

No. 332.

1. MASTER AND SERVANT—SAFE APPLIANCES—INSTRUCTIONS—HARMLESS ERROR

An instruction making it the absolute duty of the master to provide reasonable and safe appliances, instead of to use reasonable care to furnish such appliances, is erroneous; but the error is harmless where the defect complained of is so obvious, and of such long standing, that a failure to remedy it was manifest negligence.

2. SAME—ASSUMPTION OF RISKS—PRESUMPTION OF KNOWLEDGE OF DEFECTS BY SERVANT.

The loop handle of a railway switch lever became bent, so that when thrown over between the tracks, instead of falling between the ties, it rested on top of a tie, exposing the loop above the level thereof. Plaintiff was injured by catching his foot in the loop while switching cars. He had been engaged about the yard as a member of a switching crew for six days, but worked mainly at night, and in his testimony denied any knowledge of the defect. *Held*, that the court was not warranted in presuming, as matter of law, that he had knowledge of such defect, but, in view of his denial, should have submitted the question to the jury; especially as the attention of one engaged in switching trains is properly fixed upon his work, so that he may well overlook defects in the roadbed.

3. SAME—ASSUMPTION OF RISK—KNOWLEDGE OF DEFECT.

A servant, having absolute knowledge of an obvious defect existing during the entire time of his service, assumes the risks thereof, and is not merely required to exercise greater care to avoid danger from the defect.

In Error to the Circuit Court of the United States for the Southern District of Illinois.

The defendant in error, William M. Clavin, brought action in trespass to recover of the plaintiff in error for damages sustained to his person on the 25th day of December, 1895. Clavin on the 4th day of June, 1895, entered the service of the receiver of the Toledo, St. Louis & Kansas City Railroad Company as a switchman in the railroad yards at Madison and East St. Louis, in the state of Illinois. He was not a member of any regular crew, but was an extra man, required to take the place of any one of the crew who might be absent from his work. A single track led from the Madison yard to the East St. Louis yard, passing over a short trestle, beyond which, in the East St. Louis yard, delivery tracks to connecting roads, six in all, branched out from it to the south; the first of them being known as the "Belt" or "Wiggins' Ferry" track, the other five being numbered from 1 to 5, consecutively. The switch stand and lever operating the switch to the Wiggins' Ferry track was situated at the west end of the trestle, north of the lead or main track. This switch was a ground switch. It was worked by a lever pivoted in the switch stand a short

distance from the rail, and was operated at right angles to the rail. The end or handhold of the lever was in the shape of a loop 7 inches long, 2½ inches wide, and was originally designed to drop between the ties when thrown over towards the rail, and to rest upon the ground, which would bring the top of it below the level of the tie, the loop or handhold being from 8 to 12 inches distant from the rail. In March, 1895, the lever of the switch had become bent, from being caught in the tank step of a switch engine. This caused the handhold, when the lever was thrown towards the rail, to rest upon one of the ties, exposing the whole of the handhold above the level of the ground. At about 4:30 p. m. on the day of the accident, the crew with which Clavin was then working brought a train of cars from the Madison yard for delivery in the East St. Louis yard, 15 cars of which train were to be delivered to the "bridge track," and the remaining 20 in the lower yard. Clavin was on top of one of this string of 20 cars, and, when the engine first went into the lower yard, this string was kicked or pushed down over the trestle, Clavin bringing them to a stop, and the engine then delivered the 15 cars to the "bridge yard," and returned, and was reattached to the string of cars on which Clavin was working. Clavin cut off two cars, and, as the engine was pushing them forward, ran ahead, to throw them upon the Wiggins' Ferry track. He threw the switch in question, that the cars might run in upon the Wiggins' Ferry track. To do this he was obliged to catch the handhold, lift the lever, and throw it away from the rails. This he did, setting his foot upon it, to press it down. The two cars passed over the switch, Clavin gave the engineer the signal to stop, and immediately upon the passage of the cars threw the lever back, resetting the switch for the lead or main track, and again putting his foot upon it to bring it down into place. The next car was to be delivered to what is known as the "house track." Clavin went to where the train stood, gave the engineer a signal to go ahead, stepped in between the last two cars to pull the pin, walking with one foot over the rail between the moving cars. He found the pins in the draw-bars of both cars jammed, and was in the act of stepping out from the car to get a tool with which to knock them out, when in passing over the switch in question his foot caught in the handhold, which rested upon the tie, and he was thrown to the ground in front of the truck, one car passing over his left hand, nearly severing it at the wrist, rendering amputation necessary. Clavin, while in the service of the receiver, had worked with the crews of both yards,—that is, with the crews that delivered east-bound freight to the Madison yard and west-bound freight into the East St. Louis yard. The condition of the switch was known to most of the crews, but its condition had never been reported. On an average of once a day, cars were delivered to the East St. Louis yard, and placed upon the various delivery tracks, passing over and using the switch in question. Clavin, while he was in the service of the receiver, had been a member of the East St. Louis crew for six whole days. He had also worked for a considerable period with the night crew, doing work in both the upper and lower yards.

At the conclusion of the evidence, the court was requested to direct a verdict for the defendant, which request was overruled, and an exception reserved. A number of instructions bearing upon the question of assumption of risk were requested by the plaintiff in error to be given in charge to the jury, which were refused, and which are not necessary to be here stated, but are considered in the opinion of the court. To the charge of the court to the jury the following errors, so far as it is deemed necessary to state them, are assigned: First. "The defendant undertook, by the law of the land,—not probably in words,—undertook to furnish to the plaintiff reasonable and safe appliances with which to carry on his work of switching." Second. "If he [the plaintiff] did have notice that it was out of repair, or, by the exercise of reasonable diligence could have known that it was out of repair, then a higher degree of diligence was required at his hand than if he had no such notice. More care in going about a place of danger is required by the pleadings and your experience and common sense than going about a place where no danger is known or supposed to exist. As to whether he had notice, the evidence will determine, and you are the judges of that evidence."

There was a verdict for the plaintiff below, and the case is brought here for review.

Brown & Geddes and Charles A. Schmettau (Clarence Brown, of counsel), for plaintiff in error.

M. Millard (F. C. Smith, of counsel), for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

JENKINS, Circuit Judge, after stating the facts, delivered the opinion of the court.

The objection to the statement by the court of the duty resting upon the plaintiff in error would be well taken, if the error was material. We have frequently held that the duty resting upon the master is not an absolute duty; that he is required to use ordinary and reasonable care to furnish appliances reasonably safe and suitable for the use of his servant, and a place reasonably safe in which he may work. *Railroad Co. v. Meyers*, 24 U. S. App. 295, 11 C. C. A. 439, and 63 Fed. 793; *Reed v. Stockmeyer*, 34 U. S. App. 727, 20 C. C. A. 381, and 74 Fed. 186; *Railroad Co. v. Johnson*, 81 Fed. 679. We do not think, however, that the error is material, and for this reason: The defect in the switch, assuming it to be a defect, had existed for nine months, and was an obvious defect. The evidence discloses that it was the duty of two of the servants of the receiver to make daily inspection, and to keep that part of the road and yard in repair. They passed daily over the track. They state that they have no recollection of having observed this defective switch. There was, therefore, manifest negligence upon the part of the receiver in failure to remedy the defect, if the switch, by reason of becoming bent, was dangerous. It was an obvious defect, and had continued for so long a time that the law must imply notice to the master. It would not, therefore, have been error for the court, assuming the switch in its then condition to be dangerous, to have charged, as matter of law, that the plaintiff in error was negligent. Is the defendant in error also chargeable with notice of this obvious defect? If he is, he could not recover. The switch, if defective and dangerous, was in such condition when the defendant in error entered into the service of the receiver. He assumed, in entering upon that service, not only such risks and perils as are incident to the performance of his duty, but the risk of such extra hazard and peril, of which he has either actual or presumed knowledge; and, where the defect is obvious, knowledge is presumed of the dangers which it suggests, and which are apparent. *Randall v. Railroad Co.*, 109 U. S. 479, 3 Sup. Ct. 322; *Reed v. Stockmeyer*, supra; *Logging Co. v. Schneider*, 34 U. S. App. 743, 20 C. C. A. 390, and 74 Fed. 195; *Railway Co. v. Rogers*, 13 U. S. App. 547, 6 C. C. A. 403, and 57 Fed. 378; *Bailey, Mast. Liab.* p. 80. The question should, therefore, have been submitted to the jury, whether the defendant in error knew, or ought reasonably to have known, the danger to him from this alleged defective appliance. In the absence of any evidence on the subject, the presumption ought possibly to be applied as a matter of law; but, in view of the evidence upon the part of the defendant in error, we think it was one proper to have been submitted to the jury. Knowledge of the alleged defect is denied by him, and his service in the yard in question was mainly at night, and we think it was for the jury to

say whether, under all of the circumstances of the case, he should have taken notice of, and be chargeable with knowledge of, the condition of the switch. It must be remembered that, when using this switch, he was engaged in the operation of switching trains, upon which his attention was centered. Could he, or did he, under such circumstances, comprehend the risk to himself from that condition of the switch? In this connection the remarks of Chief Justice Ryan in *Dorsey v. Construction Co.*, 42 Wis. 583, are pertinent, and commend themselves to our judgment:

"The safety of railroad trains depends largely upon the exclusive attention of those operating them to the track and to the trains themselves. It is not for the interest of railroad companies or of the public, with like, if not equal, concern in the safety of trains, that persons so employed should be charged with any duty or necessity to divert their attention; and it appears to us very doubtful whether persons operating railroad trains, and passing adjacent objects in rapid motion, with their attention fixed upon their duties, ought, without express proof of knowledge, to be charged with notice of the precise relation of such objects to the track. And, even with actual notice of the dangerous proximity of adjacent objects, it may well be doubted whether it would be reasonable to expect them, while engaged in their duties, to retain constantly in their minds an accurate profile of the route of their employment, and of collateral places and things, so as to be always chargeable, as well by night as by day, with notice of the precise relations of the train to adjacent objects. In the case of objects so near the track as to be possibly dangerous, such a course might well divert their attention from their duty on the train to their own safety in performing it. Notwithstanding some things said in some cases cited for the appellant, we should be rather inclined to think that, in the absence of express notice of immediate danger, employés operating trains may perform their duties under an implied warrant that they may so do without exposing themselves to extraordinary danger not necessarily incident to the course of their employment."

The court below ignored wholly the doctrine of assumption of risk, and refused the instructions requested in that behalf, erroneously supposing that absolute knowledge of the defect which existed during the entire time of his service could not, under any circumstances, amount to an assumption of risk, but merely cast upon him greater care in the use, or in avoiding danger from the defective appliance. This is manifest error, for which we think the judgment must be reversed. The doctrine of assumption of risk is not to be confounded with the doctrine of contributory negligence; for, where the former doctrine is applicable, the servant may exercise the greatest care, and yet be precluded from recovery for an injury in the performance of his service, because the risk was assumed. *Miner v. Railroad Co.*, 153 Mass. 398, 26 N. E. 994.

There are other assignments of error to the charge which are not without merit, but, since there is to be a new trial, and the particular objections may be obviated upon a retrial, we refrain from comment upon them.

The judgment will be reversed, and the cause remanded, with instruction to the court below to grant a new trial.

## JUSTICE MIN. CO. v. BARCLAY et al.

(Circuit Court, D. Nevada, August 9, 1897.)

No. 632.

## 1. MINES AND MINING—CONTINUITY OF VEINS—EXPERT EVIDENCE.

In determining questions as to whether ore bodies found in different claims are parts of a continuous vein or lode, or are separate and independent veins, a wide latitude is always permissible for the purpose of ascertaining the reasoning upon which the conclusions of witnesses are based, as well as their general knowledge of the ground, their experience and observation, and their qualifications as practical miners or experts, derived from years of experience in the particular mining district.

## 2. SAME—LOCATION—ABANDONMENT—ASSESSMENT WORK.

Although the owner of a location has failed to do the necessary assessment work, so that the ground is subject to a relocation, yet if, before any such relocation by others, he perform the amount of assessment work required by the statute, then his rights are revived, and a subsequent relocation is invalid.

## 3. SAME—ASSESSMENT WORK—ADJOINING CLAIMS.

Assessment work done upon one of a number of adjoining claims, to the amount required to be done upon all of them for the year, is sufficient to hold all of them, if it be clearly shown that it was intended as the annual assessment work upon all the claims, and that it was of such a character that it would inure to their benefit.

## 4. SAME—INTERMEDIATE RELOCATIONS—ABANDONMENT.

Where relocations have been made after the owner of the original location has failed beyond the statutory time to do the necessary assessment work, but such relocations are afterwards abandoned, and thereafter the owner of the original location performs assessment work which revives his rights, the fact of such intermediate relocations cannot aid one who subsequently attempts to relocate the same ground.

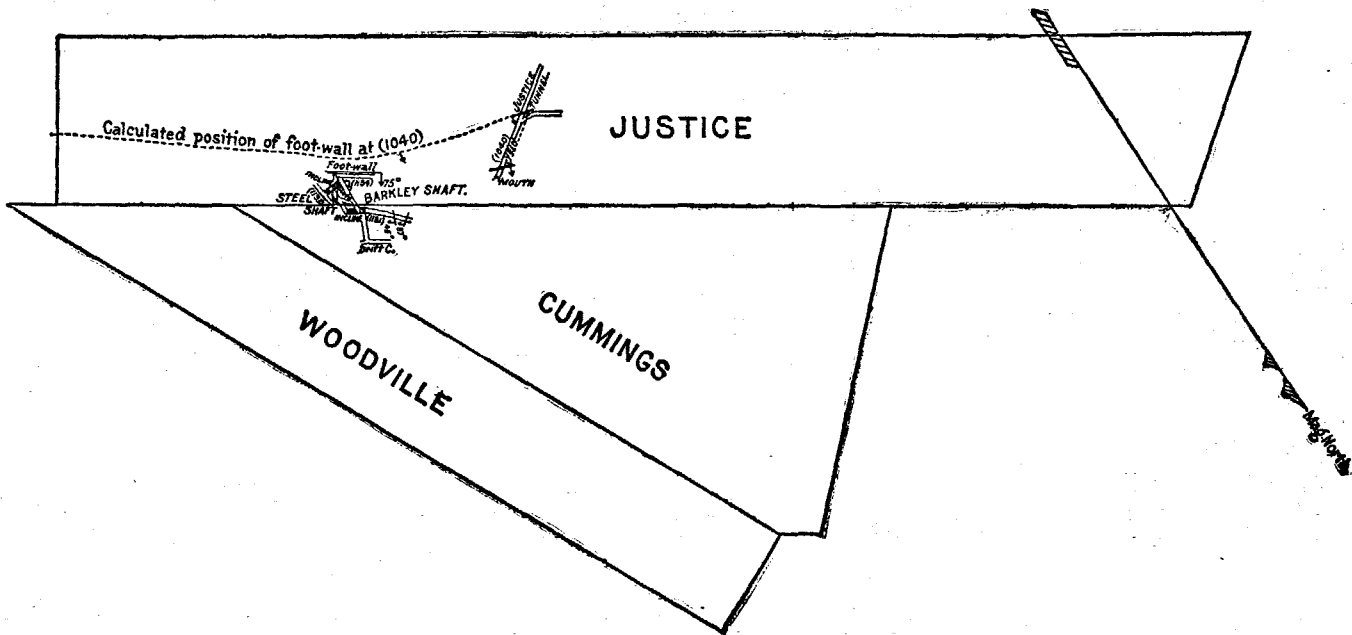
This is a suit in equity by the Justice Mining Company against John Barclay and others to enjoin the working of a certain mine, situated in the Gold Hill mining district, in Storey county, Nev.

W. E. F. Deal, for complainant.

Alfred Chartz, for respondents.

HAWLEY, District Judge. This is a suit in equity, brought by complainant, to enjoin the respondents from mining, extracting, or removing any quartz rock, earth, or ore from certain mining ground claimed by complainant, situate in the Gold Hill mining district, Storey county, Nev. The complainant is the owner of the Justice patented ground and lode, and of the Woodville patented ground and lode, the surface boundaries of which are delineated upon the following diagram.

The title of complainant to both of these claims as patented is admitted by the respondents, but they deny that either of said lodes includes any part of the mining ground, lode, claim, or premises lying between the easterly side line of the Justice patented claim and the westerly side line of the Woodville patented claim. On April 27, 1895, complainant leased to George Hobart, Charles H. Steele, and respondents Thomas Bell and C. Benham, for the period of one year, the mining ground "commencing at the trestle leading from the Justice Company's tunnel to the Washoe Mill, and running thence in a



southerly direction, following the course of Gold cañon, to the south boundary line of the Justice claim, and extending from the line of the Devil's Gate toll road easterly to the east line of said Justice Mining Company's claim," upon an agreed royalty or percentage of the value of ore extracted. Steele and Hobart testified that, after the lease was executed, the superintendent of the Justice informed them that they could work as far east as the Justice claimed, or as far east as they pleased. Respondents Bell and Benham testified that the lease was only intended for the main Justice lode within the Justice patented lines. The respondents, on January 1, 1896, located certain mining ground, described in the answer as follows:

"Beginning at post No. 1 on the east side line of the mining claim and premises first described in plaintiff's bill of complaint, being what was formerly known as the Justice Independent claim, U. S. survey No. 48, but now known as the Justice claim, from which post No. 7 of the Justice Independent claim bears south,  $47^{\circ}$  east, 307.1 feet distant; thence, for the first course, north,  $41^{\circ}$  west, 636.9 feet, to post No. 2, identical with post No. 6 of the U. S. survey No. 48; thence, second course, north,  $49^{\circ}$  east, 382.7 feet, to post marked No. 3; thence, third course, along the west line of said Woodville claim, south,  $10^{\circ}$  east, 743 feet, to the place of beginning,—which said last described mining claim and premises is known as and called the Hills Gold and Silver Quartz Mine."

This ground is situate within the triangle shown on the diagram between the Justice and Woodville side lines.

The real contention on the part of the complainant is that the lode located by the respondents has its apex within the patented lines of the Justice claim, and extends downward vertically, entering into the adjoining land located by the respondents. The same contention is made with reference to the Woodville, the theory being that there is but one lode, known as and called the "Comstock Lode." The contention of the respondents is that the Hills Gold and Silver Quartz Mine is upon a separate and independent lode, well defined, between foot and hanging walls, having its apex outside of the surface limits of either the Justice or Woodville patented ground, and solely within the ground located by respondents. This is the principal and most important question in controversy, and upon which there is a decided conflict in the testimony.

It would serve no useful purpose to give the substance of the testimony as to the theory of the witnesses, with the facts upon which their conclusions are based. In all controversies concerning the identity of ore bodies found on different levels at various depths beneath the surface, there is always room for a wide divergence of opinion among men of equal credit and experience as miners. The absolute truth is often difficult to ascertain, except in cases where connections are made between the different bodies of ore found on the different levels; and even then there is often room for controversies unless absolute continuity of vein matter is found, until expensive explorations are made, for the continuity of ore may be broken by the injection of country rock into the vein, or what is known among miners as a "horse" is found, which is not always easily distinguished from the actual walls of country rock. One witness, upon a careful inspection, may be of the opinion that it is the hanging or foot wall of the lode; while another, from

his examination, gives it as his opinion that it is simply a horse, and that further exploration will develop the fact that the different bodies of ore are upon the same vein. A wide latitude is always permissible for the purpose of ascertaining the reasoning upon which the conclusions of witnesses are based, as well as their general knowledge of the ground, their experience and observation, and their qualifications as practical miners or experts, derived from years of experience in the particular district where the ore bodies in question are found. *Mining Co. v. Corcoran*, 15 Nev. 153; *Book v. Mining Co.*, 58 Fed. 106, 111, 120, 126; *Consolidated Wyoming Gold Min. Co. v. Champion Min. Co.*, 63 Fed. 540, 544. Courts, however, are always inclined to give heed to the actual facts which have been ascertained from the workings at different points on the ground in dispute, and especially at the places where it is claimed on one side and denied by the other that the ore bodies unite. Upon this branch of the case a brief abstract of the testimony is filed herewith, giving a fair outline, in the language of the witnesses, as to their conclusions in relation to the developments actually made in the Steele shaft and in the Hills or Barclay shaft, and the various levels, tunnels, drifts, and inclines connected therewith, and the character of rock, earth, and ore found therein, and particularly upon the point whether the ore found in the ground covered by the Hills location is connected with, and forms a part of, the main Justice lode, which has its apex within the patented ground of the Justice, or is separated therefrom, and belongs to an independent vein or lode, having its apex within the limits of the Hills location, to which reference will hereafter be made.

In support of complainant's right to recover herein, it is alleged in the bill that complainant is the owner of, in possession of, and entitled to the possession of, the mining ground, claim, real estate, and premises lying between the easterly side line of the Justice patented ground and the westerly side line of the Woodville patented ground, together with all the veins of gold and silver bearing quartz rock, the apexes of which are within the surface boundaries of said claim, with the right to follow such veins or lodes to any depth; that while the respondents Charles Benham and Thomas Bell were in possession of and working on the lode within the Justice ground, as tenants of complainant, the other respondents herein, on January 1, 1896, conspired with them, and made a pretended location of a portion of said ground between the Justice and Woodville patented locations in the name of W. P. Hills, but for the use and benefit of the other respondents; that, when said location was made by W. P. Hills, the respondents Benham and Bell were in actual possession of said ground and vein as tenants of complainant, and were working the same for the purpose of complying with the laws of congress with reference to holding, possessing, and working mining claims; and that complainant had every year up to January 1, 1896, done and performed more than \$100 worth of work for the purpose of holding and possessing said claim, in accordance and compliance with the provisions of the act of congress in regard thereto. The title of complainant to the particular piece of ground in controversy, independent of any rights it may have by virtue of its ownership in the Justice and Woodville patented ground, is derived from the



mining location made by A. Cummings on the 19th of March, 1875, which included in its description all the ground embraced in the location of the Hills Gold and Silver Quartz Mine. This mining ground was on April 12, 1875, conveyed by deed to the Woodville Con. S. M. Company. In July, 1880, the complainant acquired title to all the mining property of the Woodville Con. S. M. Company, including, among others, the Cummings claim. At this time S. T. Curtis was the superintendent of the complainant, and upon the trial hereof testified that he went upon the ground, and took possession of all the property, including the Cummings claim; that he received a tracing from the company's office in San Francisco of all the claims; that he took the tracing, went upon the ground, and found a great many of the old monuments and stakes. It is claimed by complainant that from that time up to January 1, 1896, when the Hills location was made, it continued to remain in the possession of the ground located by Cummings, and that its possession was open and notorious.

It is shown that respondents, at the time of, or soon after, the Hills location was made, were notified of complainant's claim to the ground, and that they would be held responsible for any damage which they might commit. No work was ever done by the complainant within the surface lines of the Cummings location. But it claims to have expended during the year 1895 over \$3,000 for the purpose of holding the Cummings and six other claims, to which it has title. This claim is partly based upon the theory that, inasmuch as the Cummings claim is contiguous to the Justice, work done upon the Justice within its patented lines would inure to the benefit of the Cummings, and constitute compliance with the provisions of the law requiring a certain amount of work upon unpatented claims to be performed every year; and, further, upon the ground that certain work performed by some of the respondents as lessees of complainant was for the purpose of saving it "a cash expenditure of money for the purpose of assessment on the different claims," including the Cummings; and that this was the principal object of making the lease. It is not claimed that the notice of location of the Cummings claim, as recorded, is not sufficiently descriptive to enable any one to ascertain therefrom what particular ground was claimed thereby. The objection urged against this location is that no evidence was offered that A. Cummings ever made the location, posted the notice, or put any stakes upon the ground, or that he or his grantees or predecessors in interest ever complied with the law requiring annual assessment work to be done upon the location; that the ground was abandoned; that, if not abandoned, it was forfeited; that it was claimed by other parties who had regularly located the ground prior to 1895, but who failed to do the assessment work in 1895; and that the ground was therefore subject to relocation on January 1, 1896, when the Hills location was made. It appears from the evidence that some five or six locations were made at the same time, or about the same time, as the Cummings, all being in proximity with each other. The plain inference to be drawn from all the testimony is that these locations were made at the instance and request and for the use and benefit of the Woodville Company, evidently for the purpose of protecting the Woodville claim. The natural presump-

tion to be drawn from the testimony is that, at the time, the lode or vein, or lodes or veins, if more than one, had not been clearly defined; the explorations and developments that had been made were not sufficient to actually determine whether certain seams of ore which were found in different places constituted different lodes or veins, or were in fact but parts of one lode; and that future workings would demonstrate this to be a fact by absolute continuity and connection of the ore bodies. It is not shown that any work was done by the Woodville Company on any of the six claims independent of the work that was being conducted and carried on by it within the surface limits of the Woodville patented claim. Owing to controversies which thereafter arose between the Justice and the Woodville as to whether both claims were not upon the same lode, or from other causes, the Woodville Company became involved, and all its property, including the Cummings ground, was sold under execution, and the Justice Company thereafter obtained the title to all the property. The Justice never performed any work upon the ground within the surface limits of the Cummings location, or any work for its benefit, save such as was performed in the regular course of work upon the Justice lode within the surface limits of the Justice patented claim. It had a watchman employed to look after its property, including the Justice, Cummings, and Woodville claims, and always asserted and claimed all the ground embraced in said locations and others not involved in this controversy.

It is a well-settled principle of law that abandonment of property is always a question of intention. It is a voluntary act. The property in question was never abandoned by complainant. It always asserted a claim to the ground. There is no evidence in the record which indicates any intention on its part to give up its right to this particular ground. Forfeiture may occur by failure to comply with some positive requirement of the statute, or of the mining rules or regulations, if the statute or rules provide that such failure shall work a forfeiture of the claim. Forfeitures, however, are not, as a general rule, favored by the law. A forfeiture of a mining claim cannot be established except upon clear and convincing proof of the failure of the owners of the claim to have the work done or improvements made to the amount required by law. *Hammer v. Milling Co.*, 130 U. S. 291, 301, 9 Sup. Ct. 548. Conceding, for the purpose of this opinion, that complainant had failed to do any assessment work upon the ground, and that it was, prior to January 1, 1895, subject to be relocated, still the respondents are not in a position to take any advantage of such failure on the part of the complainant to do the assessment work. The evidence is direct and positive that the object of the lease, as executed by complainant, was for the express purpose of performing enough work to hold the Cummings and the other claims lying outside of the patented lines of the Justice and Woodville. This testimony, although criticised and questioned by respondents' counsel, is undisputed. If true, it was sufficient to prevent the respondents from making any valid location in January, 1896. The assessment work by complainant in 1895, prior to the relocation of the grounds by Hills, on behalf of the respondents, and before any intervening rights by other parties had been acquired, revived its rights under the Cummings location; and the ground em-

braced in the Cummings claim could not therefore be considered as forfeited at the time Hills entered upon the ground, and made the location of the Hills Gold and Silver Quartz Mine.

The language of section 2324, Rev. St., is clear, plain, and explicit upon this point. After stating the amount of work that must be annually performed on each claim, it reads as follows:

"But, where such claims are held in common, such expenditure may be made upon any one claim; and, upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure, and before such location."

North Noonday Min. Co. v. Orient Min. Co., 1 Fed. 522, 539; Jupiter Min. Co. v. Bodie Consol. Min. Co., 11 Fed. 668, 681; Lakin v. Mining Co., 25 Fed. 337, 343; Mining Co. v. Deferrari, 62 Cal. 160, 163; Gregory v. Pershbaker, 73 Cal. 109, 119, 14 Pac. 401; Pharis v. Muldoon, 75 Cal. 284, 17 Pac. 70; Belk v. Meagher, 104 U. S. 279, 282.

In order to comply with the law, it was not necessary that the assessment work should be done upon the surface of the claim. It may be done on the surface or beneath the surface, and this would be sufficient although it might be that the work was performed on a lode having its apex outside of such surface lines. Mining Co. v. Callison, 5 Sawy. 439, 456, Fed. Cas. No. 9,886. It may be done on other claims or upon other ground, where, as here, it is in reasonable proximity to it; and if the work, as done, would be beneficial, and tend to the future development or improvement of the claims, it is sufficient. Doherty v. Morris, 17 Colo. 105, 28 Pac. 85; U. S. v. Iron Silver Min. Co., 24 Fed. 568. It has always been held by the supreme court that, when several adjoining claims to mineral lands are held in common, work for the benefit of all done upon any one of them in a given year to an amount equal to that required to be done upon all in that year meets the requirements of section 2324, Rev. St. Smelting Co. v. Kemp, 104 U. S. 636, 655; Jackson v. Roby, 109 U. S. 440, 3 Sup. Ct. 301; Chambers v. Harrington, 111 U. S. 350, 4 Sup. Ct. 428; Book v. Mining Co., 58 Fed. 106, 117; Royston v. Miller, 76 Fed. 50, 52; Eberle v. Carmichael (N. M.) 42 Pac. 95. In Smelting Co. v. Kemp the court said:

"Labor and improvements, within the meaning of the statute, are deemed to have been had on a mining claim, whether it consists of one location or several, when the labor is performed or the improvements are made for its development,—that is, to facilitate the extraction of the metals it may contain,—though in fact such labor and improvements may be on ground which originally constituted only one of the locations, as in sinking a shaft, or be at a distance from the claim itself, as where the labor is performed for the turning of a stream, or the introduction of water, or where the improvement consists in the construction of a flume to carry off the debris or waste material. It would be absurd to require a shaft to be sunk on each location in a consolidated claim, when one shaft would suffice for all the locations."

Some questions are suggested in respondents' brief as to whether the work performed within the patented lines of the Justice could be "harnessed on" to the rule that work might be sufficient if performed in a tunnel run for the purpose of developing a mine, etc. Where the work is not done within the surface boundaries of the location, the law undoubtedly casts the burden upon the party claiming to have

done the work, not only to show that the work done outside of such boundary was intended as the annual assessment work on the claim, but that it was of such a character as that it would inure to the benefit of such claim. But, when such facts are clearly established, then it is wholly immaterial whether the work to accomplish such purpose was performed off the ground upon a patented or unpatented mining claim. *Hall v. Kearny*, 18 Colo. 505, 509, 33 Pac. 373. The fact that the stakes and monuments, as designated in the notice and shown in the tracings, as seen by Curtis when he took possession of the Cummings ground for the Justice, were not visible at the time of the location of the Hills claim, does not vitiate the Cummings location, if the law in all other essential respects has been complied with. *Book v. Mining Co.*, 58 Fed. 106, 114. The fact that the "Leermo" and "Quinn" locations had been made within the surface boundaries of the Cummings prior to 1895 did not defeat complainant's title to the Cummings. If either of said locations were valid, the respondents would have no standing in court. They do not claim any rights under either of these locations. The proof is that both locations were either forfeited or abandoned, and the evidence in regard to these locations was only admissible as tending to support the theory of the respondents that the triangular space of ground between the Justice and Woodville patented lines was generally considered by the miners as locatable ground, and that respondents, acting upon that belief, were not conspirators, acting in bad faith in making the Hills location.

With reference to complainant's right to the Cummings claim, still treating it to be upon a separate and independent vein from the Woodville and the Justice, there still remains the further question whether the complainant has or has not been in the actual possession of the ground since it acquired title thereto, and was in the actual possession thereof at the time the Hills claim was located. This matter has been incidentally referred to simply to show that complainant had not abandoned the ground, and that it was at all times asserting its rights to and claim of the ground in dispute. Was this a mere bald assertion, a sham, a pretense without any right, a mere bugbear to frighten off all comers? Or was it acting in good faith, under color of right, in the honest belief that it was the owner of the ground? Its asserted claim was made at all times, whenever, wherever, or by whom attacked. The Quinn location was made in July, 1891. John O'Toole, who was interested therein, testified as to what occurred when he and Mr. Quinn commenced work on the location. He said:

"At that time Charles Lyons was superintendent of the Justice, and Charles Lyons notified us that that ground belonged to the Justice, and we told him that we did not think it did, and he said, if we took anything out, he would attach it; and we took out some ore, not a great deal, and we got a little behind, and had no money to do further work, and Lyons was making it kind of interesting, and we thought we had better leave it go, and we quit. We worked until some time in August, I believe, and we quit; and the ore that was there, we left it in the creek, and a freshet came along, and washed it away, and we never got anything out of it. Q. What occurred that made you leave the place? A. It was simply through Lyons talking to us, and telling us that we could not hold it. \* \* \* Mr. Lyons simply told me the ground belonged to the Justice Company, and if we worked it, and took anything out, he would take it from us."

**Altoona Q. M. Co. v. Integral Q. M. Co.** (Cal.) 45 Pac. 1047, 1049, is cited by respondents as establishing the proposition that:

"If there was only the naked claim to be looked after, and a watchman were placed there merely to warn prospectors, and thus prevent a relocation, it would not be labor upon the mine, in the sense of the statute."

It is shown, however, that the complainant performed the necessary amount of work in 1895. The presence of the watchman shows, or tends to show, the actual possession of the ground by complainant, and that such possession was open and notorious.

These results, as to the acts of the complainant and its good faith with reference to its ownership of the ground embraced in the Cummings claim, taken in connection with all the circumstances under which respondents Bell and Benham took the lease, coupled, as it must be, with the further condition that, while working under the lease as tenants of complainant, they discovered the ore body in dispute, lead to the conclusion that complainant has established a better right and superior title to the mining ground in question than the respondents. But the judgment in this case need not be based solely upon this ground. The same result would probably be reached upon the theory that there is but one vein or lode within the Justice or Woodville patented lines, and that the ore extracted by the respondents was from that lode. But, be that as it may, after a careful review and consideration of all the evidence, I am clearly of opinion that the decided weight and preponderance of evidence upon the facts, shown by the developments as made in the Steele shaft and the Hills or Barclay shaft, with the different levels, tunnels, drifts, and inclines connected therewith, is to the effect that the ore body, seam, or vein disclosed in respondents' workings is a part of, and is connected in vein matter with, the Justice lode, having its apex within the patented lines of the Justice. Let a decree be drawn in favor of complainant, in accordance with the views herein expressed.

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**A. J. WHITE, Limited, v. PEASE et al.**

(Circuit Court, S. D. New York. September 24, 1897.)

**LIBEL—BILL OF PARTICULARS.**

In an action for libel, where it is plain that plaintiff has no intention of contending at the trial that every assertion contained in each of several alleged libels is false, he should be required to set forth, by bill of particulars, what portions are claimed to be libelous and false.

Action for libel by A. J. White, Limited, against George C. Pease, Robert G. Eccles, and others. Motion by defendants to require plaintiff to make complaint more definite.

Charles De Hart Brower, for the motion.  
Townsend, Dyett & Levy, opposed.

**LACOMBE**, Circuit Judge. The complaint is sufficiently definite and certain to enable defendants to answer. It is perfectly plain, however, that plaintiff has not the remotest intention of contending at

the trial that every assertion contained in each of the alleged libels is false, and proper practice should require it to set forth in some way what portions are claimed to be libelous and false. The proper way to do this is by a bill of particulars, and there is no reason why there should be a second motion and a second argument to determine what such bill should contain. An order may be taken requiring the filing of a bill of particulars showing (1) in what particulars the publication set forth in folios 12 to 21 is alleged to be false; (2) in what newspapers, journals, magazines, circulars, and gazettes the "other false and malicious articles substantially similar," etc., as set forth in folio 23, were published, giving the text of such articles, or of so much thereof as plaintiff complains of, and like particulars as to the newspapers referred to in folio 27; (3) setting forth the analysis made by Charles T. F. Fennel (referred to in folio 24), and indicating in what respects it is contended that it was false. When such a bill of particulars is filed, the precise issues will be sufficiently defined to enable defendants to answer and to prepare for trial, without requiring any repetition of the particulars as prayed for. In all other respects the motion is denied.

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UNITED STATES ex rel. INTERSTATE COMMERCE COMMISSION v.  
SEABOARD RY. CO.

(Circuit Court, S. D. Alabama. July 2, 1897.)

No. 203.

CARRIERS—INTERSTATE COMMERCE—COMMON ARRANGEMENT FOR CONTINUOUS CARRIAGE.

The shipment of freight over a number of lines of railroad from a point in one state to a point in another, at a through rate of charges, under an agreement, express or implied, for a conventional division of the charges among the different roads, constitutes a "common arrangement for a continuous carriage or shipment," within the meaning of the interstate commerce act, and a road participating in such arrangement is subject to the provisions of the act, though its line lies entirely within one state, and its part of the joint charge is its regular local rate.

Jos. N. Miller, Dist. Atty., for the United States.

E. L. Russell, for defendant.

TOULMIN, District Judge. The question to be considered in this case is whether the defendant, in transporting property from Fairford, in the state of Alabama, to Chicago, in the state of Illinois, and in transporting goods from Cincinnati, in the state of Ohio, to Fairford, is engaged in such transportation, under a "common arrangement for a continuous carriage or shipment," within the meaning of that language, as used in the act to regulate commerce. The defendant claims that it is not engaged in interstate traffic; that the freight charge from Fairford to Chicago and from Cincinnati to Fairford is made up of a joint rate between Calvert, in the state of Alabama, and Chicago, and between Cincinnati and Calvert, and the regular local rate between Calvert and Fairford; and, as the amount

of the said regular local rate goes to it (the defendant), such a method of carrying freight between the points named and of apportioning the money earned is not a transportation of property between those points "under a common arrangement for a continuous carriage or shipment." In other words, it is contended that, as the Seaboard Railway Company is a corporation of the state of Alabama, and as its road lies wholly within that state, and as it exacts and receives its regular local rate for the transportation from Fairford to Calvert and from Calvert to Fairford, it is not, as to freight so carried, within the scope of the act of congress to regulate commerce.

The supreme court, in the case of Cincinnati, N. O. & T. P. Ry. Co. v. Interstate Commerce Commission, 162 U. S. 193, 16 Sup. Ct. 704. held that:

"When goods shipped under a through bill of lading from a point in one state to a point in another are received in transit by a state common carrier under a conventional division of the charges, such carrier must be deemed to have subjected its road to an arrangement for a continuous carriage or shipment within the meaning of the act to regulate commerce."

—And said:

"When we speak of a through bill of lading, we are referring to the usual method in use by connecting companies, and must not be understood to imply that a common control, management, or arrangement might not be otherwise manifested."

In the case cited there was a through bill of lading. In the case now under consideration there is no evidence of a through bill of lading. But for that fact, the two cases would be almost identical. The supreme court, however, say that they must not be understood to imply that a "common arrangement" might not be otherwise manifested than by a through bill of lading. Of course, it may be shown by an express agreement to that effect. In this case there is no evidence of any express agreement. But I think such an arrangement may be manifested by circumstances, such, for instance, as when a carrier, in the usual course of business, enters into the carriage of foreign freight by agreeing to receive and ship goods from a point in one state to a point in another, and to participate in through rates and charges, under a conventional division of the same; that is, a division of the same, expressly or impliedly agreed to. The supreme court, in the case cited supra, in effect held that, when a railroad enters into the carriage of foreign freight by agreeing to receive and ship goods from a point in one state to a point in another, and to participate in through rates and charges, it thereby becomes part of a continuous line, made by an arrangement for the continuous carriage or shipment from the one point to the other, and becomes amenable to the act in relation to interstate commerce. This declaration of the supreme court, it seems to me, clearly shows that the "common arrangement" referred to is implied from the circumstances stated. In that case the court held that a through bill of lading and a conventional division of the charges manifested a common arrangement, and that, although one of the lines of railroad used was a state common carrier, with its line wholly within the

state, and its part of the charges was the regular local rate between two points within the state, it was subject to the interstate commerce act. The facts of that case were that goods were shipped from Cincinnati, Ohio, to Social Circle, Ga., a station on the Georgia Railroad. The initial carrier at Cincinnati issued through bills of lading, and quoted through rates. Said rates were arrived at by adding to the rates from Cincinnati to Atlanta the full local rates of the Georgia Railroad from Atlanta to Social Circle. The Georgia road received the goods at Atlanta, and transported them continuously to Social Circle, but it demanded and collected its full rates from Atlanta to Social Circle. The United States circuit court of appeals and the supreme court held that the Georgia road was amenable to the interstate commerce act.

The facts of the case under consideration are that the defendant received at Fairford, a station on its line, lumber by car loads destined for Chicago, which was shipped over its road to Calvert, a station on the Mobile & Birmingham Railroad, and a point where the two roads cross; that the railroad agent at Calvert was the common agent of the two roads at that point; that he issued freight waybills over the Mobile & Birmingham road from Calvert to Chicago, via Mobile, whence the shipment in the same cars continued over the Louisville & Nashville Railroad and other lines in succession to Chicago. The waybills contained the name of the shipper and of Fairford, the place of shipment, and also the name of the consignee, and of Chicago, the place of destination. There was a joint freight tariff on lumber in car loads from Fairford, Ala., to Chicago, Ill., expressly agreed to or concurred in, in writing, by all railroad lines over which the shipments were made, except by the defendant. There was no evidence that the defendant expressly agreed to the tariff, but that it received and receipted for its part of the through freight as the same was provided for in the tariff, its portion being  $1\frac{1}{3}$ , which was equivalent to its regular local rate between Fairford and Calvert. The freight was paid to the terminal road at Chicago, and by it transmitted through the several intervening roads to the defendant, the initial road; each road, as is usual in such cases, retaining its part, and paying the balance over to the preceding road in the line of transportation; the defendant receiving its part of said freight from the Mobile & Birmingham Railroad. The facts also are that, in the usual course of business, goods are shipped from Cincinnati to Fairford over the Louisville & Nashville Railroad, consigned to Fairford, with waybill to Mobile, and by continuous shipment from there to Calvert over the Mobile & Birmingham Railroad, and thence by continuous shipment to Fairford, where the freight is collected by the defendant, its part retained, and the balance transmitted to the other railroads in the line in the usual course. My opinion is that the facts of this case manifest a common arrangement for a continuous carriage or shipment of property from one state to another state of the United States, in contemplation of the act to regulate commerce, as the same is construed by the supreme court of the United States. *Interstate Commerce Commission v. Detroit, G. H. & M. Ry. Co.* (U. S. Sup. Ct. decision, May 24,



1897) 17 Sup. Ct. 986. I am therefore constrained to grant the prayer of the petitioner, and to order the writ of mandamus to issue as prayed for; and it is so ordered.

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THE ISAAC REED.

MONTAGUE et al. v. THE ISAAC REED.

(District Court, N. D. California. August 31, 1897.)

No. 10,906.

1. CARRIERS—BILL OF LADING—BURDEN OF PROOF.

Where the bill of lading for merchandise is shipped exempts the carrier from liability for damage to the goods "if properly stowed," if the goods are damaged the burden of proving proper stowage is on the carrier.

2. SAME—ACTION FOR NEGLIGENT STOWAGE—DEGREE OF CARE.

In an action to recover for damage to range boilers because of negligent stowage, where the evidence shows that the boilers were stowed in the customary way, and according to the best judgment of experienced stevedores, the fact that if they had been put in crates, or several of them lashed together, the injury sustained might have been avoided, does not make the carrier liable, as he was not required to take such extraordinary precautions.

C. M. Jennings, for libellant.

Andros & Frank, for respondent.

DE HAVEN, District Judge. This is an action to recover damages on account of sundry range boilers and small articles of hardware shipped by the libellant at the port of New York on board the ship Isaac Reed, for carriage to San Francisco, and which the libellant alleges were crushed and broken during such voyage solely by reason of negligent and improper stowage. The bill of lading under which the merchandise was shipped contained this clause: "Vessel not accountable for breakage, chipping, chafing, leakage, rust, or numbers, or for splits or stains in plank, if properly stowed." Under such a contract of carriage, when the goods are damaged, the burden to prove and show proper stowage is on the carrier (*Edwards v. The Cahala*, 14 La. Ann. 224), and when the carrier has proved proper stowage such a contract exempts him from liability on account of breakage or on account of the other enumerated causes, unless the shipper shall show that the damage might have been avoided by reasonable care upon the part of the carrier. In other words, under such a contract, when the carrier has shown proper stowage, the burden of proof is then cast upon the shipper to show that his goods were damaged by reason of the carrier's negligence; and without proof of such negligence the shipper is not entitled to recover.

The only evidence in this case as to the manner in which the libellant's merchandise was stowed was produced by the claimants, and is contained in the depositions of the master and the first officer of the vessel; and, as each supports the other, a very general summary of the testimony of the first officer is all that need be given here. He testified, in substance, that he had followed the occupation of a

stevedore for ten years in loading and unloading ships at the port of New York, and for about three years of that time was a general foreman in such business; that the ship Isaac Reed was loaded for the voyage upon which she carried the goods which are the subject of this action by an experienced stevedore under the supervision of the witness; that her cargo was carefully stowed, and with reference to the fact that the voyage was to be a long one, as well as one upon which heavy weather might be encountered. The evidence of this witness further shows that the ship met with unusually strong gales upon the voyage, during one of which a portion of the merchandise shipped by the libelant got "adrift," or shifted from the position in which it was originally stowed, and thereby sustained the damage complained of. That this witness was, by reason of his long experience as a stevedore, and his personal knowledge of the manner in which the goods in question were stowed, entirely competent to give evidence upon the general question as to whether such goods were stowed with reasonable care, does not admit of doubt; and that his testimony, in the absence of any evidence tending to contradict it, must be accepted as sufficient proof of the fact that there was proper stowage, is equally clear. The facts testified to by this witness on cross-examination, to the effect that, if the range boilers had been put in crates, or if several of them had been lashed together, so as to form one package, the injury sustained by them might have been avoided, is not sufficient to overthrow the evidence given by him on his direct examination to the effect that there was proper stowage. If the shipper desired the boilers to be packed in crates, it was his duty to deliver them in that condition; and the failure to lash several of the boilers together, even though it should be conceded they would thus have been made more secure, does not necessarily show the absence of reasonable care in the manner in which they were actually stowed. It does not show that any usual precautions were omitted, or that the cargo was not stowed in the customary manner, and according to the best judgment of the mate and of the stevedore, both of whom had experience in the loading of ships. Under the contract in this case the carrier was only required to exercise reasonable and customary skill in stowing the cargo, as contradistinguished from unusual or extraordinary care; and the fact that a portion of the cargo got "adrift," and was damaged, while the ship was laboring and straining during a heavy gale, is not sufficient to show improper stowage, as against the positive testimony of a competent witness that the cargo was stowed with reasonable or customary care; and upon this point I quote, as expressive of my own views, the following from the opinion of Morris, J., in the case of *The George Heaton*, 20 Fed. 326:

"It cannot be predicted with any reasonable certainty just what character of straining a cargo stowed in the customary and proper manner will withstand. As is the case with seaworthy wooden vessels, which sometimes spring a leak in a rough cross sea, when they have stood the strain of most violent gales, I think it may be quite possible that one cargo, stowed with all reasonable and customary caution, may get adrift, when another, stowed with like precaution, will come safely through the stress of the same storm. All that can be demanded of the shipowner is reasonable and customary skill; and where

it is shown that the injury was sustained during a severe stress of weather, and was the result of it, and there is also affirmative proof of the proper care in stowage, the shipper must sustain the onus of showing by affirmative proof that by proper attention the damage might have been avoided."

The evidence in this case being sufficient to show proper stowage, and there being no claim that the carrier was negligent in any other respect, the claimants are entitled to a decree dismissing the libel and for their costs. Let such decree be entered.

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### VILLAGE OF OQUAWKA v. GRAVES.

(Circuit Court of Appeals, Seventh Circuit. October 7, 1897.)

No. 338.

1. MUNICIPAL CORPORATIONS—REFUNDING BONDS.

Under the Illinois act of February 13, 1865, authorizing "counties or cities," under certain circumstances, to issue new bonds to satisfy or to take up prior indebtedness, the cities referred to are those already incorporated as such when the act took effect; and it does not cover towns or villages, though afterwards incorporated as cities.

2. SAME.

No power exists as of course in a municipal corporation to issue renewal or refunding negotiable bonds merely because the corporation is indebted.

In Error to the Circuit Court of the United States for the Southern Division of the Northern District of Illinois.

This was an action at law by Luther R. Graves against the village of Oquawka to recover the principal and interest of certain refunding bonds issued by the city. In the circuit court a judgment was entered for plaintiff, and the defendant has brought the case to this court on writ of error.

L. M. Kirkpatrick and Raus Cooper, for plaintiff in error.

O. J. Bailey and James W. Sedwick, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

SHOWALTER, Circuit Judge. Plaintiff in error seeks the reversal of a judgment rendered against it and in favor of defendant in error on April 23, 1896, for \$25,534.55, the aggregate of principal and interest thereon from July 1, 1891, of certain bonds made by the city of Oquawka. The declaration filed October 6, 1893, contained one special count on all the bonds and the common counts; but with the declaration was a notice in the words following:

"Notice: The defendant is hereby notified that the sole causes of the action herein sued on, and of which evidence will be offered, are the twenty-three bonds mentioned in the special count, and that they are fac similis of each other except the amounts and bond numbers, the amounts and bond numbers being as in said special count specified."

There was also filed with the declaration a copy of one of the bonds in words following:

"No. 1.

\$1,000.

"United States of America.

"State of Illinois.

"City of Oquawka.

"Twenty-Year Six per Cent. Bond.

"Issued under an act of the general assembly of the state of Illinois, entitled 'An act relative to county and city debts, and to provide for payment thereof by taxation in such counties and cities,' approved February 13, 1865.

"The city of Oquawka, in the state of Illinois, twenty years after date, will pay the bearer hereof one thousand dollars (\$1,000) and six per cent. per annum thereon, payable annually on the first day of July in each year at the agency of the treasurer of the state of Illinois, in the city of New York, on presentation and surrender of the annexed coupons as they severally become due.

"In pursuance of said act, the mayor of said city of Oquawka has hereto set his hand, and caused the seal of said city to be hereto affixed, and this bond to be countersigned by the clerk of said city of Oquawka, Illinois, this first day of July, A. D. 1871.

"City of Oquawka.

S. S. Phelps,

Mayor.

"[Seal.]

E. H. N. Patterson,  
City Clerk."

"A. D. 18—.

On written stipulation, the cause was heard without a jury, and a finding was made in words following:

"(1) Prior to 1871 the defendant was organized as a town, under and by virtue of the laws of the state of Illinois, and contracted a bonded indebtedness of some \$60,000.

"(2) That in the fall of 1870 the Merchants' National Bank of St. Louis, holding a portion of said bonds, brought suit against the town upon said bonds held by it.

"(3) In January, 1871, the president and board of trustees of said town were authorized to negotiate a settlement of the bonded indebtedness of the town held by the Merchants' National Bank of St. Louis, on the basis of fifty cents on the dollar. In pursuance of this authority, on or about the 30th of January, 1871, an agreement was entered into between said bank and the agent of the town, to the effect that the town would refund the indebtedness by issuing and delivering to the bank the bonds of said town, 'or of the corporation, if it is thought best that said town should become a city to give validity and value to said bonds,' at the rate of fifty cents on the dollar; such bonds to run for twenty years, with coupons attached for the annual interest at 6 per cent. per annum, the whole to bear date July 1, 1871.

"(4) That on the 30th day of January, 1871, at a meeting of the president and board of trustees of said town, said agreement was ratified and spread upon the records of the town, and at the same meeting an election was ordered to be held on the 21st day of February, 1871, to vote for or against city organization.

"(5) The general laws then in force of the state of Illinois authorized towns having a population of 1,500 inhabitants to incorporate as cities upon an affirmative vote of a majority of its inhabitants at an election to be held therefor.

"(6) That on the 21st day of February, 1871, at a meeting of the president and board of trustees of said town, the election returns were duly canvassed, and the election was declared to have been carried in favor of city organization, and that such city organization composed the same territorial limits as the town of Oquawka.

"(7) That no census or computation of the inhabitants of the town was had, made, or attempted after the taking of the census under the laws of the United States in 1870, and prior to the election to incorporate as a city, and that the census of the United States of 1870, completed September 10th of that year, showed the population to be 1,371.

"(8) After said election, ordinances were passed dividing the city into wards, providing for the election of aldermen, mayor, and other city officers;

and on the 14th day of March, 1871, an election for mayor and aldermen was held, and said officers elected.

"(9) At a meeting of the city council held on May 17, 1871, the mayor and city clerk were instructed to issue to the holders of bonds of the town of Oquawka, at the rate of fifty cents on each dollar of such bonds, bonds of the city of Oquawka, to be dated July 1, 1871, due twenty years after date, bearing interest at the rate of six per cent. per annum, payable annually on the first day of July in each year, said bonds to show upon their face that they were issued under an act of the general assembly of the state of Illinois, entitled 'An act relating to county and city debts, and to provide for the payment thereof by taxation in counties and cities,' approved February 13, 1865; said bonds and coupons to be signed by the mayor and city clerk, and the bonds to bear the seal of said city, and have printed upon the back thereof the act of the general assembly above referred to. The mayor was also instructed to take up the bonds of the town of Oquawka to the amount of \$23,000, held by the Merchants' National Bank of St. Louis, and exchange in lieu thereof bonds of the city of Oquawka in conformity with an existing contract between the town of Oquawka and said bank.

"(10) This action was brought by the plaintiff upon twenty-three bonds of said city of Oquawka, as above stated, and purchased by the plaintiff for value before maturity, which said bonds were signed by the mayor and city clerk of said city of Oquawka, with the seal of the city attached, and had printed on their face that they were issued under an act of the general assembly of the state of Illinois, entitled 'An act relative to county and city debts, and to provide for the payment thereof by taxation in such counties and cities,' approved February 13, 1865, and that said act is also printed upon the backs of said bonds. Said bonds are dated July 1, 1871, payable twenty years thereafter, with interest at the rate of six per cent. per annum, payable annually on the first day of July in each year. Said bonds were duly registered in the auditor's office of the state of Illinois.

"(11) Said city of Oquawka duly performed all the functions of a city, passed ordinances for its government, collected taxes for the payment of interest on said bonds and for other purposes, and paid said interest as it became due, without any protest, until August, 1880, when said city was organized as a village under the general laws of the state of Illinois then in force. Said village comprised the same territorial limits as the said city. Said village continued to collect taxes, and paid the interest on said bonds, up to and until the maturity of said bonds, July 1, 1891, without any protest. At the maturity of the bonds, it refused to pay the principal.

"(12) Bonds of the plaintiff, numbered, respectively, 1, 2, 3, 4, 5, 6, 15, 16, 17, 18, 19, 20, 21, 22, and 24, were delivered by the city of Oquawka to the Merchants' National Bank of St. Louis, in settlement of indebtedness due it; and bonds numbered, respectively, 25, 26, 27, 28, 29, 30, 32, and 33, were delivered to various other parties by said city in settlement of indebtedness due them."

On February 13, 1865, there was enacted by the Illinois legislature an act entitled "An act relative to county and city debts, and to provide for the payment thereof by taxation in such counties and cities." The first section was as follows:

"Section 1. Be it enacted by the people of the state of Illinois, represented in the general assembly, that in all cases where counties or cities have heretofore, under any law of this state, issued bonds or securities for money on account of any subscription to the capital stock of any railroad company, or on account of, or in aid of any public improvement, and the same remain outstanding, or any debt arising thereout remains unpaid, the board of supervisors or county court of such county, and the city council or municipal authority of such city, as the case may be, having issued such bonds or securities, may, upon due surrender of any such bonds or securities, or cancellation of such debt, issue in place thereof to the holder or owner, new bonds, in such form, for such amount, upon such time, and drawing such interest as may be agreed upon with the holder or owner; provided, such new bonds shall not be for a greater sum than the principal and accrued or earned interest unpaid of

the bonds or debts in place of which they shall be given, nor bear a greater rate of interest than six per cent. per annum, payable on the first day of July in each year; and such bonds shall show on their face that they are issued under this act, and, if so agreed, may provide for payment of five per cent. of the principal thereof, annually, until fully paid."

Sections 2 to 8, inclusive, concerned the registration of such new bonds, and the method of taxation and procedure for the payment of the interest, and eventually the principal. Section 9 was in words following:

"Sec. 9. If it shall be deemed advisable, any such county or city may issue such new bonds for the purpose alone of satisfying or taking up their respective bonds or debts."

On March 26, 1872, the Illinois legislature enacted another statute, entitled "An act to enable counties, cities, townships, school districts and other municipal corporations to take up and cancel outstanding bonds and other evidences of indebtedness and fund the same." Section 1 of this act read:

"That in all cases where any county, city, township, school-district or other municipal corporation has issued bonds or other evidences of indebtedness for money on account of any subscription to the capital stock of any railroad company, or on account of, or in aid of any public improvement, or for any other purposes which are now binding or subsisting legal obligations against any such county, city, township, school-district, or other municipal corporation and remaining outstanding and which were properly authorized by law, the proper authorities of any such county, city, township, school-district or other municipal corporation may upon the surrender of any such bonds, or other evidences of indebtedness, or any number thereof, issue in place or in lieu thereof to the holders or owners of the same, new bonds or other evidences of indebtedness," etc.

The emergency clause of this act declared that:

"Whereas some counties, cities, townships and other municipal corporations in this state have outstanding bond and other evidences of indebtedness that will soon fall due and are without any remedy for renewing or funding the same, therefore this act shall be in full force from and after its passage."

The act of 1872 was amended April 14, 1875. Section 1 was made to commence, "That in all cases where any county, city, town, township, school districts or other municipal corporations," etc.; going on as in the original section 1, but putting in limitations as to interest and upon the increase of the aggregate indebtedness.

These statutes are discussed by the supreme court of Illinois in the case of *People v. Lippincott*, 81 Ill. 194. That case was a mandamus proceeding to compel the auditor of public accounts to register a certain new bond issued by Macoupin county, in lieu of a prior indebtedness incurred before March 26, 1872, and after February 13, 1865. It was insisted that the auditor was bound to so register this bond by force of the act of 1865; but the supreme court held that the act of 1865 was limited in its application to debts which had been created prior to February 13, 1865. The court said in the course of the opinion: "The act of 1865, with its provision for registration, etc., applies to only a comparatively small class of bonds,—those issued by counties and cities prior to February 13, 1865." By reference to the terms of section 1 of the act of 1865, it will be seen that

that act concerns only certain cities, namely, those which had already been incorporated as such when that act took effect. The point can hardly admit of discussion. The debt of a town or village was not within the terms of that act. Moreover, this is plainly the understanding of the courts and of the legislature of Illinois, as will appear from the case last referred to. The words of section 9, "any such county or city," cannot mean any such county or any city. The word "such" identifies the municipal corporation, whether county or city, as described in section 1. The city of Oquawka was not in existence until 1871. The act of February 13, 1865, was not authority, therefore, for issuing the bonds here sued on. *Ogden v. Glidden*, 9 Wis. 50; *U. S. v. Gooding*, 12 Wheat. 476; *Kelley v. Milan*, 127 U. S. 139, 8 Sup. Ct. 1101. It may be questionable whether under Illinois law there be any distinction between a town and a village, but certainly a town or village in Illinois is not a city. See *Welch v. Post*, 99 Ill. 471, and *Enfield v. Jordan*, 119 U. S. 680, 7 Sup. Ct. 358. Apart from the act of 1865, there was no statute of Illinois, so far as indicated to this court, which authorized, expressly or by necessary implication, negotiable bonds—that is to say, bonds intended to pass as commercial paper from hand to hand on the market, such as those here sued on—to be issued by the city of Oquawka in place of evidences of indebtedness previously existing. Nor does the power to issue renewal or refunding negotiable bonds exist as of course, and merely because a municipal corporation is indebted.

In *Merrill v. Monticello*, 138 U. S. 673, 11 Sup. Ct. 441, the town of Monticello, in 1869, had made a valid issue of bonds which were sold upon the market. In 1878, when this issue of bonds was about to mature, the authorities of the town, in order to obtain money for payment of the same, made another issue of bonds payable in 10 years. In a suit by a purchaser and holder of these latter bonds they were held illegal and void. Mr. Justice Lamar said:

"The town had no power to pay off these bonds in this way, namely, by the issue of new bonds, or it could perpetuate a debt forever. \* \* \* When bonds are once issued for a lawful purpose, the town is *functus officio* as to that matter. To argue that the old bonds are a debt for school purposes, which may be liquidated by new bonds, is a refinement of construction which the sound sense of the law rejects."

In the case of *Brenham v. Bank*, 144 U. S. 173, 12 Sup. Ct. 559, the charter of the city of Brenham provided that "the said council shall have the power and authority to borrow for general purposes not exceeding fifteen thousand dollars on the credit of said city"; also, that the "bonds of the corporation of the city of Brenham shall not be subject to tax under this act." The supreme court of the United States ruled that negotiable bonds issued and sold by the city of Brenham for cash were invalid and void, as being in excess of any power or authority vested in the corporation; that even the express power to borrow money did not authorize the issue of bonds to circulate as commercial paper.

In *County of Hardin v. McFarlan*, 82 Ill. 139, the supreme court of Illinois ruled that certain bonds issued in 1869, in consideration of the surrender of certain evidences of indebtedness in the shape of

county orders, were void, there being at the time no legislative authority for the issue of the bonds. In that case the supreme court said:

"To enable counties to fund their indebtedness, the legislature passed an act approved April 14, 1875. The question and policy is left by that act to a vote of the majority of the legal voters of the county. The implication would be that prior to the passage of this law counties had not the power exercised in this case."

In the case at bar it appears that there was a "bonded indebtedness of some \$60,000" against the town of Oquawka. This indebtedness was to be taken up and canceled at the rate of 50 cents on the dollar in part by the bonds here sued on. If there were no authority in the municipal corporation to issue bonds such as those here sued on, we do not see how the mere measure of convenience or advantage to the town can help the matter. The supreme court of Illinois in the case last cited said:

"It is not a question of advantage which the taxpayers may derive from the exercise of the power claimed, but it is a question of the right to exercise the power."

In *Merrill v. Monticello* and in *Brenham v. Bank* the municipal corporation itself sold upon the market, and received cash for the bonds sued on. It does not appear, however, that it would have made any difference if the city had received some other consideration, as the cancellation, for instance, of a prior indebtedness. The point against the municipal authority to issue such bonds is that they have the qualities of negotiable paper. They are not mere evidences of indebtedness, and nothing more. *Police Jury v. Britton*, 15 Wall. 566.

It is strongly insisted by counsel for plaintiff in error that the city of Oquawka was not lawfully incorporated, and that such illegality may be here asserted against the validity of the bonds. Possibly, *Shapleigh v. City of San Angelo*, 167 U. S. 646, 17 Sup. Ct. 957, is against this contention. At all events, and for reasons before given, the judgment is reversed, and the cause remanded, with the direction that judgment for plaintiff in error be entered in the circuit court.

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SOCIETY FOR SAVINGS v. BOARD OF COM'RS OF PRATT COUNTY.  
 AETNA LIFE INS. CO. v. BOARD OF COM'RS OF SEWARD COUNTY.  
 SAME v. BOARD OF COM'RS OF MEADE COUNTY. NATIONAL LIFE  
 INS. CO. v. BOARD OF COM'RS OF HASKELL COUNTY.

(Circuit Court, D. Kansas, S. D. September 13, 1897.)

Nos. 624, 629, 626, and 668.

**COUNTIES—REFUNDING INDEBTEDNESS—COUNTY WARRANTS.**

Under the Kansas statute authorizing counties to refund all matured and maturing indebtedness, counties have authority to refund county warrants, as well as other indebtedness, without referring the matter to a vote of the people. *Howard v. Kiowa Co.*, 73 Fed. 406, applied.

These were four suits, brought, respectively, against the defendant counties, upon past-due coupons cut from refunding bonds issued by said counties.



J. T. Herrick and Rossington, Smith & Dallas, for plaintiff Society for Savings.

Bentley & Hatfield, for plaintiff Aetna Life Ins. Co.

Bentley & Hatfield and J. T. Herrick, for plaintiff National Life Ins. Co.

S. S. Ashbaugh, for defendants Board of Com'rs of Pratt Co., Board of Com'rs of Meade Co., Board of Com'rs of Seward Co., and Board of Com'rs of Haskell Co.

WILLIAMS, District Judge. These are all actions at law, and are upon past-due coupons detached from bonds issued by the various counties sued upon, and the bonds from which the coupons are detached are all of the class denominated "refunding bonds," issued by the various counties. The court is constrained to say that all the questions in these cases have been passed upon by this court, and by the circuit court of appeals of this district; and I know of nothing that I can say that will add anything to or detract from the decision by this court of the case of *Howard v. Kiowa Co.*, 73 Fed. 406, in which every phase of the law as applicable to the refunding bonds issued by counties in the state of Kansas was passed upon, and not only by this court, but by the circuit court of appeals of this district. So, with all due deference to the very learned counsel who have made a vigorous, able, and lawyer-like defense in these cases, I am of the opinion that there is but one question in all the cases that has not been clearly passed upon, and that is the question solely as to whether counties, under the laws of the state of Kansas, have the right to refund the warrants of the county that had been previously issued, without referring the proposition to refund them to a vote of the people. The language of the statute is that they have the right to refund all matured and maturing indebtedness, and the question raised by the learned counsel for the defense is that county scrip is not the kind of indebtedness referred to in this act. I fail to see any difference between an indebtedness of the county, passed upon by the board of county commissioners, or the proper officers to pass upon any claim against the county, as evidenced by the solemn issuance of a writing signed by the proper officers, to which is affixed the seal of the county, and which calls upon the treasurer of the county to pay at sight to the bearer a certain amount of money, and a bond of the county executed by the same officers. As has been said very aptly by counsel for one of the plaintiffs in these cases, they are both evidences of indebtedness; and I fail to see any logic or reasoning that places one evidence of indebtedness in any different attitude or condition or light from the other. In fact, I think that this question has been well settled by the courts heretofore. In the case heretofore referred to (*Howard v. Kiowa Co.*), the court used this language:

"And the funding of warrants is often essential to the prosperity of the county. They become so numerous that they are greatly depreciated in value. Everything furnished to the county is upon the basis of the actual value of the warrants, necessitating the creation of a large debt for the purchase of trifling commodities. Under these circumstances, the only salvation lies in funding a portion of them, so that the remainder may gain something like their face

value, and the business of the county may no longer be transacted upon the basis of a ruinous discount."

I can add nothing to this language to convey the idea that the laws of the state of Kansas permitting county commissioners to refund the indebtedness of the counties authorizes the refunding of warrants, as has been done in these cases. This being the case, the court is content to let the matter, so far as it is concerned, rest on the adjudications it has heretofore made in like cases. There should be a verdict and judgment in all the cases for the plaintiffs.

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LANNING v. OSBORNE et al.

(Circuit Court, S. D. California. July 22, 1897.)

No. 671.

**WATER SUPPLY IN CALIFORNIA—CONTRACTS RELATING TO FURNISHING WATER—AMENDMENT OF ACT.**

The amendment of March 2, 1897, of Acts Cal. March 12, 1885, prescribing the manner of fixing water rates, by inserting therein a new section, which provides that nothing contained in the act shall be construed to prohibit or invalidate any contract relating to the sale, rental, or distribution of water, or to the sale or rental of easements or servitudes of the right to the flow and use of water, nor to prohibit or interfere with the vesting of rights under such contracts, does not give validity to any such contracts which in the absence of such amendment would be void.

Works & Works, for complainant.

Haines & Ward, C. H. Rippey, and J. S. Chapman, for defendants.

ROSS, Circuit Judge. This cause has been under consideration on two previous occasions. 76 Fed. 319; 79 Fed. 657. In considering the exceptions to the original answer the court held, among other things, that "as the water in question, from the moment the appropriation became effective, became charged with a public use, it was not in the power of either the corporation making the appropriation, or of the consumers, to make any contract or representation that would at all take away or abridge the power of the state to fix and regulate the rates" at which it should be furnished; that the constitution of California conferred upon the legislature of the state the power, and made it its duty, to prescribe the manner in which such rates should be established; and that the legislature did that by an act approved March 12, 1885 (St. 1885, p. 95), entitled "An act to regulate and control the sale, rental, and distribution of appropriated water in the state other than in any city, city and county, or town therein and to secure the rights of way for the conveyance of such water to the places of use." Construing that act, this court said in *Lanning v. Osborne*, 76 Fed. 335:

"By the terms of this act of the legislature, the boards of supervisors of the several counties are given power, and it is made their duty, in the manner prescribed in the act, to fix the maximum rates at which any person, company, or corporation may sell, rent, or distribute water appropriated for the purpose. The circumstances under which such board is authorized and required to do that thing are prescribed by sections 3, 4, 5, and 6 of the act. The action of the board can only be invoked in the first instance by a petition

in writing of not less than 25 of the inhabitants who are taxpayers of the county. It may be that the number thus fixed by the statute is too large; that in some cases it may be difficult, in others impossible, to obtain 25 inhabitants, who are taxpayers of the county, to join in the petition asking the board to establish maximum rates. If so, it is a matter for the consideration of the legislature, with which the constitution has left it. By the statute, as enacted, when such a petition, so signed, has been presented, the board, upon giving the notice required, is empowered to examine witnesses; to send for persons, books, and accounts; to ascertain the value of the water system, and the reasonable expenses of its management and operation, including the cost of repairs, together with all other facts, circumstances, and conditions pertinent to the question; and, after such investigation and consideration, to fix and establish the maximum rates at which the water shall be sold, rented, or distributed to the inhabitants of the county outside of any city, town, or other municipality; the board being empowered to establish different rates for water furnished for the different uses, such as mining, irrigation, mechanical, manufacturing, and domestic, but being required to make them equal and uniform as to each class, and being further required to 'so adjust them that the net annual receipts and profits thereof to said persons, associations, and corporations so furnishing such water to such inhabitants shall be not less than six nor more than eighteen per cent. upon the said value of the canals, ditches, flumes, chutes, and all other property actually used and useful to the appropriation and furnishing of such water, of each of such persons, companies, associations, and corporations; but in estimating such net receipts and profits, the costs of any extensions, enlargement, or other permanent improvements of such water rights or waterworks shall not be included as part of the said expenses of management, repair, and operating of such works, but when accomplished may and shall be included in the present cost and cash value of such work.' By section 6 of the act it is provided that at any time after the rates have been once established by the board of supervisors the same may be established anew, or abrogated in whole or in part, by such board, to take effect one year next after such first establishment, upon either the written petition of 25 inhabitants who are taxpayers of the county, or 'upon the written petition of any persons, companies, associations, or corporations the rates and compensations of whose appropriated waters have already been fixed and regulated and are still subject to such regulation by any of the boards of supervisors of this state, as in this act provided.' Not until after the rates have been once established upon the petition of 25 of the inhabitants who are taxpayers of the county is the person, company, or corporation furnishing the water authorized to make any application to the board. Then, and then only, such person, company, or corporation may apply to have the rates established anew, or abrogated in whole or in part. Since, to make good the appropriation, it is essential that the water be applied to some beneficial use, these provisions of the statute of themselves necessarily presuppose that, until the action of the board of supervisors is called into play, the parties furnishing the water must designate the rates. It cannot be furnished for nothing. The law does not exact that, nor has any consumer the right to expect it. The statute evidently proceeds upon the theory that the rates charged by the person, company, or corporation may be satisfactory to the consumers, in which event there would be no occasion for the intervention of the board of supervisors. But, to protect the consumers in the event such charges should be unsatisfactory, they, and they only, are given the right to first invoke the intervention and action of the board. Until that time the rates established and collected by the person, company, or corporation furnishing the water prevail. This, it seems to me, would be the true and obvious construction of the statute if it had not so declared in terms. But the statute itself does so declare in terms, and in these words: 'Until such rates shall be so established [namely, those first established by the board], or after they shall have been abrogated by such board of supervisors as in this act provided, the actual rates established and collected by each of the persons, companies, associations, and corporations now furnishing or that shall hereafter furnish appropriated waters for such rental or distribution to the inhabitants of any of the counties of this state shall be deemed and accepted as the legal rates thereof.' Act Cal. March 12, 1885, § 5."

These views were adhered to by the court on consideration of the exceptions to the amended answer. 79 Fed. 663. After the decision of the court sustaining the exceptions to the original answer, and pending the submission of the exceptions to the amended answer, to wit, March 2, 1897, the legislature of the state of California amended the act of March 12, 1885, by inserting a new section therein, numbered 114, and which is in these words:

"Nothing in this act contained shall be construed to prohibit or invalidate any contract already made, or which shall hereafter be made, by or with any of the persons, companies, associations, or corporations described in section two of this act, relating to the sale, rental, or distribution of water, or to the sale or rental of easements and servitudes of the right to the flow and use of water; nor to prohibit or interfere with the vesting of rights under any such contract."

To enable the respective parties to be heard upon the question as to what extent, if at all, this amendment affects the rights of the parties to the suit, the cause was restored to the calendar, and upon that question they have been fully heard. The amendment of March 2, 1897, has not been construed by the supreme court of the state, so far as I am advised. Whatever the reason for its enactment, or its real design, it is very certain that this court has not the power to add to its language, nor the right, by construction, to import into its provisions a meaning not in consonance with the provisions of the constitution of the state. The amendment does not purport to provide any manner of fixing water rates, nor does it purport to make valid any contracts otherwise invalid. In *People v. Stephens*, 62 Cal. 209, the supreme court of California, in speaking of sections 1 and 2 of article 14 of the state constitution, said:

"By section 1 of article 14 the use of all water heretofore or hereafter appropriated for sale, rental, or distribution is expressly declared to be a public use. It is not left to the legislature, as formerly, to say whether it shall be a public use or not, but the constitution itself declares it to be such, and then makes the use subject to the regulation and control of the state (that is to say, of the legislature), in the manner to be prescribed by law, to wit, by statute law, subject, however, to certain enumerated provisions contained in the constitution itself; among them, to provisions in respect to the rates or compensation to be collected by any person, company, or corporation, for the use of water supplied to any city and county, or city, or town, or the inhabitants thereof. Such rates or compensation the constitution expressly declares shall be fixed in a certain specified manner, at a certain time, and by a certain body; and the body failing to do so is expressly made 'subject to peremptory process to compel action, at the suit of any party interested, and liable to such further processes and penalties as the legislature may prescribe.' But by the next section of the same article of the constitution the right to collect the rates or compensation so established is declared to be a franchise, 'and can not be exercised except by authority and in the manner prescribed by law,'—that is, by statute law. But, of course, the constitution contemplated the enacting by the legislature, where they did not exist, of all laws necessary to give effect to its commands, and that none should be passed in contravention of its provisions. When, therefore, the constitution fixed the manner of establishing the rates or compensation to be charged for water furnished to any city and county, or city, or town, or the inhabitants thereof, and further declared that the right to collect the rates or compensation so established is a franchise, and cannot be exercised except by authority of, and in the manner prescribed by, law, it was the duty of the legislature, if they did not exist, to provide the needful laws. But the failure of the legislature to do so, if failure there was, could not prevent the establishment of the rates or compensation specifically required to be established by the constitution."

If the contracts set up in the amended answer of the defendants were void in the absence of the statutory amendment of March 2, 1897, it is manifest that that amendment did not give validity to them. As already said, the amendment does not even purport to make valid any contract otherwise invalid, nor does it purport to provide any manner of fixing water rates. The invalidity of any and all contracts for the furnishing of water appropriated for sale, rental, or distribution under and by virtue of the constitution and laws of California, other than as prescribed by that constitution and those laws, is, in my opinion, clearly and sufficiently demonstrated in the opinions heretofore rendered in this cause, to which reference has been made. Exceptions to the amended answer sustained.

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**GARRARD v. SILVER PEAK MINES et al.**

(Circuit Court, D. Nevada. August 16, 1897.)

No. 617.

**1. PUBLIC LANDS—AUTHORITY TO ISSUE PATENT—COLLATERAL ATTACK IN ACTION AT LAW.**

A patent valid on its face may be collaterally attacked in an action at law, and shown to be void by extrinsic evidence which by its nature is capable of showing a want of authority to issue the patent or convey the title.

**2. SAME—PATENT FOR LAND RESERVED OR DEDICATED—OPEN TO CHALLENGE.**

Where by act of congress a tract of land has been reserved from entry, or dedicated to any special purpose, proceedings in the land department to procure title thereto in defiance of such reservation or dedication, though culminating in a patent, confer no title, and may be challenged in an action at law.

**3. SAME—GRANT TO STATE—SELECTION OF RESERVED LANDS—PATENT BY STATE.**

The selection of a tract of either mineral or occupied lands by the state of Nevada, under the grant to the state by the United States of 2,000,000 acres of unappropriated nonmineral lands, to be selected by the state, is void, and a patent issued by the state for such tract confers no title on the patentee.

**4. SAME—PATENT FOR MILL SITE—MISTAKE IN DESCRIPTION—RIGHTS OF PATENTEE.**

A patentee of a mill site, on which he had erected a quartz mill, and who continues to occupy the site, and makes other valuable improvements, but by reason of a mistake in the survey the description in the patent does not cover the land occupied, has at least an equitable title that will prevail against one who, with notice, attempts to acquire the legal title.

**5. SAME—DESCRIPTION IN CONVEYANCE—FIXED, VISIBLE MONUMENTS—STARTING POINT.**

In determining the location of premises by the description in a conveyance, a fixed, visible monument can never be rejected as false or mistaken, in favor of mere course and distance, as the starting point, when there is nothing else in the terms of the grant to control and override the fixed and visible call.

**6. SAME—LOCATION OF SALINE LAND—FAILURE TO RECORD SURVEY IN TIME.**

A location of saline land, and the recording of the survey in accordance with the provision of the statute, though not within the time specified, is valid and sufficient against one who attempts to acquire an adverse title more than 20 years after the field notes were recorded.

7. SAME—EXTENT OF CLAIM—EVIDENCE OF OCCUPANCY—SALINE AND MINERAL LANDS.

The actual possession of the entire tract claimed by occupancy under a mining or saline location need not be indicated by fence or other inclosure as in the case of agricultural lands, compliance with the statutes as to record and notice, and the actual occupancy of a part of the premises, being sufficient.

This is an action in ejectment to recover of and from the defendant the Silver Peak Mines the following lands, situate in Esmeralda county, Nev., to wit: "The north-east quarter of the north-east quarter of section twenty-two (22) in township two (2) south, range thirty-nine (39) east, Mt. Diablo base and meridian, containing forty acres."

The complaint, among other things, alleges that in and upon said lands were and are valuable mill tailings and slimes, containing gold, silver, and other metals; that defendants ever since June, 1895, have been, and now are, engaged in making excavations and openings in said land, and removing and converting to their own use large quantities of said tailings and deposits, containing gold and silver of the value of \$6,000, to the damage of plaintiff in said sum. The answer of the defendant Silver Peak Mines, after denying all the allegations of the complaint, except as to there being upon said land valuable tailings and slimes, containing gold and silver and other metals, alleges as a defense to said action: That in the year 1865 the predecessors in interest and grantors of this defendant, under and by virtue of an act of the legislature of the state of Nevada entitled "An act to provide for the location of lands containing salt," did locate and have surveyed under and by virtue of the possessory act of the said state a tract of land and mill site and water right in the Silver Peak and Red Mountain mining district, Esmeralda county, state of Nevada, described as follows: "Beginning at a post and mound situated about south, 60° west, 24 chains, from the Great Salt Basin mill, and runs thence, first, N., 19° 30' E., 45.71 chains, to a post and mound; thence, second, south, 70° and 30' E., 35 chains, to a post and mound; thence, third, south, 19° and 30' W., 45.71 chains, to a post and mound; thence, fourth, north, 70° and 30' W., 35 chains, to the place of beginning,—containing 160 acres." That said land was upon the unsurveyed and unappropriated public domain of the United States. That in the years 1865, 1866, and 1867 the grantors and predecessors in interest of defendant caused to be erected and constructed on said land a mill site and water right and quartz mill costing the sum of \$70,000. That, after the construction and completion of the said quartz mill, such steps were taken and acts done as required by the several acts of congress and the rules and regulations and instructions of the general land office and secretary of the interior in relation to the locating and patenting of mill sites. That on the 1st day of May, 1879, the government of the United States issued to the grantors and predecessors in interest of the defendant the Silver Peak Mines a patent for 4.97 acres as a mill site, upon which land the said quartz mill was then constructed. That since 1865 this defendant, and those from whom it has derived its title, has been, and now is, in the quiet, peaceable, and undisturbed possession of said 160 acres of land, and of the said patented ground. That since the year 1865 this defendant, through its predecessors in interest and grantors, has been, and now is, a bona fide settler and occupant of the land and premises described in plaintiff's complaint, and the whole thereof. That its grantors and itself have made valuable improvements thereon. That said settlement was made and improvements constructed long prior to any selection of said land or claim of ownership by the plaintiff or his grantor. That the plaintiff and his grantor were well aware at the date of the selection of the said land that this defendant and its grantors were, and had been for a great number of years, in the open, notorious, and exclusive possession of all of said land, claiming ownership of the same. That, prior to the time of the alleged selection and claim of ownership of the land and premises on the part of the plaintiff, there was regularly located upon said ground a mining claim known

as the "Manser Mining Claim," 1,500 feet in length by 600 feet in width, of which this defendant is in the quiet, peaceable and undisturbed possession, and is the owner thereof. That the said plaintiff and his grantor in the procuring of the said pretended title and claim of ownership well knew that the same was procured by fraud and false representations, which said fraud and misrepresentations consist of the following facts: "That the pretended title to the said land was procured by the plaintiff and one Alexander Morrison, his grantor, through and from the state of Nevada; and the said state of Nevada derived its right to receive applications for the sale of land within the territorial limits of said state under and by virtue of an act of congress donating lands to the several states and territories, and the several acts amendatory thereof and supplemental thereto, in which said acts of congress it is expressly provided that 'the lands hereby granted shall be selected by the state authorities of said state from any unappropriated, non-mineral, public land in said state, in quantities not less than the smallest legal subdivision'; but notwithstanding the said A. Garrard, the plaintiff, and the said Alexander Morrison, his grantor, well knew that this defendant, the Silver Peak Mines, was, and had been for a long time prior to the date of making the application to purchase the land described in the complaint, in the quiet, peaceable, and undisturbed occupancy of the said land, and every part thereof, and well knowing that this defendant, the Silver Peak Mines, and its grantors and predecessors in interest, had caused to be erected on said land valuable, prominent, and permanent improvements, at a cost of one hundred thousand dollars or thereabouts, and said plaintiff and his grantor well knowing that the said land was mineral in character, containing gold, silver, and other precious metals, and also salt and saline, and that the said land was not fit for grazing or agricultural purposes, notwithstanding that all of the above facts were within the personal knowledge of the plaintiff and his grantor, they and each of them falsely and fraudulently misrepresented and misstated the facts to the surveyor general and ex officio land register of the state of Nevada, and by such false and fraudulent acts and misrepresentations induced the said surveyor general, as ex officio land register of the state of Nevada, to believe that the said land was unoccupied and nonmineral in character, and he, the said surveyor general, as ex officio land register, so believing from the said statements as aforesaid, was induced to select the land described in the complaint as a part of the lands granted by the acts of congress, \* \* \* when in truth and in fact the said land was not of the class of land granted or included within the spirit or terms of the said act of congress, but, upon the contrary, were and are expressly excluded therefrom by reason of its being occupied, appropriated, and mineral, and not public, and was not open to selection by the said state of Nevada, and by reason of the said false and fraudulent misrepresentations as hereinbefore mentioned, and the selection of the said land by the state of Nevada, through its surveyor general, as ex officio land register, a fraud has been perpetrated against the government of the United States of America, and against this defendant, the Silver Peak Mines."

The case was tried before the court without a jury. The evidence on behalf of the defendant shows: That in 1865 the Great Salt Basin Mill & Mining Company located, under the possessory laws of the state, 160 acres of unsurveyed and unappropriated public land, including the 40-acre tract in controversy, and caused the same to be surveyed, and the boundaries thereof marked by posts and mounds, and the field notes of the survey, with the diagram of the location and survey, were recorded in the county recorder's office of Esmeralda county. That during that year Samuel B. Martin, John W. Harker, and Maj. Raymond constructed a 10-stamp quartz mill upon said land, which mill was then known as, and commonly called, the "Great Salt Basin Gold & Silver Mining Company's Quartz Mill." That in February, 1866, this mill was closed down, and the property was left in charge of the secretary of the company. That in the spring of 1866 the company dug a ditch around three sides of the 160-acre tract of land. That in the fall of that year Samuel B. Martin caused to be graded a foundation for a new quartz mill, and during the year 1867 was engaged building a mill which was completed in 1868, and the company commenced crushing ore, and continued working until the fall of 1870. This mill was known and designated as the "Silver Peak & Red Mountain Gold &

Silver Mining Company's Quartz Mill." That this mill is still on the same land, and is substantially in the same condition as it was at the time of completion. That some of the machinery has been replaced, and a building added thereto, to be used as a cyanide plant. That this land, including the new mill and other property, was conveyed by Samuel B. Martin and John W. Harker to the Silver Peak & Red Mountain Gold & Silver Mining Company in November, 1866, and a confirmatory deed executed in 1869. That in 1877 the Silver Peak & Red Mountain Gold & Silver Mining Company applied for a patent for a mill site. That on May 1, 1879, a patent was issued to it for said mill site, being mineral entry No. 184, designated by the surveyor general as lots Nos. 37A and 37B, embracing a portion of the unsurveyed public domain in the Silver Peak mining district, in the county of Esmeralda, described in the patent as follows: "Beginning for the description of that portion of the premises designated as lot No. 37B at a post marked 'No. 1, U. S. Survey No. 37, Lot B,' from which post No. 1 of U. S. survey No. 37, lot A, hereinbefore described, bears south, eighty-four (84) degrees west, at the distance of eighty-five hundred and fifty-eight (8,558) feet, the north corner of said company's mill on this claim bears south, two (2) degrees thirty (30) minutes west, at the distance of one hundred and sixty-five (165) feet, and the southeast corner of the stone office bears north, eight (8) degrees west, at the distance of four hundred and ninety (490) feet; thence from said corner No. 1 south, forty-five (45) degrees east, seven hundred and twenty-two (722) feet, to corner No. 2, a post marked, 'No. 2, U. S. survey No. 37B;' thence south, forty-five (45) degrees west, three hundred (300) feet, to corner No. 3, a post marked, 'No. 3, U. S. Survey No. 37B;' thence north, forty-five (45) degrees west, seven hundred and twenty-two (722) feet, to corner No. 4, a post marked, 'No. 4, U. S. Survey No. 37B;' thence north, forty-five (45) degrees east, three hundred (300) feet, to the place of beginning,—containing four (4) acres and ninety-seven hundredths ( $\frac{97}{100}$ ) of an acre of land, more or less." That the Silver Peak & Red Mountain Gold & Silver Mining Company afterwards became bankrupt, and proceedings in bankruptcy were thereafter instituted in the district court of the Southern district of New York, where said corporation was organized, and Andrew C. Armstrong was duly appointed assignee of the bankrupt's estate. That Armstrong, as such assignee, on June 13, 1877, conveyed the land in controversy in this action, with other property, to Charles E. Vail, who, with his wife, conveyed the same to the defendant herein January 8, 1878. That the property of the bankrupt corporation, including the land in question in this action, was also sold at sheriff's sale, under an execution issued out of this court in the suit of Blair v. The Silver Peak & Red Mountain Gold & Silver Mining Co., to John D. Vail, on February 5, 1878. That the said John D. Vail and his wife on September 13, 1879, conveyed the same, by deed, to the defendant herein. That this defendant has been ever since in the actual, quiet, peaceable, and undisturbed possession thereof, and it, and those through whom it claims and derives title, caused to be constructed on said land and premises prominent and permanent improvements, consisting of a 30-stamp quartz mill, concrete houses, assay office, blacksmith shop, store houses, buildings, and corrals, at an expense of \$50,000. That the 40-acre tract purchased by Morrison is not agricultural land. That over one-half thereof, and all that is covered with the tailings and slimes, is known to be saline land, and was so known at the time that Morrison made application to purchase the same. That in June, 1888, the Manser mining claim was located, and in June, 1889, conveyed to defendant, said claim being upon the land in question.

The act to provide for the location of lands containing salt, approved February 24, 1865, reads as follows:

"346. Section 1. Any person may locate, claim, and hold not exceeding one hundred and sixty acres of the public lands within this state containing salt or saline matter.

"347. Sec. 2. It shall be the duty of any person or persons locating salt lands to have the same surveyed by the county surveyor of the county in which said lands are located, within thirty days from the date of location; and the surveyor shall, within thirty days from the completion of said survey, make and deliver to the party employing him to make the survey, a correct description and plat of the lands thus surveyed, and the same shall be recorded in the office



of the county recorder of said county within thirty days from the delivery thereof by the surveyor.

"348. Sec. 3. All locations made prior to the passage of this act upon saline lands are hereby ratified and confirmed to the locators thereof, their heirs and assigns; provided, the parties now holding and occupying said lands shall, within sixty days from the passage of this act, have the same surveyed and recorded as provided in section two of this act." Gen. St. Nev. §§ 346-348.

The land in question is a part of the 2,000,000 acres of land granted by the act of congress to the state of Nevada in lieu of the sixteenth and thirty-sixth sections in said state, approved June 16, 1880 (21 Stat. 287). This act provides as follows:

"Sec. 2. The lands herein granted shall be selected by the state authorities of said state from any unappropriated, non-mineral, public land in said state in quantities not less than the smallest legal subdivision; and when selected in conformity with the terms of this act the same shall be duly certified to said state by the commissioner of the general land office and approved by the secretary of the interior.

"Sec. 3. The lands herein granted shall be disposed of under such laws, rules and regulations as may be prescribed by the legislature of the state of Nevada."

On March 12, 1885, the legislature of Nevada passed "An act to provide for the selection and sale of lands that have been or may hereafter be granted by the United States to the state of Nevada." Gen. St. 1885, p. 97. Section 14 of this act provides that "all lands selected under the two million acre grant of June 16, 1880, may be sold in tracts equal to one section to each applicant.

\* \* \* No lands shall be sold in tracts less than the smallest legal subdivision." On March 3, 1887, the legislature passed "An act to encourage mining" (St. 1887, p. 102), declaring that the grants of land by the United States to the state reserved mineral lands; that sales of such lands were made subject to such reservation; that citizens "may enter upon any mineral lands in this state notwithstanding the state's selection," and explore for mineral, and obtain title thereto under the laws of the United States, "notwithstanding such selection"; and that every contract, patent, or deed hereafter made by the state shall contain a provision "expressly reserving all mineral lands," etc. On March 5, 1887, the legislature passed "An act defining the rights of applicants for and contractors to purchase land from the state of Nevada and providing for maintaining certain actions concerning such lands" (St. 1887, p. 124), declaring that purchasers of land from the state shall be deemed to have the right to the exclusive possession thereof, "provided no actual adverse possession thereof existed in another at the date of the application"; that such purchaser "shall be entitled to maintain or defend any action at law or in equity concerning said land or its possession \* \* \* provided no actual adverse possession of such land existed in another at the date of such application."

The patent was issued to Morrison "according to the provisions of an act of the legislature approved March 12, 1885, entitled 'An act to provide for the selection and sale of lands that have been or may hereafter be granted by the United States to the state of Nevada' and the acts amendatory thereof and supplementary thereto"; and the land specified was granted subject to the proviso "that all mines of gold, silver, copper, lead, cinnabar, and other valuable minerals that may exist in said tract are hereby expressly reserved."

Reddy, Campbell & Metson, for plaintiff.

Rush Taggart, Clarence W. Mitchell, and M. A. Murphy, for defendants.

HAWLEY, District Judge (orally). 1. The plaintiff's title to the land described in the complaint rests upon the validity of the patent from the state of Nevada to Alexander Morrison, dated May 22, 1891, and the deed from Morrison to the plaintiff, executed June 29, 1891. The defendant introduced testimony tending to support the various allegations of its answer, which, if admissible, was

claimed to be sufficient to invalidate the plaintiff's patent, and entitle it to the judgment. This testimony was admitted for the consideration of the court, subject to the objections of plaintiff. The contention of plaintiff is that all the testimony which tended to invalidate the patent was inadmissible; that in an action at law a patent cannot be collaterally attacked. This general rule is well settled, but there are also certain exceptions to the general rule that are as well settled as the rule itself. The difficult question to determine is whether the case comes within the general rule, or belongs to the class of cases which are excepted from the rule. A vast number of authorities have been cited by the respective counsel, all of which have been carefully examined, as well as many others which shed more or less light upon this subject. There is a clear distinction between the two lines of cases, although it is not always easy to ascertain from the particular facts within which line the case falls. In *Doolan v. Carr*, 125 U. S. 618, 624, 8 Sup. Ct. 1231, the court, in discussing this question, said:

"There is no question as to the principle that where the officers of the government have issued a patent in due form of law, which on its face is sufficient to convey the title to the land described in it, such patent is to be treated as valid in actions at law, as distinguished from suits in equity, subject, however, at all times to the inquiry whether such officers had the lawful authority to make a conveyance of the title. But if those officers acted without authority, if the land which they purported to convey had never been within their control, or had been withdrawn from that control at the time they undertook to exercise such authority, then their act was void,—void for want of power in them to act on the subject-matter of the patent, not merely voidable, in which latter case, if the circumstances justified such a decree, a direct proceeding, with proper averments and evidence, would be required to establish that it was voidable, and should therefore be avoided. The distinction is a manifest one, although the circumstances that enter into it are not always easily defined. It is nevertheless a clear distinction, established by law, and it has been often asserted in this court, that even a patent from the government of the United States, issued with all the forms of law, may be shown to be void by extrinsic evidence, if it be such evidence as by its nature is capable of showing a want of authority for its issue. The decisions of this court on this subject are so full and decisive that a reference to a few of them is all that is necessary: *Polk v. Wendall*, 9 Cranch, 87; *New Orleans v. U. S.*, 10 Pet. 662, 730; *Wilcox v. Jackson*, 13 Pet. 498; *Stoddard v. Chambers*, 2 How. 284, 317; *Easton v. Salisbury*, 21 How. 426, 428; *Reichart v. Felps*, 6 Wall. 160; *Best v. Polk*, 18 Wall. 112, 117; *Leavenworth Railroad v. U. S.*, 92 U. S. 733; *Newhall v. Sanger*, 92 U. S. 761; *Sherman v. Bulck*, 93 U. S. 209; *Smelting Co. v. Kemp*, 104 U. S. 636; *Steel v. Refining Co.*, 106 U. S. 447, 1 Sup. Ct. 389; *Railway Co. v. Dunmeyer*, 113 U. S. 629, 642, 5 Sup. Ct. 566; *Reynolds v. Mining Co.*, 116 U. S. 687, 6 Sup. Ct. 601."

In *Burfenning v. Railroad Co.*, 163 U. S. 321, 323, 16 Sup. Ct. 1019, the court said:

"It has undoubtedly been affirmed over and over again that, in the administration of the public-land system of the United States, questions of fact are for the consideration and judgment of the land department, and that its judgment thereon is final. Whether, for instance, a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact not resting on record, dependent on oral testimony; and it cannot be doubted that the decision of the land department, one way or the other, in reference to these questions is conclusive, and not open to relitigation in the courts, except in those cases of fraud, etc., which permit any determination to be re-examined. *Johnson v. Towsley*, 13 Wall. 72; *Smelting Co. v. Kemp*, 104 U. S. 636; *Steel*

v. Refining Co., 106 U. S. 447, 1 Sup. Ct. 389; Wright v. Roseberry, 121 U. S. 488, 7 Sup. Ct. 985; Heath v. Wallace, 138 U. S. 573, 11 Sup. Ct. 380; McCormick v. Hayes, 159 U. S. 332, 16 Sup. Ct. 37. But it is also equally true that when by act of congress a tract of land has been reserved from homestead and pre-emption, or dedicated to any special purpose, proceedings in the land department in defiance of such reservation or dedication, although culminating in a patent, transfer no title, and may be challenged in an action at law. In other words, the action of the land department cannot override the expressed will of congress, or convey away public lands in disregard or defiance thereof. Smelting Co. v. Kemp, 104 U. S. 636, 646; Wright v. Roseberry, 121 U. S. 488, 519, 7 Sup. Ct. 985; Doolan v. Carr, 125 U. S. 618, 8 Sup. Ct. 1228; Davis' Adm'r v. Weibbold, 139 U. S. 507, 529, 11 Sup. Ct. 628; Knight v. Association, 142 U. S. 161, 12 Sup. Ct. 258."

These cases sufficiently indicate, in general terms, the line of distinction which should always be observed and followed by the courts; the question being always dependent upon the peculiar facts of each particular case. I have had occasion in numerous cases, under a great variety of facts, to consider the question in many of its different phases, and to make the application under the rules above stated. Heydenfeldt v. Mining Co., 10 Nev. 290, 308, affirmed 93 U. S. 634; Rose v. Mining Co., 17 Nev. 25, 64, 27 Pac. 1105, affirmed 114 U. S. 576, 581, 5 Sup. Ct. 1055; Whitney v. Taylor, 45 Fed. 616, affirmed 158 U. S. 85, 88, 15 Sup. Ct. 796; Lakin v. Dolly, 53 Fed. 333, 336, affirmed 4 C. C. A. 438, 54 Fed. 461.

2. Was the 40-acre tract selected by Morrison, at the time the selection was made, unappropriated, nonmineral, public land? If it were, the state had no authority, under the law, to issue a patent therefor. The evidence shows that prior to the selection of this land by Morrison the government of the United States had issued a patent to the defendant's grantors for 4.97 acres as a mill site; and the defendant, at the time of the selection of the 40-acre tract and the issuance of the patent to Morrison by the state, and at the time of plaintiff's purchase, was in the actual possession of the mill site, and had erected thereon a 30-stamp quartz mill, and made other valuable improvements thereon. These facts were well known by the plaintiff at the time he procured the deed from Morrison. He relies, however, upon a mistake in one of the courses described in the United States patent, which, literally followed, without reference to the buildings and monuments mentioned in the patent, would place the land for the mill site in section 15 instead of section 22; but, if you take the buildings and monuments referred to in the patent as found upon the ground, the land for the mill site described in the United States patent is in section 22, upon the land claimed by plaintiff. This is made absolutely clear by the testimony of Mr. L. F. J. Wrinkle, a surveyor called by the plaintiff, who, after describing certain surveys made by him, testified as follows:

"If you will allow me to explain, I will explain, to my mind, at least. The question was presented to me whether this mill site lies, according to the calls of the patent and other United States maps, in section 15 or section 22. Now, if you take the call of the patent in connection with the United States map alone, it will place it in section 15; but if you go upon the ground, and supplement the knowledge in the patent, or rather, substitute what you get in the patent by knowledge you acquire on the ground, it will place it in section 22."

The law is well settled that courses and distances must always yield to natural and well-defined and easily ascertained objects and monuments. The general principle is clearly expressed in Tyler, Ej. 569:

"What is most material and most certain in a description shall prevail over that which is less material and less certain. Thus, course and distance shall yield to natural and ascertained objects, as a river, a stream, a spring, or a marked tree. Indeed, it seems to be a universal rule that course and distance yield to natural, visible, and ascertained objects. *Newsom v. Pryor's Lessee*, 7 Wheat. 10; *Preston v. Bowmar*, 6 Wheat. 582; *Jackson v. Camp*, 1 Cow. 605; *Doe v. Thompson*, 5 Cow. 371; *Jackson v. Moore*, 6 Cow. 706. And a false or mistaken particular in a conveyance may be rejected when there are definite and certain particulars sufficient to locate the grant. But, *prima facie*, a fixed, visible monument can never be rejected as false or mistaken, in favor of mere course and distance, as the starting point, when there is nothing else in the terms of the grant to control and override the fixed and visible call. The general rule that courses and distances must yield to natural or artificial monuments or objects is upon the legal presumption that all grants and conveyances are made with reference to an actual view of the premises by the parties thereto. *Raynor v. Timerson*, 46 Barb. 518."

See, also, *Book v. Mining Co.*, 58 Fed. 106, 115; *Higueras v. U. S.*, 5 Wall. 827, 835; *Adair v. White*, 85 Cal. 313, 24 Pac. 663; *Anderson v. Richardson*, 92 Cal. 623, 28 Pac. 679; *Stoll v. Beecher*, 94 Cal. 1, 29 Pac. 327; *Kanne v. Otty*, 25 Or. 531, 36 Pac. 537; *Robinson v. Laurer*, 27 Or. 315, 40 Pac. 1012; *Greer v. Squire*, 9 Wash. 359, 37 Pac. 545; *Richwine v. Jones*, 140 Ind. 289, 39 N. E. 460; *McCullough v. Improvement Co.*, 48 N. J. Eq. 170, 21 Atl. 481; *Thompson v. Harris*, 40 Neb. 230, 58 N. W. 712; *Peterson v. Skjelver*, 43 Neb. 663, 666, 62 N. W. 43; *Pitman v. Nunnally* (Ky.) 32 S. W. 606.

The mistake in the present case was not of such a character as could be taken advantage of by the plaintiff or his grantor. There was no mistake in making the survey of the mill site. There was simply a clerical mistake made in the entry of the United States deputy mineral surveyor in his field notes as to one course,—84° west; but the north corner of the mill site, and the southeast corner of the stone office, and the place where post 1 of the survey is found and designated in the field notes and other reference in the patent, show very clearly what land was really included in the mill site, viz. the land upon which the company's mill was then situated, in section 22. In *Washington & I. R. Co. v. Cœur D'Alene Ry. & Nav. Co.*, 160 U. S. 77, 96, 16 Sup. Ct. 231, there was a controversy between two railroad companies over a right of way claimed by both companies. It appears that the Cœur D'Alene Company made a survey of three different lines as to the route of its road; that on the 9th day of November, 1886, ten days after the completion of the survey of the three lines, A, B, and C, the company filed in the United States land office a map and profile, which were, on December 3, 1886, approved by the secretary of the interior, and that on this map the line B, through the town of Wallace, in Idaho, was platted as the line of the said railroad; that in the fall of 1877 the company constructed its railroad upon line C, and across the land in controversy, but no amendment of the said map was made, nor was any approval of the secretary of the interior obtained to any map covering line C. After comment-

ing upon the facts as to the filing of the map of one route, and the building of the route and station on another, the court said:

"If the United States could not and do not complain, there is no foundation for the plaintiff company to do so, as it was found by the trial court that the platting of line B instead of line C was through a mistake, and that such mistake was not discovered until after the completion of the defendant's railroad and depot over and upon the ground in controversy, and that the filing of the plat showing line B was not done for the purpose of in any manner deceiving the plaintiff or any one else, and that the plaintiff was not in any manner misled or prejudiced by the filing of said plat, or by said mistake."

And at the close of the opinion the court said:

"When a court of law is construing an instrument, whether a public law or a private contract, it is legitimate, if two constructions are fairly possible, to adopt that one which equity would favor."

Admitting that the defendant's grantors are responsible for the acts of the surveyor, it cannot be claimed that they lost or forfeited any of their rights by a mistake which injured no other party. *Watson v. Robey*, 9 Cal. 52. The defendant has at least an equitable title, under its patent obtained from the United States, to the land and mill site in section 22, even if the land was misdescribed in the original application. This equitable title can be enforced as against any one who afterwards, with full knowledge of all the facts, obtained the legal title from the state. The holder of a legal title in bad faith must always yield to a superior equity. *Sensenderfer v. Kemp*, 83 Mo. 581; *Hedrick v. Beeler* (Mo. Sup.) 19 S. W. 492; *Widdicombe v. Childers*, 124 U. S. 400, 404, 8 Sup. Ct. 517. In the case last cited the defendants claimed title under one Smith, who applied at a public land office for the S. E.  $\frac{1}{4}$  section of land, but by a mistake the register described it as the S. W.  $\frac{1}{4}$ . Many years afterwards, *Widdicombe*, with knowledge of the mistake, obtained a patent from the United States for the S. E.  $\frac{1}{4}$  section. The court said:

"The mistake in this case does not appear to have been discovered by Smith, or those claiming under him, until after *Widdicombe* had got his patent, and after they had been in the undisputed enjoyment for thirty-five years and more of what they supposed was their own property, under a completed purchase, with the price fully paid. *Widdicombe*, being a purchaser with full knowledge of their rights, was in law a purchaser in bad faith; and, as their equities were superior to his, they were enforceable against him, even though he had secured a patent vesting the legal title in himself."

See, also, *Godkin v. Cohn*, 25 C. C. A. 557, 80 Fed. 458, 464.

Apply these principles to the facts of the case at bar. The company's mill mentioned in the patent was in section 22. There was no mill in section 15. When the entire description and references contained in the United States patent are considered, any person going upon the ground would at once discover where the land mentioned in the patent was, and that a mistake had been made in one of the courses given by the surveyor. This is as clear as the noonday sun when it shines, although it was obscured at the trial by the testimony of witnesses, by ingenious questions asked by counsel. The plaintiff, a surveyor by profession, knew it. He knew that the mill mentioned in the patent was in section 22, and was also aware that by literally following the field notes of the United States surveyor a sur-

vey could be made that would not include the mill. He sought, and now seeks, to take advantage of this mistake, and objects to the consideration of any and all testimony which tends to establish the truth, upon the ground that if the truth be ascertained, and effect given to it by the court, his title under the state patent will be invalidated. "My patent," he asserts, "cannot be collaterally attacked in an action at law." But why not? Is it not always permissible in any case at law or in equity to show that a patent upon which either party relies was issued without authority of law? In *Polk v. Wendall*, 9 Cranch, 87, 99, the court said:

"But there are some things so essential to the validity of the contract that the great principles of justice and of law would be violated, did there not exist some tribunal to which an injured party might appeal, and in which the means by which an elder title was acquired might be examined. \* \* \* But there are cases in which a grant is absolutely void, as where the state has no title to the thing granted, or where an officer had no authority to issue the grant. In such cases the validity of the grant is necessarily examinable at law."

In *Patterson v. Winn*, 11 Wheat. 380, 384, the court, after reviewing previous decisions, said:

"We may therefore assume, as the settled doctrine of this court, that if a patent is absolutely void upon its face, or the issuing thereof was without authority, or was prohibited by statute, or the state had no title, it may be impeached collaterally in a court of law, in an action of ejectment."

In *Rose v. Mining Co.*, *supra*, speaking for the supreme court of this state, I said:

"In cases where a patent is issued without authority of law, there is no necessity to resort to a court of equity to have it declared void. The question of its invalidity can be raised and determined in any proceeding either in law or equity. The authority of the court to declare the St. George and Victoria patents void, under the pleadings in this action, is too well settled to require discussion."

And in this case, upon the evidence introduced by the defendant, the same conclusion is reached as to plaintiff's patent. All the presumptions in favor of the patent are fully met and overcome by the proofs, which are, under the authorities, held to be admissible in actions at law as well as in suits in equity, as will more fully appear hereafter in the discussion as to the specific facts of this case. In the present case the plaintiff's patent is not absolutely void upon its face, but the testimony offered by defendant tends to show, and does show, that it was issued without authority, that it was prohibited by the statute of this state, and that the state had no title to the land conveyed. In all such cases the patent may be impeached collaterally in a court of law.

3. The 2,000,000-acre grant by the United States to the state of Nevada was not intended to include any mineral lands. *Hermocilla v. Hubbell*, 89 Cal. 5, 26 Pac. 611; *Heydenfeldt v. Mining Co.*, *supra*. It has been the universal policy of the general government to exclude such lands from its grants. Saline lands are mineral, and were therefore reserved from the grant to the state. In *re Eagle Salt Works*, *Copp's U. S. Mineral Lands*, 324; *Hall v. Litchfield*, Id. 321; *Morton v. Nebraska*, 21 Wall. 660, 667; *Milling Co. v. Clay (Ariz.)* 29 Pac. 9. The land upon which the slimes and tailings are

situated being salt or saline lands, it follows that the state acquired no title thereto, because such lands were exempted from the grant. The same principle applies to the ground included in the location of the Manser mine. The state authorities were to select the land granted "from any unappropriated, nonmineral, public land." They were not invested with the duty of passing upon the question of fact as to whether or not each particular section of land was nonmineral or unappropriated; nor was this duty imposed upon the commissioner of the general land office when he certified to the selection, or upon the secretary of the interior when he approved the same, to the same extent as in cases of applications made by individuals or corporations for a patent to agricultural or mineral lands, where specific proofs are required, and the land department is clothed with the power to hear and determine all questions as to the character of the land, the right of the applicant to apply for and receive the same, and the sufficiency of the proofs to show a compliance with the law entitling the applicant to a patent. All of these acts upon the part of the officers were subject to the reservations specified in the act itself. This is true of the grants made by the government to the railroad companies, and all other grants of similar character. In *Mining Co. v. Consolidated Min. Co.*, 102 U. S. 167, 174, the court, upon this subject, said:

"Taking into consideration what is well known to have been the hesitation and difficulty in the minds of congressmen in dealing with these mineral lands, the manner in which the question was suddenly forced upon them, the uniform reservation of them from survey, from sale, from pre-emption, and above all from grants, whether for railroads, public buildings, or other purposes, and looking to the fact that from all the grants made in this act they are reserved, one of which is for school purposes besides the sixteenth and thirty-sixth sections, we are forced to the conclusion that congress did not intend to depart from its uniform policy in this respect in the grant of those sections to the state. It follows from the finding of the court and the undisputed facts of the case that the land in controversy, being mineral land, and well known to be so when the surveys of it were made, did not pass to the state under the school-section grant."

In *Morton v. Nebraska*, *supra*, the court, after declaring that it had been the general policy of the government to reserve saline lands from its grants, and that the section of the act under consideration should be construed in conformity with this policy, said:

"The language of the section is imperative, and leaves no room for construction. Besides, why should an intention be imputed to congress to exclude actual settlers from saline lands, but leave them open to private entry by speculators? The legislation upon the subject of public lands has always favored the actual settlers, but the construction contended for would discriminate against them, and in favor of a class of people whose interests congress has never been swift to promote. \* \* \* It does not strengthen the case of the plaintiffs that they obtained certificates of entry, and that patents were subsequently issued on these certificates. It has been repeatedly decided by this court that patents for lands which have been previously granted, reserved from sale, or appropriated, are void. The executive officers had no authority to issue a patent for the lands in controversy, because they were not subject to entry, having been previously reserved, and this want of power may be proved by a defendant in an action at law."

In *Hermocilla v. Hubbell*, *supra*, which was an action of ejectment, the plaintiff claimed title under a patent from the state; the

state having acquired whatever right it had from a grant from the general government of sections 16 and 36 for school purposes. The defendants, after denying plaintiff's title, averred that they were the owners of certain mining ground situate on the land claimed by plaintiff. The court, after declaring that the title to mineral lands did not pass by the grant to the state, among other things, said:

"It is also claimed that the defendants were not in a position to attack the patent. But, as we have seen, the state had no title to the mineral land, and passed none to its patentee. The title still remained in the general government, and under its laws the land was open to occupation and purchase as mineral land. The defendants were in possession of their claims under locations which were made in accordance with the law and the local rules and customs. They were therefore in privity with the United States, and had a clear right to contest the patent and assert their rights."

If it could possibly be held that the title of the government to the mineral land passed to the state, it would not benefit the plaintiff; for it has always been the policy of this state, as expressed in the various acts to which reference has already been made, to exclude the mineral lands from sale. The state has no authority whatever to issue a patent for any mineral land. *Heydenfeldt v. Mining Co.*, supra.

4. There is still another branch of this case, which leads with equal certainty to the same conclusive results. Take the facts in relation to the 160 acres of land, the improvements made thereon, the change of title, the possession of the parties, and the actual occupancy of the land by the defendant under a claim of title, and we are forced to the conclusion that the land in controversy was at the time of its selection by Morrison and the issuance to him of the patent by the state, and of the purchase by plaintiff, in the actual, adverse possession of another, which, under the provisions contained in sections 1 and 2 of the act approved March 5, 1887, is of itself sufficient to prevent the plaintiff from maintaining this action. In this connection it must be remembered that the selection of the land is made by the applicant at his own peril, and he cannot shield himself from his own error or fault by showing that his selection was approved by the proper state officers. It must also be borne in mind that neither the plaintiff nor his grantor was ever in the possession of any part or portion of the land. He has no title, interest, claim, or right to the land, or to the possession thereof, except such as is derived from and through the patent from the state. He must recover, if at all, upon the strength of his own patent, and cannot rely upon the weakness of his adversary's title. The legislature of this state, guided by the sound policy so long adopted and universally followed by the general government, and, in the exercise of its own wisdom and good faith to the citizens of this state, early had in view the local conditions with reference to the unsurveyed lands, and the difficulties under which the early settlers were prevented from acquiring any title, either from the state or national government, and the lapse of time that might occur before such titles could be obtained, fostered, encouraged, and protected, so far as state legislation could, the possessory rights of individuals upon lands ceded or granted to the state by the general



government, and all other public, unappropriated, and unsurveyed lands. It will be noticed that in all the acts found in the statutes of this state with reference to such lands, or the sale thereof, great care has been manifested by inserting provisions so as to guard and protect the possessory rights acquired either prior or subsequent to the survey or sale of the land. This court is not called upon to answer all of the various objections urged by plaintiff's counsel, as to whether all the various deeds and other documents by which the title of the Great Salt Basin Gold & Silver Mining Company and of the Silver Peak & Red Mountain Gold & Silver Mining Company passed to the defendant. The question, and the only question, that need be discussed upon this branch of the case, is whether or not at the time Morrison made his application to purchase the 40-acre tract the land was in the actual, adverse possession of another. It is argued that the Great Basin Company did not regularly locate the land. It is enough to say upon this point that it followed and complied with the provisions of the statute. Next, it is contended that the field notes of the surveyor were not recorded within the time mentioned in the act. True; but is this a matter of which plaintiff can complain? Certainly not. He does not pretend to have acquired any rights prior to the recording of the field notes. The incipency of plaintiff's rights, if any he ever obtained, did not arise until over 21 years had elapsed after the field notes were duly recorded. It is manifest that this objection is totally without merit. In *Johnson v. Towsley*, 13 Wall. 72, 90, it was claimed that the pre-emption claim of Towsley was governed by the fifth section of the act of 1843, and that, inasmuch as he did not file his declaration of intention within three months from the time of the settlement, his claim was forfeited. The court, in answer to this, said:

"If no other party has made a settlement, or has given notice of such intention, then no one has been injured by the delay beyond three months; and if at any time after the three months, while the party is still in possession, he makes his declaration, and this is done before any one else has initiated a right of pre-emption by settlement or declaration, we can see no purpose in forbidding him to make his declaration, or in making it void when made. And we think that congress intended to provide for the protection of the first settler by giving him three months to make his declaration, and for all other settlers by saying, 'If this is not done within three months, any one else who has settled on it within that time, or at any time before the first settler makes his declaration, shall have the better right.' As Towsley's settlement and possession were continuous, and as his declaration was made before Johnson or any one else asserted claim to the land or made a settlement, we think his right was not barred by that section."

See *Piper v. Wyoming*, 15 Land Dec. Dep. Int. 93, 97; *Mining Co. v. Barclay*, 82 Fed. 554, and authorities there cited; *Taylor v. Brown*, 5 Cranch, 234, 243.

It is argued that the testimony fails to show that defendant was in the adverse possession of the land at the time of Morrison's application. The contention of the plaintiff is that the defendant abandoned the possessory rights of its grantors, if any they ever had, by its failure to keep possession and control of it, and that in any event it has not retained possession of any portion of the land save and except those portions upon which the buildings and improvements were

erected. If the 160 acres had been taken up as agricultural land, the argument of plaintiff's counsel would have much weight. It may be admitted that there was no such location or inclosure of it as would be required to establish a possessory right to 160 acres of agricultural land. The land, however, is not agricultural. It is not claimed by the defendant as such. A portion of the land, including a part of the 40-acre tract claimed by plaintiff, is saline land. It is true that there was no specific location or designation of the land as saline, except such as is to be inferred from the steps that were taken—by having it surveyed, and the field notes thereof recorded—as required by the act of the legislature with reference to saline lands. The law does not require such land to be fenced, in order to subject it to the dominion and control of the claimant. The evidence of acts sufficient to constitute possession of land must always, in a great measure, depend upon the character of the land, its locality, and the object and purpose for which it was taken up and claimed. The law does not require vain and useless things to be done. It only requires such acts to be performed as are necessary to subject the land to the will and control of the claimant, sufficient to notify the public that the land is claimed and occupied, and is in the possession of the claimant. *Silver Peak Mines v. Valcalda*, 79 Fed. 886, 888, and authorities there cited. In *Rogers v. Cooney*, 7 Nev. 213, 218, the court, in discussing the question as to what acts were necessary to constitute possession of land upon which tailings from a mine had been deposited, said:

"It is the suggestion of justice and the clearest reason that the same acts which are required to enable a settler to obtain actual possession of pasture or agricultural land should not be demanded where the claim is only of mining ground. In the first case, fencing is often indispensable to completely subject the land to the purposes for which alone it is useful. Hence it is generally held that such acts must be performed as will bring it within this rule of utilization. But fencing a mining claim would be an utterly useless act. It would in no wise improve its value, and would often be a mere incumbrance. It would not in the remotest manner further the purpose for which alone the land is valuable. The rule requiring fencing and improvement is a rule of utility, requiring the land to be subjected to the purposes for which it is useful; but the reason for requiring such improvements in respect to agricultural lands has no application to a mining claim, nor to land like this, which is valuable only for mining purposes. It has therefore been uniformly held that fencing is not necessary; that to do so could serve no purpose except to mark the boundaries, and any other means which will accomplish that object will equally answer the requirements of the law."

Applying to the evidence in this case these general rules, it is, in my opinion, sufficient to establish a possession of the land under the provisions of the law of this state concerning saline lands. The land in question was never abandoned by the defendant, or by any of its grantors or predecessors in interest, after the survey was made. Abandonment is always a question of intention. The various claimants had valuable mines and water rights in the mining district and region of country where the land is situated. They had erected large and expensive improvements of various kinds thereon. The court has the right to assume from the evidence that their early investments and efforts to develop their mining property were not a complete

success. The property was situated in a mountainous region, far removed from transportation facilities, and difficult of access. They closed down their mills and suspended operations for several years, but they never abandoned the property which they acquired. They always asserted a title and claim thereto, and always had an agent or watchman in charge thereof. Under these circumstances, I am of opinion that a fair, just, and liberal construction ought to be given to the provisions of the statutes of this state which express a clear purpose to protect the settlement, buildings, and improvements of all parties in their possessory rights; and, when such construction is given, it follows that the acts performed by the defendant brought it within the protection of the statute. The possession of the defendant having been acquired, kept up, and maintained in good faith, with full knowledge of the facts upon the part of the plaintiff, it cannot be divested of such rights because it did not avail itself of the privileges granted by the statute to apply to the state, after the land was surveyed, and make the claim of a preferred right to purchase the same. *Nickals v. Winn*, 17 Nev. 189, 195, 30 Pac. 435, and authorities there cited; *Stewart v. Doll*, 18 Land Dec. Dep. Int. 309; *Chapman v. Toy Long*, 4 Sawy. 28, 35, Fed. Cas. No. 2, 10.

Upon all the facts established by competent evidence in this case, it cannot, under the repeated decisions of both national and state courts, be successfully maintained that the land in controversy in this case was "unappropriated, public land" at the time of its selection by the state, or at the date when it was listed to the state, or that it was not "in the actual, adverse possession of another" at the time Morrison made his application to the state to purchase the 40-acre tract. In addition to the authorities hereinbefore referred to, see *U. S. v. Williams*, 12 Sawy. 138, 30 Fed. 309; *Id.*, 138 U. S. 514, 11 Sup. Ct. 457, and authorities there cited. Judgment is ordered to be entered herein, in accordance herewith, in favor of the defendant, for its costs.

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#### UNITED STATES v. CITY OF MOLINE.<sup>1</sup>

(District Court, N. D. Illinois. July 3, 1897.)

##### 1. NAVIGABLE WATERS—POWER OF CONGRESS TO REMOVE OBSTRUCTION.

When congress has assumed jurisdiction over a navigable river lying wholly within one state, congress has power to order obstructions to navigation removed, even though their construction was authorized by such state.

##### 2. SAME—BRIDGES—EMINENT DOMAIN.

When a bridge over a navigable river is authorized by a state legislature, reserving a right to require a draw in the bridge on a certain contingency, congress, on assuming control of the river, may require the construction of a draw in the bridge upon the happening of such contingency, without providing for compensation to the bridge owners.

##### 3. CONSTITUTIONAL LAW — DELEGATING LEGISLATIVE AND JUDICIAL POWERS — BRIDGES.

Act Cong. Sept. 19, 1890, § 4, authorizing the secretary of war to give notice for the alteration of bridges that he believes to be unreasonable

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<sup>1</sup> Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

obstructions to navigation, and empowering the district attorney to prosecute parties refusing to comply with such notice, is not unconstitutional, as vesting the secretary with either judicial or legislative powers.

At Law. On motion to quash information.

Information against the city of Moline for obstructing a navigable water way.

John C. Black, U. S. Dist. Atty.

S. W. Odell and W. R. Moore, for defendant.

GROSSCUP, District Judge. The information, read in connection with the plans for the building of the Illinois & Mississippi Canal, shows that it is the purpose of the United States to construct a canal from the Illinois river, at or near the town of Hennepin, to the Mississippi river, at or above the mouth of Rock river, together with the necessary feeders thereto; that at Milan, about five or six miles below what is known as the "Moline Bridge," to a point about five or six miles above this bridge, the proposed canal is to follow the bed of and use Rock river as a part thereof; that Rock river is situated in the state of Illinois, within this district, and is a navigable water way of the United States; that the bridge known as the "Moline Bridge," and owned and controlled by the city of Moline, is now, and will be when said canal is finished, an unreasonable obstruction to the navigation of said water way; that the secretary of war, in pursuance of statute, has notified the city of Moline so to alter the bridge by putting in draws, etc., as will make said river at said point practically navigable; that the period for making such changes has passed, and the city of Moline still neglects and refuses to conform to the requirements of such notice and order of the secretary of war, and continues to maintain such obstruction, whereby its acts in the premises are a misdemeanor, under section 5 of the act of September 19, 1890.

The motion to quash necessarily admits the truth of the averments of the information. The city, by its counsel, in effect contends: First, that the river in question is wholly within the state of Illinois, and has never been declared, by the government of the United States, to be a navigable stream; second, that the bridge in question was lawfully authorized by the legislature of Illinois, is the lawful property of the city of Moline, and cannot be taken or injured by the government of the United States without just compensation; third, that the proceedings of the secretary of war giving rise to this information are in pursuance of a statute unconstitutional, and therefore void. Many statutes of the state of Illinois providing for and authorizing dams and bridges across Rock river are exhibited by counsel in support of this contention, and have been judicially taken notice of in the disposition of this motion.

The constitution confers upon congress the exclusive right to regulate interstate commerce. A water way like Rock river, emptying into the Mississippi river, though lying wholly within the state of Illinois, is, if navigable, one of the highways of interstate commerce. It leads, with its connections, from points within Illinois to points in other states, and is thus a part of the water way which, as an entirety,

interconnects cities in many states, and carries the commerce of many states. Any obstruction to such a water way, in the face of a mandate of congress that the river shall be used as one of its interstate water ways, is open to removal by the proper authority of the United States government. The fact that the state may have authorized the structure is of no avail from the moment that the government of the United States determines to employ the river as such an interstate highway.

Has congress indicated such a purpose? The act of 1888 provides for the location of a canal from the Illinois river, at or near the town of Hennepin, to the Mississippi river, at or near the mouth of Rock river, to be 80 feet wide at the water line, and to have a depth of not less than 7 feet of water, with locks, feeders, etc., and that the secretary of war shall cause to be made and submitted to congress detailed plans and estimates for such construction. In pursuance of this act the canal was, by the secretary of war, duly located, and detailed plans and estimates for its construction submitted, which plans and estimates included the use of Rock river, averred by the information to be navigable, from a point five or six miles below the bridge in question to a point five or six miles above. Following this action of the war department, the congress of 1889-90 passed an act authorizing the secretary of war to construct the canal upon the plans and specifications submitted, with power to make certain alterations in respect of the locks and feeders, and with the necessary powers of eminent domain. Following this, the congress of 1891-92 made appropriations for the construction of such canal, and the acquirement of right of way; and every congress since has continued such appropriations. These acts clearly indicate a defined purpose upon the part of congress, as far back, at least, as 1889 or 1890, to use Rock river for a distance of several miles above and below the bridge in question as a part of the proposed water way. As a navigable water of the United States, congress had, at any time, the right to enter upon its improvement; and the plans adopted by congress in effect adopt the river, for the distance pointed out, as a part of the proposed water way. The acts of congress, read in connection with the plans and specifications of the war department upon which the acts proceed, look to a navigable water way from the Illinois river to the Mississippi, and utilize towards that end so much of the Rock river—a stream admittedly navigable—as seems best adapted to that purpose. The improvement, therefore, is, in effect, an improvement in the navigability of the river. The effect of all these acts is that congress has taken into its jurisdiction, as one of the navigable waters of the United States, that portion of Rock river where this bridge is located, intending thereby to make it a part of the proposed water way from the Illinois river to the Mississippi river. From the moment of such a declaration, the power of congress over the portion of the river designated is supreme. Any obstructions, however authorized by the state law, must yield to this superior authority.

But the right of congress to remove the obstruction does not, of itself, exempt the government of the United States from the duty of making just compensation for such property rights as are taken.

*Monongahela Nav. Co. v. U. S.*, 148 U. S. 312, 13 Sup. Ct. 622. The right of congress to interfere with such property rests simply upon its power to regulate commerce. It has no other right touching such property. But, says Justice Brewer, for the supreme court, in *Monongahela Nav. Co. v. U. S.*, supra:

"Like the other powers granted to congress by the constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the fifth amendment we have heretofore quoted. Congress has supreme control over the regulation of commerce; but if, in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this fifth amendment, and can take only on payment of just compensation. The power to regulate commerce is not given in any broader terms than that to establish post offices and post roads; but, if congress wishes to take private property upon which to build a post office, it must either agree upon the price with the owner, or in condemnation pay just compensation therefor."

The inquiry, then, is: Has the city of Moline a property right in this bridge inconsistent with the control to be taken by congress, and the changes made in consequence thereof? If so, compensation must be first made. The ownership of the city of Moline is as successor to the Moline & Rock River Plank & Macadamized Road & Bridge Company, which company was, on the 14th of February, 1855, authorized to build a toll bridge across Rock river at the point where the bridge in question crosses the river. The franchise thus granted was purchased by the city of Moline May 6, 1876. This act of the legislature provided that a draw should not be required in such bridge until such time as the legislature should require draws to be placed in the Chicago & Rock Island Railroad Company's bridge and the Rock Island & Camden Railroad Company's bridge,—the first located about eight miles above the Moline bridge, and the other at Milan, several miles below. Now, it seems to me that this franchise to the bridge company clearly contemplated that Rock river might, at some time in the future, be used for the purpose of practical navigation, and that, when that time came, the bridge company should so readjust its structure, without cost to the state, as to make it adaptable to such navigation. The company was exempted from such readjustment only so long as the two railway bridges—the one above and the other below—enjoyed a like exemption. The franchise was unquestionably accepted with reference to this possible changed use of this river in the future, and with equal reference to the duty of the company to change its bridge accordingly, without further compensation, when that time came. The implied stipulation to change the structure without compensation was a part of the terms on which the franchise was granted. Unquestionably, the legislature of Illinois could, without compensation, have required the construction of a draw at the time that a like draw was required of the two railway companies.

The proceedings to change the use by the construction of the draws both here and at the railway bridges are under acts of congress instead of the legislature of the state. It is true that at the point where the railway bridges cross the river the proposed water way is not in the bed of the river, but at one side. But this can make no difference in the substance of the requirement. It is true, also, that because the water way

is not in the bed of the river the railroads will be compensated for such draw. But there is no provision in the franchise to the bridge company providing that it shall receive like compensation, or that the draw shall not be required until a draw without compensation is required of the two railway companies. It is true, also, that the government of the United States, not the legislature of Illinois, is the power that commands this change. This, literally, is a variance from the terms of the franchise. But the act in question must be considered upon no such narrow lines. It contemplated simply immunity from change in the matter of the draw until the river was needed for navigation, and it is immaterial whether that need is now declared by the legislature of the state or the government of the United States. The real substance of the contract between the bridge company and the state was that the company should have the right to erect, control, and use the bridge as a toll bridge, without interference in the way of putting in, compulsorily, a draw, until, under the acts of some authority competent to act, the river should be employed for the purposes of practical navigation. The provision looked towards ultimate improvement of the river's navigability; and that such improvement might come at the hands of the nation was certainly contemplated. The only interference with the bridge proposed by congress is this compulsory construction of a draw,—a right clearly reserved by the legislature of Illinois in granting the franchise. Congress, in effect, proposed to take, for the purpose of making the river navigable, only what the legislature of Illinois could, under the literal terms of its contract with the company, have taken for the same purpose. Such a reservation in favor of the state of Illinois inures, in my judgment, to the nation, when the authority of the United States is exercised for the same purpose.

But it is contended that the proceedings of the secretary of war under the fourth section of the act of September 19, 1890, are invalid, because such section is unconstitutional. The section provides that, whenever the secretary of war shall have good reason to believe that any bridge now constructed over any navigable water way of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, it shall be his duty, first giving the parties reasonable opportunity to be heard, to give notice to the person owning or controlling such bridge so to alter the same as to render navigation under it free, easy, and unobstructed, and in giving such notice to specify the changes required to be made, and prescribe a reasonable time in which to make them. If, at the end of such time, the alteration has not been made, the district attorney for the proper district is empowered to bring the criminal proceeding here instituted. *U. S. v. Keokuk & H. Bridge Co.*, 45 Fed. 178, was a case where a bridge had been built and maintained in accordance with the requirements of the act of congress across the Mississippi river at Keokuk. The secretary of war declared that, by reason of its location, it rendered, at certain stages of the water, navigation over the Des Moines rapids through the west draw difficult, and ordered that it be so altered as to render navigation through or under it free, easy, and unobstruct-

ed. On demurrer to the petition, Judge Shiras held that, the present status of the bridge having been fixed by act of congress, and the bridge being, therefore, a lawful structure, it was not within the power of congress to delegate to the secretary of war power to change such status; but that such power of change, whatever it might be, was exercisable only by congress itself. *U. S. v. Rider*, 50 Fed. 406, was a case where the county commissioners of Muskingum county, Ohio, were notified by the secretary of war to change a bridge then being over the Muskingum river, a navigable stream of the United States, so as to provide a draw span in said bridge whereby free navigation of the river could be obtained. Judge Sage held the notice given to have been unreasonable, and, further commenting upon the case, expressed his concurrence in the conclusion of Judge Shiras in *U. S. v. Keokuk & H. Bridge Co.*, supra, to the effect that congress could not delegate, as it had undertaken to do, its authority in the matter under discussion to the secretary of war. These two cases are the only adjudications I know of upon the constitutionality of this statute. In *Lake Shore & M. S. R. Co. v. Ohio*, 165 U. S. 365, 17 Sup. Ct. 357, the supreme court, having under consideration a similar case, expressly passed, without deciding, the question whether congress could lawfully delegate to the secretary of war all its powers to authorize structures of every kind over all navigable waters.

I have already held, for the purposes of this motion, that Rock river, at the point under consideration, is, in fact, a navigable stream; that congress has, by the acts, beginning in 1888, relative to the Illinois & Mississippi Canal, assumed jurisdiction of such stream from the point below the bridge to the point above the bridge, between which the canal uses, for its purpose, the river; that through that space of the river the proposed government work is, in effect, an improvement of the navigation of Rock river; that the bridge of the city of Moline over the river is unprovided with a draw, and is, in such condition, palpably, an obstruction to the navigation of the stream; that the necessity of a draw was recognized with the increase of navigation of the river, and the right to impose it reserved, in the act of legislature creating the bridge franchise. Now, if congress can constitutionally authorize any of its executive officers to deal with a case like this, whereby the obstruction may be removed, and the water way opened up, without having first passed an act specifically applicable to the given obstruction, these proceedings ought to be maintained. It will be observed that the power claimed in this instance is not to either authorize the building of a bridge, or ordering its construction, thereby drawing with it the decision of what streams congress either takes or surrenders jurisdiction over. The power claimed is, in effect, an incident only to the execution of the larger purpose of congress respecting Rock river, and administrative of that purpose. It is one of the essential administrative acts towards carrying out the special acts of congress, to the effect that through this river, at this point, there shall be a waterway having capacity for vessels of at least 280 tons burden. The bridge, during the time of its present construction, is an effectual obstruction to such water way. If congress can, by special act, constitutionally endow the arm of the secretary of war



with power to remove everything that lies in or across that river obstructive to the proposed water way, why may it not grant such power, with equal efficacy, by a general act applying to all cases as they arise? Whether the act conferring the power be special or general, the war department becomes simply the arm that carries out the legislative will. It is true that this involves decision of the department, but the department can in no instance be an effective, and at the same time an insensate and unjudging, executive instrument. In administrative undertakings of this character the directions cannot be so completely foredrawn by congress that there will be left no questions to the administrative mind to decide. The test of the legality of the delegation of power is, not that the administrator must himself decide questions as they arise, but, are the questions thus presented essentially judicial?

In this case, two questions alone arise: First. Is the bridge an obstruction to navigation? Second. Is it there by any such legal right that the government may not interfere with it in the respect designated without just compensation? The first question is purely administrative, and is one that congress can certainly delegate to the secretary of war. A thousand questions of equal moment to the parties interested, and of equal difficulty, are necessarily delegated to the great departments of the government every month. In the very nature of things, congress cannot dispose of them. A government of the size of this, operated upon such a conception, would be clogged immediately. The second question is, undoubtedly, judicial, and for that very reason is not subject, constitutionally, to the decision of congress any more than of the secretary of war. If the bridge be there by legal right,—if it be a franchise or property that cannot be taken except after just compensation,—congress is powerless, either by special or general acts, to touch it. In the face of such property right, congress is as helpless as the war department. In the end, such right, whether it be attacked by special act of congress, or by some action of the war department, will, through some channel, find an appeal to the judiciary. This right of appeal to the judiciary in all questions in their nature judicial is preserved in the sections of the statute under discussion. The secretary of war has no power to carry out his decisions respecting these obstructions except through a court. Any question, whether of law or fact, essentially judicial, may be raised under these informations. A court of the United States stands always, by the clear provisions of the act, between the decision of the secretary and its execution. There is, therefore, in the act, no delegation of judicial power to the secretary that is not open to review in the courts. I hold, therefore, that the act, so far as it is applicable to the case in hand, is constitutional and valid, and the motion to quash will be overruled.

## UNITED STATES v. NUNEZ et al.

(Circuit Court, S. D. New York. November 19, 1896.)

## NEUTRALITY LAWS—MILITARY EXPEDITION AIDING CUBAN INSURGENTS—REV. ST. § 5286.

The transportation of goods for commercial purposes only and the carriage of persons separately, though their individual design may be to enlist in a foreign strife, are not prohibited by our law if the transportation is without any features of a military character. Indications of a military operation or of a military expedition are concert and unity of action, organization of men to act together, the presence of weapons, and some form of command or leadership. When these exist and are known to the persons engaged in the transportation, all who knowingly aid in such transportation for military purposes are liable under section 5286, Rev. St.

Indictment for breach of section 5286, Rev. St. U. S., for setting on foot or providing the means for a military enterprise against Spain, and fitting out the steamship *Laurada* from the city of New York in aid of Cuban insurgents in May, 1896.

The vessel left Philadelphia on the 8th day of May. She had several boats in her hold, and one on deck. She arrived in the city of New York on the Saturday following; cleared at the custom house the same afternoon for Port Antonio, upon a manifest stating a few chairs and tables as cargo, and sailed for Montauk Point at the east end of Long Island. The same night two lighters were loaded with arms, ammunition and men at pier 39 East river and at Astoria in the East river, and were thence towed to Montauk Point, where the men and arms were transferred to the *Laurada*, which then proceeded directly to Cuba, where the men and arms were secretly landed. On the voyage the boxes of arms were opened, and the men were supplied with arms and drilled. Gen. Ruiz went on board the *Laurada* in the harbor of New York in company with the defendant Nunez, and continued on board and was landed with the expedition in Cuba. Nunez left the *Laurada* at Montauk Point and returned to this port by one of the tugs that had towed down the lighters. At Montauk Point, where the men and arms were transferred to the *Laurada*, her firemen and crew struck and refused to work. The tug containing Nunez was called back and the captain of the *Laurada* reported to him their refusal to proceed without further pay "if the expedition meant Cuba"; whereupon \$100 was given to the captain for them, either by Nunez or a companion, upon which the *Laurada* proceeded. Nunez afterwards proceeded to Charleston where he was awaiting the return of the *Laurada* from Cuba.

Wallace Macfarlane and Jason Hinman, for the United States.  
Gen. Tracy, for defendants.

BROWN, District Judge (after stating the facts as above). As has been rightly stated to you, gentlemen, by counsel, this is a case of more than usual interest and importance; because it not only affects as has been said the individual defendants and their relations perhaps to a few persons, but it involves also indirectly international relations. The series of laws or enactments of which the statute under which this indictment is framed is one, known usually as the "Neutrality Laws," were enacted long since, and substantially in the same form in which they exist to-day, during the administration of Washington in 1794. These enactments pretty much covered what it was considered necessary to provide in order to prevent entanglements between this government and foreign powers, by prohibiting expeditions from this country interfering with belligerents, or with the relations between a mother

country and its insurgent people, in such a way as to entangle us, and become justly a subject of contention, and in that way, if not checked, liable to lead us into serious complications. For that purpose the statute of 1794, embracing a number of different provisions, was passed to endeavor to check the various forms in which these evils might arise. I have regarded it from the first as of some consequence to look to that statute as a whole, because what it prohibited, as well as what it did not prohibit, was such as to throw some light upon the different parts of the statute, and show what was intended. This will aid in the interpretation, inasmuch as in the section under which this indictment is drawn, there is such generality of language as to lead to some difficulty or perplexity in its application to particular cases. This observation upon the statute is not my own. It was made by Chief Justice Marshall only a few years after this statute was passed, when he said that there was in this section "a lack of precision in defining the offense, which might hereafter lead to difficulty in its application." It is for that reason that I ask your attention for a few moments to the different provisions of the law, that you may understand more clearly the differences between what is lawful, and what is unlawful within our statute. I should say that there have been one or two minor amendments to this statute since it was passed; but they are of quite a minor character, and in no way affect this prosecution. The old law has been embodied in the provisions of the Revised Statutes, adopted in 1874, and is now referred to in different sections of the Revised Statutes.

Section 5282 deals with the enlistment of individuals. Section 5286, under which this indictment is framed, deals with military expeditions or enterprises. Section 5283 deals with armed cruisers, designed to commit hostilities in favor of one foreign power as against another. The section which deals with the enlistment of individuals, section 5282, prohibits any person from enlisting in this country as a soldier in the service of a foreign power. It also prohibits any person from hiring or retaining any other person to enlist or to go abroad for the purpose of enlisting; but it does not prohibit any person, whether he is a citizen or not, from going abroad himself for the purpose of enlisting in a foreign state or foreign army.

By our legislation, therefore, on this subject, it is evident from this statute, and from what is prohibited and what is not, that individuals are permitted to go abroad to foreign countries to enlist, when they do so voluntarily and without being induced by other persons, or without hiring, and there is no enlistment in this country. So there is nothing in this statute which prohibits a commercial enterprise. The transportation of goods in a commercial way, whether it be contraband of war or not, is not prohibited by the fact that other nations are at war, or that a colony is in a state of insurrection against the parent country. As there is no prohibition against persons going individually to enlist in foreign armies, so it is competent for them, as a necessary incident to this right, to go in company with one another, one or a dozen or a hundred, and in any way they see fit, so long as they do not infringe the only provision bearing upon that subject, namely, that they do not constitute any military expedition or

enterprise. It is the same with the transportation of goods. So long as it is a commercial transaction, so long as it is a peaceable transportation by a vessel either of goods or of men, and is without any features of a military character, such as would constitute it a military enterprise or expedition, our statutes do not prohibit it.

The first question, then, which you have to consider, is whether there was in this case a military expedition or not; whether the facts proved before you show that there was what should be properly termed a military enterprise. The indictment is either for beginning or setting on foot a military enterprise or for providing the means for it. If you do not find there was any military enterprise at all, of course that ends the case.

What constitutes a military enterprise? What are some of the features that mark a military enterprise or expedition as distinguished from a peaceable transportation of passengers, arms, ammunition, or goods? The essential features of military operations are evident enough. They are concert of action, unity of action, by a body organized and acting together, acting by means of weapons of some kind, acting under command, leadership. These are the three most essential elements of military action. On this subject I will read a few passages from the recent case of *The Horsa* [16 Sup. Ct. 1134], which was before the supreme court, in which this subject is touched on in three or four paragraphs. Chief Justice Fuller in referring to this point says as follows:

"The definitions of the lexicographers substantially agree that a military expedition is a journey or voyage by a company or body of persons, having the position or character of soldiers, for a specific warlike purpose; also the body and its outfit; and that a military enterprise is a martial undertaking, involving the idea of a bold, arduous and hazardous attempt. The word 'enterprise' is somewhat broader than the word 'expedition'; and although the words are synonymously used, it would seem that under the rule that its every word should be presumed to have force and effect, the word 'enterprise' was employed to give a slightly wider scope to the statute."

In quoting from the opinion of the court below in approval, the court say:

"If the persons referred to had combined and organized in this country to go to Cuba and there make war on the government, and intended when they reached Cuba to join the insurgent army and thus enlist in its service, and the arms were taken along for their use, that would constitute a military expedition, and the transporting of such a body from this country for such a purpose would be an offense against the statute."

Again the court say in approval:

"Any combination of men organized here to go to Cuba to make war upon its government, provided with arms and ammunition, we being at peace with Cuba, constitutes a military expedition. It is not necessary that the men shall be drilled, put in uniform, or prepared for efficient service, nor that they shall have been organized as or according to the tactics or rules which relate to what is known as infantry, artillery or cavalry. It is sufficient that they shall have combined and organized here to go there and make war on a foreign government, and to have provided themselves with the means of doing so."

And once more:

"If they intended to stand together and defend themselves, if necessary, the jury had a right, under the circumstances stated, to find that this was a military expedition or enterprise under the statute."

Under these rulings and definitions of the supreme court, I must instruct you that if you find upon the evidence that this body of men, when they landed in Cuba, landed with arms in their hands, which had been provided for their use; that they were then organized together in such a way that they should stand by each other and fight their way if necessary, and defend themselves, or make attack, as the case might be, that would be in fact a military descent upon the Island of Cuba, and the organization or combination would be a military combination—a military enterprise. If you do not find from the evidence that state of things existed, then you will dismiss this case; for if a military expedition is not shown to have existed at that time, it certainly did not exist before. If you do find that the character of that landing was military in its form and substance—namely, a body of men combined and organized, intending to stand by each other for attack or defense, and having arms in their hands for that purpose when they landed—then you find a military expedition at that time; and the question will then remain for you to determine if that was the expedition intended when they left the harbor of New York; and, if so, whether these defendants, or either of them, were privy to it, or provided the means for it.

I shall refrain from commenting to any extent upon the evidence, as it is so freshly before you, and has been commented upon so fully by both counsel. I have already said that the transportation of arms and the transportation of men may be perfectly lawful. By way of illustration I will say further that, for aught I can perceive, if this same association or group of individuals had been taken by the Laurada to the coast of Cuba, to the very spot where they landed, and they had been put ashore in these same boats, and these boxes containing ammunition and other military implements had not been opened or distributed, but had been landed like merchandise,—for aught I can see, that would have been purely a nonmilitary landing, and there would have been no military enterprise. It would have been a case of smuggling; the endeavor to smuggle arms and ammunition for the help of the Cubans in Cuba; and the endeavor of individuals to go there secretly and join the Cuban army, both of which are perfectly lawful, so far as this country is concerned. Those who engage in it take the risk of the Spanish authorities, that is all.

Now, what are you to infer from all the other evidence in the case as to the nature of this expedition when the Laurada left New York? The charge is that the defendants in the Southern district of New York began or set on foot or provided the means for a military expedition. If you find that this was a military expedition when it landed in Cuba, do you find that it was so within the knowledge of the captain (taking him first) when the Laurada left New York? In an indictment of this kind it is a necessary averment that the offense took place in some district, and that must be proved as stated in the indictment. Here it is alleged to have been done in New York. If this landing, in the form described, was not the undertaking that existed when the Laurada left New York, or if the captain did not know of it, he is not liable. But in order to constitute an unlawful expedition "to be carried on from this country,"—for that is the language of the statute—and to be

carried on from the city of New York, it is not necessary that everything shall be complete when it leaves this district. The statute says: "Every one who shall begin or set on foot" such an expedition. Therefore, by way of illustration again, if a person takes part in collecting a body of men, and in collecting arms and equipment with the intent that those shall be combined afterwards so as to form a complete expedition, I must say to you that that is a beginning or setting on foot of the expedition which is planned from the first and which is afterwards completed. Such an enterprise falls within the statute. It is an enterprise which would be begun and set on foot here, provided the first important steps were taken here, with the intent to have it completed afterwards, and it was completed in accordance with that intent. If then, when this vessel sailed from New York, there was no intention to make an armed descent upon Cuba, but a mere peaceable transportation of merchandise, of munitions of war, and the peaceable transportation of men as individuals, without any military form or military force at Cuba, then there is no case: the subject-matter, the unlawful expedition, has not arisen. But if these men were collected together here, and were forwarded in the ways you have heard alleged, and if the munitions of war and war material were collected together here with the intent to have them combined, and to form a military descent upon the Island of Cuba, then that enterprise, that undertaking, was begun here.

If you find that was the case, then you will next inquire whether either of these defendants were concerned in beginning or setting this expedition on foot, or whether either of them provided the means for it, in this district. As to the commencement or beginning or setting on foot of whatever was done, the testimony is not very complete. The expedition, you will observe, is not the vessel; the vessel is a mere means of transportation. The vessel was not a war vessel; it is very evident that the vessel contemplated no fighting. She was only a means of transportation. But the persons who furnished the vessel at New York, and who started her from New York, in pursuance of a plan to transport an expedition that was intended from the start to be a military expedition, would be providing the means for that expedition; and whoever furnished the vessel, knowing that intent, would be liable under this statute, as providing the means for the enterprise. If the captain, therefore, as the master of the ship, understood that this expedition was to be a military descent upon the Island of Cuba, or, to put it in another way, that the men were to be landed in a body armed and drilled, ready to stand by each other and to defend themselves, if he understood that when he left this city, he is guilty. If he understood nothing of that, or if you are not satisfied beyond a reasonable doubt that he must have understood that, then whatever else there may be in the case, it would be your duty to acquit him.

It is true, as has been urged by counsel, that matters of precaution or secrecy, irregular modes of transportation, are consistent with a peaceable transportation of contraband of war. In any case, the hazards of loss are so great that the only prudent course for persons who are engaging even in a perfectly lawful enterprise of that kind, would be to make their proceedings as secret as possible.

It is, however, equally consistent with an unlawful purpose. If the purpose was a military descent, there is the same necessity for secrecy, and the same result in that respect would follow.

Now in regard to the captain. There are very strong circumstances to show that this voyage was not intended to be simply a voyage to Port Antonio. So much, it is plain, he must have understood. He took on extra boats in the Delaware river. They could be used, it is true, for the landing of the cargo at Cuba, for the Cuban army, in a perfectly legitimate and lawful manner. That circumstance is not of itself indicative of guilt, or even of an unlawful expedition. It is precisely what would be done for the smuggling of these goods into Cuba, if it was a smuggling expedition that the captain intended; or if it was the landing of individuals merely for the Cuban army. To elude the Spanish vessels, it was necessary as much for the lawful enterprise as it would be for the unlawful. You will understand gentlemen, that I am speaking of lawful in reference to this country. So, in going to Montauk Point. If the captain were directed to go to Montauk Point and there await orders, or to wait for cargo to be landed on the Cuban coast, he would understand that his voyage was not for Port Antonio direct, but that he was to be engaged in some kind of irregular transportation for Cuba. He may not have known for what destination, but when he left New York it was plain that he must have known, as I should infer—and these matters, gentlemen, are all for you; what I observe on matters of fact you are to give no weight to except as they commend themselves to your judgment—but when he went to Montauk Point, away from his course towards Port Antonio, he knew that something else was to take place. Ordinarily, it is reasonable to suppose that persons intend what happens under their administration. The captain is the master of the ship. What is done on board the ship, if it is a matter that would naturally attract attention, or would come to the attention of the officers of the ship and be reported to him, it is fair to assume must be known to him. There is no evidence from the several witnesses who have come here from the ship tending to show that there was any objection on the part of the master, or of anybody else belonging to the ship, when these cases were opened and the arms distributed. If there had been evidence of that kind, that would have tended to show that there was a surprise to the master; something different from what he anticipated. The absence of such testimony, while it is not conclusive, is a circumstance which you take into account.

The captain in civil matters is held answerable for what takes place upon his ship. He is supposed to know what takes place, and to accede to what takes place, unless the contrary appears; because he is the supreme commander. If from what there is before you, you consider that there is no reasonable doubt but that the master acquiesced in what has been described and made no objection to it, you will be authorized to find that he understood that what was done was expected to be done, certainly, when he left Montauk Point. Up to Montauk Point, however, there had been three persons come

on the ship with him; the defendant Nunez for one, Dr. Castillo for another—

Mr. Macfarlane: He was on the tugboat. Captain Morton went, according to the testimony.

The Court: Yes, it was he, Captain Morton. There is no evidence here as to when Captain Dickman received his instructions on any of these subjects. We only know he left New York harbor with these two gentlemen, civilians, on board, who went with him to Montauk Point, and remained there until these arms and men were shipped on board and then left, and then he pursued his voyage, and you have the armed landing on Cuba.

A defendant is entitled to all reasonable presumptions in his favor. In order to convict, you must find in your own minds beyond a reasonable doubt, that the defendant Dickman knew the purpose of this expedition, and that it was intended to be a military descent upon Cuba. It is for you to draw your inference on that subject from all the circumstances before you. The court cannot aid you, and must not attempt to take your place. If you are satisfied beyond reasonable doubt that the captain understood in substance that it was intended that that should be done which was afterward accomplished—if he understood that when he left the harbor of New York—then it is your duty to convict him. It is not necessary that he should have understood every detail, but it is necessary that he should have understood sufficient of the facts to show that an expedition of an unlawful character was planned, and that he was expected to carry it out by furnishing transportation for it. If you are satisfied of that, then it is your duty to convict. If you are not satisfied of that beyond reasonable doubt, it is your duty to acquit him.

In regard to the defendant Nunez, there is no evidence to show that he had any part in the collection of the men, in the purchase of the arms, in the hiring of the tugs, in the ownership of the vessel or the chartering of the vessel, if she was chartered; and, so far as I recollect, no evidence that he had done anything to promote this expedition until the arrival at Montauk Point, where he had gone on board.

Mr. Hinman: Where he was on board. He went on board in New York.

The Court: Yes, he went on board in New York. The statute in this case does not include the words "aiding and abetting" expressly. What is prohibited is to begin or set on foot such an enterprise. I do not perceive anything (and if I am in error about this, I will ask counsel to correct me) tending to show that the defendant Nunez did anything in regard to this expedition, either as regards the men or the vessel or the arms within this district—any direct evidence, I mean—towards setting it on foot or beginning it. The rest of the statute is against providing or preparing the means for it. If the defendant Nunez did either of these things in the city of New York, then it is your duty to convict him, if you find that this was a military enterprise. Unless you find he did some one of those four things, it is your duty to acquit him; that is to say, took some part in beginning or setting on foot this expedition, or else providing or preparing the means for it within this district.



I said there was no direct evidence of any act of his done here. The reliance of the government, as I understand, is upon the indirect evidence, which they claim warrants your conclusion that he was the manager of the expedition. To illustrate once more. If the defendant, Nunez, was a mere passenger on board the Laurada when she went down to Montauk Point, and there at the captain's request gave him \$100 to satisfy the requirements of the crew, if that was all that Nunez had to do with this enterprise and had nothing to do with it in fathering it before that, that act was not done within this district, and he is not liable for that. So in regard to what happened in Jacksonville harbor or at Mayport. But if he did go there, and if he went to Mayport or Jacksonville to be on the watch for the Laurada when she should have finished her work in Cuba and returned to Jacksonville according to appointment, and met her there in order to give her further instructions; if that was part of a pre-arranged plan, or if the evidence that has been given here warrants, in your judgment, your finding that, then that would point very strongly to show a connection with the enterprise as a principal; and that, as I understand, is the contention of the government. Not that those single acts, not that the payment of \$100 at Montauk Point, makes him liable for that act, nor the order or request that the ship should go to Charleston, if he did give it; but that these things, if you credit the evidence that they were done in the way the government contends for, indicate so strongly the relation of Nunez to this enterprise that you are warranted in finding that he was the manager of it from the start; and that therefore he was concerned in setting it on foot in the harbor of New York. The fact that nobody else is shown to have very much connection with it cannot weigh much with you in finding that it was Nunez. It is only upon affirmative evidence, that is to say, direct evidence, and the circumstances, and such inferences as may be rightly and reasonably drawn from such evidence, that you can convict in a criminal case.

The evidence, as I said a few moments ago, of who it was that set on foot this expedition and managed it here, is very meager. There is some direct evidence in relation to Dr. Castillo and Mr. Espin and General Ruiz—some direct evidence of their action here, but none as regards the action of Nunez here in fitting out the expedition.

Mr. Macfarlane: If your honor will permit me, I would like to call your attention to the fact that the evidence shows that Colonel Nunez went with General Ruiz on the Laurada. General Ruiz was one of the men who went on board the steamer here.

The Court: Yes; I know. He went on board the Laurada.

Now, gentlemen, it is for you to say whether you are satisfied, as reasonable men, and beyond reasonable question, from the circumstances of this case, that Mr. Nunez was engaged in setting on foot this expedition; that he was engaged in planning it here, and planned to make it such a military expedition as was landed in Cuba. If you are satisfied of that beyond reasonable doubt, it is your duty to convict him; otherwise not.

Some other observations will be necessary in commenting upon the various requests to charge that have been made, and I will take them

up seriatim. Many of these, I think, I have covered already; but, perhaps, it will be shorter for me to read them.

Defendants' counsel have asked me to charge as follows:

"To constitute a military expedition, within the meaning of our statute, it must be proved in this case beyond a reasonable doubt that a body or company of men combined and organized in this country to go to Cuba and make war on the Spanish government, that the arms supplied them were supplied for that purpose, and that they were acting under some leadership for that purpose."

I charge that must appear, or else that the beginning of such an organization was started in this country with the intent to complete it so as to make a military descent upon the Island of Cuba; one or the other.

I further charge you, as requested:

"That it is entirely lawful for a number of men to leave this country, with the intent to go to Cuba and there join the Cuban army and fight against the Spanish government, and that the transportation of such a body of men, knowing their intention, does not constitute the aiding or abetting or setting on foot of a military expedition or enterprise, and is not an offense within the meaning of our statute.

"It is entirely lawful for an American citizen, or any other person residing in the United States, to sell and ship arms to the Cuban army in Cuba, or to sell to the agents of the insurgents in this country, with a view to their being shipped to the insurgents in Cuba, there to be used against the Spanish government, and that such act is not unlawful, even although it is done with the intent thereby to aid and assist the insurrection in Cuba."

I charge you that.

The fact that the men are transported and the arms and ammunition carried in boxes as merchandise upon the same ship, does not of itself constitute a military enterprise or expedition within the meaning of our statute.

And I add to that that the intent of the men to enlist after they get to Cuba does not make an expedition, which is otherwise lawful, unlawful.

I further charge you as requested, that if you find the expedition as fitted out was an unlawful expedition or enterprise, but that no knowledge of the facts which constituted it an unlawful expedition or enterprise came to Captain Dickman's knowledge until after he left the port of New York, he must be acquitted.

Also, that to convict the captain of the ship you must find from the evidence, not only that the enterprise was an unlawful one within the meaning of the statute, but that the captain had in New York knowledge of sufficient facts to show that an unlawful enterprise or expedition was contemplated.

Even should the jury find that the captain, before he left New York, knew that he was to transport from off Montauk Point on the Laurada a number of men and a cargo of arms and ammunition, that alone is not enough of itself to convict him. The jury must also find that before leaving this district he had reason to believe that the men and arms were to be so combined on the way to Cuba as to constitute a military expedition, within the meaning of the statute.

I also charge you that it was entirely lawful for the captain to en-

gage in the secret transportation of arms and ammunition intended for the Cuban service in Cuba, in a commercial and nonmilitary way, and that any step taken by him to conceal from the Spanish man of war, or the agents of the Spanish government, the fact that he was about to engage in such an enterprise, is as consistent with a lawful purpose as it is with an unlawful purpose, and therefore is not of itself any certain evidence of guilt against the captain of the ship.

Inasmuch as the transportation of passengers and merchandise in a perfectly lawful way would be accompanied with danger, therefore it would be only the part of prudence in those who would wish to conduct a perfectly lawful enterprise to be cautious, careful, and to take all the means of secrecy possible to prevent the anticipation and thwarting of the enterprise.

I charge you that the mere fact of secrecy or mystery that might hover around such enterprises as have been described does not of itself give it an unlawful character.

In regard to Nunez I also charge, as requested, that the presence of Nunez on board the Laurada off Montauk Point and his visit to that vessel off Jacksonville are not in themselves alone sufficient to prove that he began, set on foot, prepared or provided the means for a military expedition or enterprise.

"To convict Nunez you must find, beyond a reasonable doubt, that before leaving the Southern district of New York he either began, set on foot, prepared or provided the means for a military expedition or enterprise, or took part in some one of those things."

"Even if you find that Nunez, within the Southern district of New York, had knowledge that the Laurada was going to carry men, arms and ammunition to Cuba, you must acquit him, unless you also find that he did some act towards beginning, setting on foot, preparing and providing the means for a military expedition or enterprise."

"Even if Nunez knew that arms and ammunition would be carried on board the Laurada, you must acquit him, unless it is proved beyond a reasonable doubt that he knew within the Southern district of New York, that these men and arms would be so combined as to constitute a military enterprise."

Instead of "knew" I should say "had reason to believe and intended, within the Southern district of New York, that these men and arms would be so combined as to constitute a military enterprise; and that he did some act towards beginning, setting on foot, preparing or providing the means for a military expedition or enterprise."

Finally, I charge as requested, that if the jury find that all the evidence and circumstances relied on to show guilt, taken altogether, are as compatible with the theory of innocence, or with the theory of an innocent undertaking, as with the theory of a prohibited undertaking, it is their duty to find the defendant not guilty; for that would constitute a situation of reasonable doubt, the benefit of which must be given to the defendant.

I am requested by the government to charge that if the jury believe that the arms were opened on the ship, and the men armed before landing, and drilled during the voyage, and landed with the arms in the manner testified to, then the expedition or enterprise was military. I

state that the jury would be authorized to find from these facts that it was a military expedition.

I am requested to charge you also by the government that if the captain knew when he left New York that he was going to take in his ship a body of men and a quantity of arms, which the men intended from the start to use in warlike operations against Spain, in Cuba, he is guilty.

I shall need to qualify that. I shall say that if the captain knew when he left New York that he was going to take in his ship a body of men and a quantity of arms, which the men intended from the start to use in making a hostile landing or a military landing in the sense I have stated, he would be guilty. I qualify that, because the men might have intended to use them only after they had enlisted in the army.

How about the third request; do you want me to charge that?

Mr. Macfarlane: I withdraw the third request. I ask your honor to call the attention of the jury to this, that in determining the guilty intention of these defendants in leaving this jurisdiction they must consider all the evidence of what happened afterwards.

The Court: That is right.

Mr. Macfarlane: And if they believe that the defendants in leaving this district had the intention to do those things in furtherance of this project, then they are warranted in finding him guilty of the offense charged.

The Court: Yes. I intended, gentlemen, to say to you also that in all such cases the commission of such an offense is almost never to be proved by a single piece of evidence or a single witness. You judge from the testimony all together, piece by piece, part by part, one thing that fits into another; and in judging the motives and intentions, and knowledge particularly, it is impossible to judge otherwise than from the circumstances; the history of events as they succeed each other. You judge of it, therefore, as a whole, and you take the testimony together as each part bears upon the other, so far as you credit it, and from these elements you draw your conclusion.

Mr. Tracy: I ask your honor to charge the jury that in order to convict the captain they must be satisfied from the evidence introduced on the trial beyond a reasonable doubt that he knew before he left New York that the guns, the ammunition, and the men were to be so combined on their way to Cuba as to make a military descent upon the island; and that if that knowledge came to him after he reached Montauk Point or on his way to Cuba, then it is their duty to acquit.

The Court: I think I did state that substantially, perhaps in a little different form. I have no hesitation in stating substantially the same thing again, if I did not so state. I think I said unless the jury were satisfied that the captain within the Southern district of New York had reason to believe, either knew or had reason to believe, that these arms and men were to be combined so as to form a military enterprise at the time they landed in Cuba, that he should be acquitted.

Mr. Tracy: The criticism I have to your honor's charge, and the only criticism in that respect, is that you leave out that they must be satisfied from facts proved, not imaginary speculation.

The Court: Undoubtedly.

Mr. Tracy: That the facts proved must satisfy them beyond a reasonable doubt that he did know.

The Court: Gentlemen, that goes without saying. You are not to imagine a person guilty, or convict him because you might fancy he may be. What you are authorized to go upon is the evidence in the case as a whole, and the inferences that as reasonable men you are warranted in drawing from that evidence. It is not speculation, not possibilities, not imaginings, not mere surmises of any kind; but those rational conclusions which you cannot help drawing as reasonable men from the facts proved. That is what I mean. You take the facts proved, and from them you are bound to draw such reasonable inferences as flow from them, because the facts proved are evidence of knowledge or intent so far as they reasonably go. It excludes all mere surmise, mere imagining, mere fancy; but it includes all those rational conclusions which as reasonable men you cannot help drawing. With these comments and that explanation, I say to you that the evidence must show, and show in that way, that he had that knowledge, or that means of knowledge or that reasonable belief.

Mr. Reubens: We except separately to your honor's refusal to charge each of our requests as put and without modification.

The Court: Yes.

Mr. Tracy: And we also except to the modifications as made. I desire also to except to that part of your honor's charge in which you submit to the jury to find whether or not Nunez did any act in the city of New York towards setting on foot or preparing for the transportation of this expedition. I except to that on the ground that your honor, having charged that what he did at Montauk Point would not constitute him guilty, that there is no evidence of any fact proved, no evidence of any act committed by him in the city of New York that tended in any way to set this expedition on foot, and therefore there is nothing on which the jury could find such a fact as that.

Mr. Macfarlane: I did not understand your honor to charge the jury that what he did at Montauk Point would not be sufficient to find him guilty if they found that he did it with intent to further an expedition which he had aided and abetted in when he left New York.

The Court: If both counsel so far misunderstood what the court intended to say, I think possibly the jury may have misunderstood equally, and that I had better state once more what I did intend to say. What I intended to state to the jury was this: That the act of Nunez in giving \$100, if you should believe the evidence upon the government's side that he did give \$100 to the captain for the purpose of quieting the men—I say that act alone would not constitute any ground for finding him guilty, for the reason that the act was done outside the district of New York, which is the district where the

indictment charges the offense to have been committed. If that was the only thing in the case, that act alone would not support the indictment by itself. And so with what took place in Jacksonville. I said, however, that as I understood the government's contention, its claim was not for those acts as independent acts, but that they were very strong evidence that he was the father of this expedition, that he was the manager or principal who was setting on foot the enterprise, attending to it, managing it, carrying it out. It is for you to judge of the strength of that testimony. If you believe it in the shape in which it was presented to you by counsel for the government, it still remains for you to consider what conclusions that warrants, how far it is sufficient to sustain the claim of the government that he was the manager of this expedition. It is only as evidence as upon that question that I consider it has any bearing upon this case.

Mr. Tracy: I desire to except to that part of your honor's charge even as modified. I submit that does not warrant any such conclusion.

The Court: I leave that to the jury. I express no opinion as to its weight or force.

The jury then retired, and having failed to agree they were subsequently discharged.

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UNITED STATES v. GARCELON.

(District Court, D. Colorado. July 14, 1897.)

No. 1,390.

**PERJURY—POWER OF CIRCUIT COURT COMMISSIONERS TO ADMINISTER OATHS.**

A charge of perjury cannot be predicated upon an oath administered by a commissioner of the circuit court, in taking bail in a criminal case, in a state where the state laws do not authorize justices of the peace to administer oaths for similar purposes.

Greeley Whitford, U. S. Dist. Atty.

John D. Fleming and John T. De Weese, for defendant.

RINER, District Judge (orally). This indictment charges the defendant with the crime of perjury, under section 5392. A motion to quash has been filed to the indictment, and the case is now before the court on the motion. The question presented for determination is whether, under the laws of the United States, the indictment on its face states an offense against the laws of the United States. It is urged in favor of the motion that the United States circuit court commissioner before whom the alleged false oath was taken had no power to administer the oath, either under the laws of the United States or the laws of the state of Colorado. On the other hand, it is urged on behalf of the government that, even if the power is not expressly conferred by statute, it is incident to the exercise of the power to take bail, which is expressly conferred by the statute. Section 1014, Rev. St. The decision of this question involves the investigation of the powers of United States circuit court commissioners under the laws of the United States. It may be of interest to examine briefly the legislation

relating to the appointment and the powers of these commissioners. In volume 1 of the Statutes at Large, page 334, I find the first legislation upon this question to be in this form:

"That ball for the appearance in any court of the United States in any criminal cause in which bail is by law allowed, may be taken by any judge of the United States, any chancellor, judge of a supreme or superior court, or chief or first judge of a court of common pleas of any state, or mayor of a city in either of them, and by any person having authority from a circuit court, or the district courts of Maine and Kentucky to take bail; which authority revocable at the discretion of such court, any circuit court or either of the district courts of Maine or Kentucky, may give to one or more discreet persons learned in the law in any district in which said court is holden, where, from the extent of the district, and remoteness of its parts from the usual residence of any of the before named officers, such provision shall, in the opinion of the court, be necessary."

This is, in substance, the power contained in section 1014 of the Revised Statutes, the Revised Statutes extending it to other persons than the persons herein named, viz. to circuit court commissioners and justices of the peace, etc. This statute was amended in volume 2 of the United States Statutes at Large, page 679, by an act of congress passed February 20, 1812. The first section is as follows:

"It shall be lawful for the circuit court of the United States, to be holden in any district in which the present provision, by law, for taking bail and affidavits in civil causes (in cases where such affidavits are, by law, admissible) is inadequate, or on account of the extent of such district, inconvenient, to appoint such and so many discreet persons, in different parts of the district as such court shall deem necessary, to take acknowledgments of bail and affidavits; which acknowledgments of bail and affidavits shall have the like force and effect as if taken before any judge of said court."

This confines the taking of bail and making affidavits to civil causes, as did the first statute. The statute was again amended (3 Stat. 350) by an act entitled "An act in addition to an act, entitled 'An act for the more convenient taking of affidavits and bail in civil causes, depending in the courts of the United States.'" The language of the amendatory act is as follows:

"The commissioners who now are, or hereafter may be, appointed by virtue of the act, entitled 'An act for the more convenient taking of affidavits and bail in civil causes, depending in the courts of the United States,' are hereby authorized to take affidavits and bail in civil causes, to be used in the several district courts of the United States, and shall and may exercise all the powers that a justice or judge of any of the courts of the United States may exercise by virtue of the 30th section of the act, entitled 'An act to establish the judicial courts of the United States.'"

This was the legislation down to the time of the Revised Statutes. The repeal provisions of the Revised Statutes (section 5596) provide:

"All acts of congress passed prior to said 1st day of December, 1873, any portion of which is embraced in any section of said revision [referring to the revision which is mentioned in the preceding section] are hereby repealed and the section applicable thereto shall be in force in lieu thereof; all parts of such acts not contained in such revision having been repealed or superseded by subsequent acts, or not being general and permanent in their nature; provided, that the incorporation into said revision of any general and permanent provision, taken from an act making appropriations, or from an act containing other provisions of a private, local, or temporary character, shall not repeal, or in any way affect any appropriation, or any provision of a private, local or temporary character, contained in any of said acts, but the same shall remain in force; and all acts of congress

passed prior to the said last named day, no part of which are embraced in said revision, shall not be affected or changed by its enactment."

—That is, by the enactment of the revision which was adopted by congress.

We find, upon examination, that these statutes relating to commissioners come within the first portion of the repealing section referred to, viz.:

"That the acts passed prior to the 1st of December, 1893, any portion of which is embraced in the section of the Revised Statutes, are hereby repealed."

Section 627, Rev. St., provides:

"Each circuit court may appoint in different parts of the district for which it is held, so many discreet persons as it may deem necessary who shall be called commissioners of the circuit court and shall exercise the powers which are or may be expressly conferred by law upon commissioners of the circuit court."

This section, I find, has been construed in the case of *Chittenden v. Darden*, Fed. Cas. No. 2,688, in the circuit court for the Northern district of Georgia, Judge Woods writing the opinion. In this case there was an attempt to urge upon the court that a circuit court commissioner had the power to issue attachments, because under the laws of the state of Georgia that power was conferred upon justices of the peace; and upon that question the learned judge said:

"It is insisted that, as section 915 of the Revised Statutes provides that in common-law cases the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the state where this court is held, and as under the law of Georgia a justice of the peace may issue an attachment against the property of the defendant, it follows by analogy that the same power is possessed by commissioners of the circuit courts. I think this is stretching too far the interpretation of section 913, Rev. St. Commissioners can only exercise powers expressly conferred. Section 627 of the Revised Statutes provides for the appointment of commissioners, and declares they shall exercise the powers which are expressly conferred by law upon commissioners of circuit courts."

The power of commissioners to take and administer oaths in certain cases is provided for in section 1778 of the Revised Statutes as follows:

"In all cases in which, under the laws of the United States, oaths or acknowledgments may now be taken or made before any justice of the peace of any state or territory, or in the District of Columbia, they may hereafter be also taken or made by or before any notary public duly appointed in any state, district or territory, or any of the commissioners of the circuit courts, and, when certified under the hand and official seal of such notary or commissioners, shall have the same force and effect as if taken or made before such justice of the peace."

It will be noticed that the limitation upon the power of the commissioner to take oaths is that his power shall not extend to cases other than those where the power was conferred by law upon a justice of the peace. In 107 U. S. 671, 2 Sup. Ct. 507, we find this question somewhat discussed by Mr. Justice Harlan of the supreme court in *U. S. v. Curtis*, although the facts there were somewhat different. That was a case where a cashier of a national bank made oath to a statement of the condition of the bank before a notary public. The case, I think, went up from the Eastern district of Missouri. The court in that case held that the officer was not authorized to admin-



ister the oath, and therefore there could be no conviction, but in discussing the question now before this court he states the general proposition as follows:

"They [referring to circuit court commissioners] could take affidavits, when required or allowed, in any civil cause in a circuit or district court, under section 945 of the act of February 20th, or administer oaths where, in the same state, under the laws of the United States, oaths in like cases could be administered by justices of the peace [Rev. St. § 1778, to which I have just called attention], or they could take evidence, affidavits, and proof of debts in proceedings in bankruptcy under sections 5003, 5076, Rev. St. But the authority of commissioners did not extend to such oaths as were administered to Curtis in this case."

The learned justice then refers to the case of *U. S. v. Bailey*, 9 Pet. 267, where it seems the same contention was made as is made in the case at bar. But Mr. Justice Harlan holds that it is not in point on this question, and calls attention to the fact that the case was disposed of on the ground that the act of congress authorizing the treasury department, or the secretary of the treasury, to prescribe rules and regulations, which should have the force of law; that the secretary had made certain regulations; that the oath in that case was taken in violation of the regulations made pursuant to authority from congress, and therefore came within the provisions of the statute.

Another case referred to by counsel for the government was the *Ambrose Case*, 2 Fed. 556. It was held in that case that the judge of the district court had the power, incident to his judicial duty as judge of the court, to administer an oath to his clerk. The case was certified, but the supreme court did not decide that question. They said it was not certified, and therefore they did not pass upon it. So that the only decision we have upon that question is the decision of the court below. However, I am inclined to think that the position of the trial court was well taken. But here we have these commissioners who the statute declares shall have just such powers, and no other powers, as are expressly conferred by statute. In the New York case referred to, in which the supreme court sustained the lower court, the question as to the power of the commissioner to take bail was evidently not urged upon the court, and is not referred to by the court in deciding that case. The court in that case must necessarily have held a motion to quash not well taken, because under the laws of the state of New York a justice of the peace was expressly authorized to administer oath in such cases.

I have, in the limited time at my disposal, examined this question as best I could, and I have been unable to find any authority which permits commissioners, in taking bail in such cases, to administer an oath on which perjury could be predicated, where the laws of the state do not authorize the state officers mentioned in the statute to administer oaths for similar purposes. The motion to quash will be sustained.

## SAWRIE v. STATE OF TENNESSEE.

(Circuit Court, M. D. Tennessee. September 30, 1897.)

## CONSTITUTIONAL LAW—INTERSTATE COMMERCE—STATE STATUTES—ORIGINAL PACKAGE.

The Tennessee statute entirely prohibiting the importation or sale of cigarettes is invalid, as an interference with interstate commerce, in so far as it applies to cigarettes brought into the state from other states or foreign countries, and sold in the original packages of importation.

This was a Petition by W. S. Sawrie for a Writ of Habeas Corpus.

W. H. Fuller and Bryan & Cartwright, for petitioner.

G. W. Pickle and J. L. Rogers, for the State.

LURTON, Circuit Judge. The petitioner, W. S. Sawrie, alleges that he is unjustly and unlawfully detained and restrained of his liberty by one Edward Willard, a constable of the county of Davidson and state of Tennessee, by virtue and authority of a judgment or warrant of commitment issued by a justice of the peace of the county of Davidson, a copy of which judgment and warrant is attached to his petition. The petitioner, Sawrie, alleges that he was arrested under the warrant issued as aforesaid, charging him with the violation of a certain statute of the state of Tennessee, passed May 1, 1897, which act is in the following words and figures:

"An act to prohibit the sale, offering for sale, or giving away of any cigarettes, cigarette paper or substitute thereof.

"Section 1. Be it enacted by the general assembly of the state of Tennessee, that it shall be a misdemeanor for any person, firm or corporation to sell, offer to sell, or bring into the state for the purpose of selling, giving away or otherwise disposing of any cigarettes, cigarette paper or substitute for the same, and a violation of any of the provisions of this act shall be a misdemeanor, punishable by a fine of not less than fifty dollars.

"Sec. 2. Be it further enacted, that the grand juries shall have inquisitorial power over offenses committed under this act.

"Sec. 3. Be it further enacted, that this act take effect from and after the first day of May, 1897, the public welfare requiring it."

He alleges that he was arrested and tried before the said justice of the peace, and by him judged guilty of violating said act of the legislature of the state of Tennessee, and required to enter into a bail for his appearance at the next term of the criminal court of the county of Davidson, and, in default of said bail, to stand committed to the county jail of said county, and that in pursuance of said judgment and sentence he was placed in the custody of Edward Willard, a constable of said county, and, not having given said bail, he is by said Willard, constable as aforesaid, under and by authority of the judgment or warrant of commitment aforesaid, detained and restrained of his liberty.

The facts constituting the alleged offense committed by the said W. S. Sawrie, as stated by his petition, are as follows: That in the month of May, 1897, and after the first day thereof, the petitioner purchased in the state of Kentucky, from the American Tobacco Company, a corporation of the state of New Jersey, and having a

factory for the manufacture of cigarettes in the city of New York, and similar factories at several other points in the United States, but having no factory or office or warehouse in the state of Tennessee, a number of packages, each containing 10 Sweet Caporal cigarettes, and directed such packages of cigarettes to be shipped to him at Nashville, Tenn. Petitioner alleges that these cigarettes were manufactured by the American Tobacco Company at its factory in said city of New York, and there packed by it, in quantities of 10, in pasteboard slide boxes, upon each of which such boxes or packages were printed the name of the manufacturer of the cigarettes therein contained, the name or brand of the cigarettes therein contained, the number of the factory and internal revenue collection or manufacturing district in which such cigarettes were made, and the name of the state in which said factory was located, the number of cigarettes contained in the box or package, the caution notice required by the laws of the United States, the internal revenue stamp for 10 cigarettes pasted across the end of such box or package so as to act as a seal thereon and therefor, and which had to be broken and destroyed to open said box or package, and all the other requirements of the laws and regulations of the United States governing the packing and sale of cigarettes. He avers that all of said boxes or packages of cigarettes so bought by him were manufactured and packed by the American Tobacco Company, and were by the said company, immediately after their sale to the petitioner, shipped from the state of Kentucky to petitioner, in the city of Nashville, in the state of Tennessee, in the original packages above described, without case, covering, or inclosure of any kind around or about any of said packages, but each such package loose and separate from each other, and were by the petitioner received in such separate packages in the same condition in which they were shipped, and just as they were shipped in Kentucky and received in Tennessee, and were exposed for sale by the petitioner at his place of business in the city of Nashville, and one of said packages containing 10 Sweet Caporal cigarettes as aforesaid was sold by petitioner on the 5th day of May, 1897, which such sale was the basis of the criminal proceedings herein referred to, and was sold by the petitioner only in the original, unbroken package, as packed at its said factory in the state of New York by the manufacturer, and shipped from the state of Kentucky to the state of Tennessee, and as received by him, in the state of Tennessee, from said state of Kentucky aforesaid. Petitioner further alleges that his detention and restraint of his liberty as aforesaid are illegal and unjust, and in contravention and violation of article 1, § 8, cl. 3, of the constitution of the United States, in that said act of the legislature of the state of Tennessee, by virtue of which, and for the alleged violation of which, your petitioner was arrested, tried, and convicted, and is now detained and restrained of his liberty as aforesaid, is, in so far as it applies, or is intended to apply, to the acts done by petitioner, unconstitutional and void, because in conflict with, and in violation of, the constitution of the United States, particularly article 1, § 8, cl. 3, thereof. Whereupon, to be relieved from such

unlawful detention and imprisonment, petitioner prays that a writ of habeas corpus be directed to the said Edward Willard, constable as aforesaid, and that he be brought before the circuit court of the United States, to the end that the validity of his imprisonment be inquired into, and that he be discharged and suffered to go at liberty.

The Tennessee act is an absolute prohibition of all commerce in cigarettes. There is no discrimination between cigarettes of domestic manufacture and those imported from another state. A sale by an importer in the original package is just as distinctly penal as would be a sale of an article which was of domestic manufacture. Limited to cigarettes of domestic origin, or cigarettes which, though imported from a foreign nation or another state, have lost their character as an import by a breaking of the original package, or by having once been sold in the state, the act would not conflict with any provision of the federal constitution. *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. 992; 1257; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273; *Plumley v. Massachusetts*, 155 U. S. 461, 15 Sup. Ct. 154. The question for my determination is whether or not the act is valid in so far as it prevents the importation and sale by the importer of cigarettes in original packages. The facts make a clear case of importation from another state, and a sale in this state by the importer in original packages. Such an importation and sale are not only prohibited by the broad and general terms of the statute, but an importation for the purpose of selling within the state is expressly made a penal offense. Though the act contains no recital of the objects or purposes of the legislature in imposing so absolute a prohibition upon this particular article of commerce, yet I feel authorized to assent to the assumption of the attorney general, who has appeared for the state, and to treat the act as passed for the purpose of protecting the health and morals of the people of the state against the evils incident to the cigarette habit. In favor of the validity of the act, it has been urged that the police power of the state has not been delegated to the general government, but has been reserved to the states and the people thereof, and that this act is but an exercise of the state's police power, and not, therefore, a regulation of commerce among the states, within the meaning of article 1, § 8, cl. 3, of the constitution of the United States, which confers upon the congress power "to regulate commerce with foreign nations and among the several states." It will not be contended that the delegation to congress of the power to regulate commerce in and of itself involved a surrender of the police power,—a power so wide and comprehensive that it has been said to extend "to the protection of the lives, limbs, health, comfort, and quiet of all persons and the protection of all property within the state." In the case of *Railroad Co. v. Husen*, 95 U. S. 465-470, the court said:

"We admit that the deposit in congress of the power to regulate foreign commerce and commerce among the states was not a surrender of that which may properly be denominated 'police power.' What that power is, it is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of domestic order, morals, health, and safety."

But in the same case the court also said:

"But, whatever may be the nature and reach of the police power of a state, it cannot be exercised over a subject confided exclusively to congress by the federal constitution. It cannot invade the domain of the national government. It was said in *Henderson v. Mayor of City of New York*, 92 U. S. 259, to 'be clear, from the nature of our complex form of government, that, whenever the statute of a state invades the domain of legislation which belongs exclusively to the congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied it may be to powers conceded to belong to the states.' Substantially the same thing was said by Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat. 1. Neither the unlimited powers of a state to tax, nor any of its large police powers, can be exercised to such an extent as to work a practical assumption of the powers properly conferred upon congress by the constitution. Many acts of a state may, indeed, affect commerce, without amounting to a regulation of it, in the constitutional sense of the term. And it is sometimes difficult to define the distinction between that which merely affects or influences, and that which regulates or furnishes a rule for conduct."

In the latest expression of that court in the very fine opinion of Justice Harlan in *Hennington v. Georgia*, 163 U. S. 299-317, 16 Sup. Ct. 1086, the learned justice, after reviewing a number of cases in which the validity of various state statutes passed in pursuance of the police power of the states which indirectly or in a slight degree affected commerce among the states was under consideration, said:

"These authorities make it clear that the legislative enactments of the states, passed under their admitted police powers, and having a real relation to the domestic peace, order, health, and safety of their people, but which, by their necessary operation, affect to some extent, or for a limited time, the conduct of commerce among the states, are yet not invalid by force alone of the grant of power to congress to regulate such commerce, and if not obnoxious to some other constitutional provision, or destructive of some right secured by the fundamental law, are to be respected in the courts of the Union until they are superseded and displaced by some act of congress passed in execution of the power granted to it by the constitution. Local laws of the character mentioned have their source in the powers which the states reserved, and never surrendered to congress,—of providing for the public health, the public morals, and the public safety,—and are not, within the meaning of the constitution, and considered in their own nature, regulations of interstate commerce, simply because, for a limited time or to a limited extent, they cover the field acquired by those engaged in such commerce."

Does this Tennessee legislation, adopted, in the exercise of the police power of the state, for the protection of its people against the evils of unrestricted commerce in the cigarette, belong to that class of enactments described by Justice Harlan in *Hennington v. Georgia*, cited above, as an act valid until superseded by some act of congress which, by its necessary operation, affects to some extent, or for a limited time, the conduct of commerce among the states; or does it belong to that other class of state enactments which invade the domain of the national government by undertaking to regulate a subject which is committed to the exclusive jurisdiction of congress? The principle by which the courts are to be governed in determining whether a particular statute belongs to the one class of statutes or the other was thus stated by Chief Justice Fuller in the opinion of the court in *Leisy v. Hardin*, 135 U. S. 100-119, 10 Sup. Ct. 687:

"The doctrine now firmly established is, as stated by Mr. Justice Field in *Bowman v. Railway Co.*, 125 U. S. 507, 8 Sup. Ct. 689, 1062, that where

the subject upon which congress can act under its commercial power is local in its nature or sphere of operation, such as harbor pilotage, the improvement of harbors, the establishment of beacons and buoys, to guide vessels in and out of port, the construction of bridges over navigable rivers, the erection of wharves, piers, and docks, and the like, which can be properly regulated only by special provisions adapted to their localities, the states can act until congress interferes and supersedes its authority; but where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the states, such as transportation between the states, including the importation of goods from one state into another, congress can alone act upon it and provide the needed regulations. The absence of any law of congress on the subject is equivalent to its declaration that commerce in that matter shall be free. Thus, the absence of regulations as to interstate commerce with reference to any particular subject is taken as a declaration that the importation of that article into the states shall be unrestricted. It is only after the importation is completed, and the property imported has mingled with and become a part of the general property of the state, that its regulations can act upon it, except so far as may be necessary to insure safety in the disposition of the import until thus mingled. The conclusion follows that as the grant of the power to regulate commerce among the states, so far as one system is required, is exclusive, the states cannot exercise that power without the assent of congress, and, in the absence of legislation, it is left for the courts to determine when state action does not amount to such exercise, or, in other words, what is or is not a regulation of such commerce. When that is determined, controversy is at an end."

In the later case, *In re Rahrer*, 140 U. S. 545, 11 Sup. Ct. 865, the court again said:

"The power of congress to regulate commerce among the several states, when the subjects of that power are national in their nature, is also exclusive. The constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free except as congress might impose restraint. Therefore it has been determined that the failure of congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several states. *Robbins v. Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. 592. And, if a law passed by a state in the exercise of its acknowledged power comes into conflict with that will, the congress and the state cannot occupy the position of equal opposing sovereignties, because the constitution declares its supremacy and that of the laws passed in pursuance thereof. *Gibbons v. Ogden*, 9 Wheat. 1, 210. That which is not supreme must yield to that which is supreme. *Brown v. Maryland*, 12 Wheat. 419, 448."

In the case last cited the court adopts the observations of Mr. Justice Catron as to the distinction between the incidental regulation of commerce admissible under the reserved police power of the states and the power of commercial regulation delegated to congress. Concerning a statute of the state of New Hampshire regulating the sale of liquor in the state, Justice Catron said, in the *License Cases*, 5 How. 599, that:

"The law and the decision apply equally to foreign and to domestic spirits, as they must do on the principles assumed in support of the law. The assumption is that the police power was not touched by the constitution, but left to the states as the constitution found it. This is admitted; and whenever a thing, from character or condition, is of a description to be regulated by that power in the state, then the regulation may be made by the state, and congress cannot interfere. But this must always depend upon facts, subject to legal ascertainment, so that the injured may have redress. And the fact must find its support in this: Whether the prohibited article belongs to, and is subject to be regulated as part of, foreign commerce, or of commerce among the states. If, from its nature, it does not belong to commerce, or if its con-

dition, from putrescence or other cause, is such, when it is about to enter the state, that it no longer belongs to commerce, or, in other words, is not a commercial article, then the state power may exclude its introduction. And as an incident to this power a state may use means to ascertain the fact. And here is the limit between the sovereign power of the state and the federal power. That is to say, that which does not belong to commerce is within the jurisdiction of the police power of the state, and that which does belong to commerce is within the jurisdiction of the United States."

In *Leisy v. Hardin*, 135 U. S. 100-110, 10 Sup. Ct. 681, the question involved was the validity of an Iowa act in so far as it prohibited the importation and sale within the state of Iowa, except for mechanical, culinary, and medicinal purposes, of ardent spirits, distilled liquors, ale, and beer. The validity of the act was defended upon the grounds assumed here, namely, that the act was not expressly intended to regulate interstate commerce, but was an exercise by the state of its police power for the purpose of protecting its people against the evil consequences of unrestricted trade in such deleterious articles. The court in that case said:

"That ardent spirits, distilled liquors, ale, and beer are subjects of exchange, barter, and traffic, like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of congress, and the decisions of the courts, is not denied. Being thus articles of commerce, can a state, in the absence of legislation on the part of congress, prohibit their importation from abroad, or from a sister state? or, when imported, prohibit their sale by the importer? If the importation cannot be prohibited without the consent of congress, when does property imported from abroad, or from a sister state, so become part of the common mass of property within the state as to be subject to its unimpeded control?"

So in this case it must be recognized that the cigarette is equally a well-known subject of barter, sale, trade, and commerce,—so recognized in all the channels of commerce, and by the laws of congress which prescribe the original package for purposes of taxation. The question here, as in the *Whisky Case*, just cited, is: Whether, being an article of commerce, can the state of Tennessee, in the absence of legislation by congress, prohibit their importation from a sister state? Or, when imported, prohibit their sale by the importer? No important distinction can be drawn between this case and *Leisy v. Hardin*. If all that can be said touching the evil consequences of the use of the cigarette upon the health and morals of the state be admitted, much more can be said, and was said, of the evils sought to be guarded against by the Iowa prohibition statute. If the traffic in ardent spirits is a recognized and legitimate subject of commerce, so is the traffic in the cigarette. If congress has recognized the fact that the one is an article of traffic and commerce, by prescribing an original package and imposing a tax thereon, so it has recognized the other. A distinction is sought to be drawn by the state's counsel between the case at bar and *Leisy v. Hardin*, in that the Tennessee statute absolutely prohibits all commerce in the cigarette for any purpose whatever, while the Iowa statute under consideration in *Leisy v. Hardin* recognized ardent spirits, wine, beer, and ale as objects of commerce, by permitting their sale by licensees of the state for mechanical, medicinal, and sacramental purposes. The argument based on this difference is that under the police power a state

may prohibit all traffic in a given article which, in the judgment of the legislature, is deleterious to the health or morals of its people, and that the power of congress to regulate commerce among the states can have no application in respect to an article when its commercial qualities have been destroyed by an exercise of the police power. This argument was met by Justice Catron in the License Cases, 5 How. 599 et seq.:

"If this be the true construction of the constitutional provision," said Justice Catron, "then the paramount power of congress to regulate commerce is subject to a very material limitation; for it takes from congress, and leaves with the states, the power to determine the commodities or articles of property which are the subject of lawful commerce. Congress may regulate, but the states determine what shall or shall not be regulated. Upon this theory, the power to regulate commerce, instead of being paramount over the subject, would become subordinate to the state police power; for it is obvious that the power to determine the articles which may be the subjects of commerce, and thus to circumscribe its scope and operation, is, in effect, the controlling one. The police power would not only be a formidable rival, but, in a struggle, must necessarily triumph over the commercial power, as the power to regulate is dependent upon the power to fix and determine upon the subjects to be regulated. The same process of legislation and reasoning adopted by the state and its courts could bring within the police power any article of consumption that a state might wish to exclude, whether it belonged to that which was drunk, or to food and clothing, and with nearly equal claims to propriety, as malt liquors and the produce of fruits other than grapes stand on no higher grounds than the light wines of this and other countries, excluded, in effect, by the law as it now stands."

This argument is adopted and repeated in *Re Rahrer*, 140 U. S. 558, 559, 11 Sup. Ct. 865. This recognition in the Iowa statute of the commercial character of ardent spirits for some purposes was not the subject of any observations by court or counsel, so far as can be learned from the report of that case.

In *Re Rahrer*, already cited, the court, referring to *Bowman v. Railway Co.*, 125 U. S. 465, 8 Sup. Ct. 689, 1062, and *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, say that the laws under consideration in these cases—

"Were enacted in the exercise of the police power of the state, and not at all as regulations of commerce with foreign nations and among the states, but as they inhibited the receipt of an imported commodity, or its disposition before it had ceased to become an article of trade between one state and another, or another country and this, they amounted, in effect, to a regulation of such commerce. Hence it was held that inasmuch as interstate commerce, consisting in the transportation, purchase, sale, and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as congress did not pass any law to regulate it specifically, or in such way as to allow the laws of the state to operate upon it, congress thereby indicated its will that such commerce should be free and untrammelled, and therefore that the laws of Iowa, referred to, were inoperative, in so far as they amounted to regulations of foreign or interstate commerce, in inhibiting the reception of such articles within the state, or their sale, upon arrival, in the form in which they were imported there from a foreign country or another state."

If the regulation is in respect to a subject within the exclusive domain of the national government, the enactment is repugnant to the commercial clause of the constitution, without regard to whether the prohibition of commerce be partial or complete. The Iowa statute was held to be repugnant to the constitution, not because com-



merce in the article was permitted for a limited purpose and under state license, but because any regulation of traffic in a commercial commodity of recognized character, as such, was an intrusion upon the exclusive power of the national government. The Iowa statute would have been no less repugnant if it had prohibited all commerce in ardent spirits, wines, etc. It must follow, if it was not competent to inhibit the importation and sale by the importer in original packages of spirits, wine, beer, to be consumed as a beverage, that it would be equally inadmissible to make the exclusion absolute. If the state may not regulate commerce among the states in a commercial article at all, it may not oust the national jurisdiction by merely declaring a commercial commodity not to be a commercial commodity merely because the local policy of the state would be subserved thereby. The conclusion of the opinion of the chief justice fully and clearly states the ground upon which the Iowa statute was held to be void. The learned chief justice, after discussing the many cases where state enactments had been upheld, said:

"These decisions rest upon the undoubted right of the states of the Union to control their purely internal affairs, in doing which they exercise powers not surrendered to the national government; but whenever the law of the state amounts essentially to a regulation of commerce with foreign nations or among the states, as it does when it inhibits, directly or indirectly, the receipt of an imported commodity or its disposition before it has ceased to become an article of trade between one state and another, or another country and this, it comes in conflict with a power which, in this particular, has been exclusively vested in the general government, and is therefore void. \* \* \* Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by state laws amounting to regulations, while they retain that character, although, at the same time, if directly dangerous in themselves, the state may take appropriate measures to guard against injury before it obtains complete jurisdiction over them. To concede to a state the power to exclude, directly or indirectly, articles so situated, without congressional permission, is to concede to a majority of the people of a state, represented in a state legislature, the power to regulate commercial intercourse between the states, by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States, represented in congress, and its possession by the latter was considered essential to that more perfect Union which the constitution was adopted to create. Undoubtedly, there is difficulty in drawing the line between the municipal powers of the one government and the commercial powers of the other, but when that line is determined, in the particular instance, accommodation to it, without serious inconvenience, may readily be found, to use the language of Mr. Justice Johnson in *Gibbons v. Ogden*, 9 Wheat. 1, 238, in 'a frank and candid co-operation for the general good.'" *Leisy v. Hardin*, 135 U. S. 123-125, 10 Sup. Ct. 681, 689.

If the state enactment regulating traffic in a particular article be in fact a quarantine or an inspection statute, and, as such, is aimed at something uncommercial, by reason of its state or condition, such as articles infected, or disguised so as to be a cheat calculated to lead a purchaser into buying something he did not intend to buy, as in *Plumley v. Massachusetts*, 155 U. S. 461, 15 Sup. Ct. 154, the enactment may be upheld as an exercise of the police power of the states, and not a regulation of commerce. But this Tennessee statute, in so far as it prevents importation and sales in the original

package by the importer. is not a quarantine or inspection statute, and is not based upon the state or condition of the cigarette. *Hennington v. Georgia*, 163 U. S. 299, 16 Sup. Ct. 1086, involved a statute of the state of Georgia prohibiting any operation of railroad trains on the Sabbath day. It was upheld as an exercise of the police power of the state, and not a regulation of interstate commerce. The opinion contains no language in any way modifying the doctrine of *Leisy v. Hardin*, or that of the cases following and reasserting the doctrine of that case. There is no possible conflict between *Hennington v. Georgia* and *Leisy v. Hardin*. It is but another of the class of cases like those considered and distinguished in *Bowman v. Railway Co.*, *Leisy v. Hardin*, and *In re Rahrer*. The case at bar does not fall within that class, and is controlled by *Leisy v. Hardin*, from which it cannot be distinguished. The case reported in 69 Fed. 233, under the style of "*In re Minor*," is not precisely in point, as the statute under consideration was purely a revenue enactment. In *Iowa v. McGregor*, 76 Fed. 956, a police statute precisely like the Tennessee act, except for a proviso that the act should not apply to jobbers doing an interstate business with customers outside the state, was held to be invalid, so far as it applied to sale by the importer in original packages. The Tennessee statute is too broad, and is repugnant to the commercial clause of the constitution of the United States, in so far as it inhibits the importation of cigarettes from foreign nations or other states, or their sale by the importer in the form in which they were imported. I reach this conclusion without any hesitation, though reluctant to even partially strike down a statute aimed at the suppression of an evil of most pronounced character. The detention of the petitioner under the commitment of the state court is illegal, and he must be set at liberty.

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In re HONG WAH.

(District Court, N. D. California. September 7, 1897.)

No. 11,360.

**1. CONSTITUTIONAL LAW—NUISANCES—LAUNDRIES—CITY ORDINANCES.**

A city ordinance provided that it should be unlawful for any person to establish, maintain, or carry on the business of a public laundry, where articles are washed and cleansed for hire, within the city, except in certain designated localities, and declared any such laundry established or carried on in violation of this provision a public nuisance, and the violation of the ordinance a misdemeanor punishable by fine or imprisonment. *Held*, that the ordinance was in contravention of the fourteenth amendment of the constitution of the United States.

**2. SAME—RIGHT TO USE ONE'S PROPERTY.**

The ownership of property, no matter where located, carries with it the right to use, and to permit the use of, such property in the prosecution of any legitimate business which is not a nuisance in itself; and the exclusion of any such lawful business from a particular locality can only be justified upon the ground that the health, safety, or comfort of the surrounding community requires such exclusion.

**3. NUISANCES—LAUNDRIES.**

A public laundry is not a nuisance per se, and cannot be made so by the legislative declaration of a city council.

**Hearing on Return to a Writ of Habeas Corpus.****Thos. D. Riordan, for petitioner.****Chas. N. Kirkbride, for respondent.**

DE HAVEN, District Judge. This is a proceeding upon a writ of habeas corpus issued in behalf of one Hong Wah. The return to the writ shows that the said Hong Wah is imprisoned by the sheriff of the county of San Mateo in execution of a judgment of the recorder of the city of San Mateo convicting the said Hong Wah of the violation of section 1 of a certain ordinance of that city, by which it is made "unlawful for any person to establish, maintain or carry on the business of a public laundry or wash-house where articles are washed and cleansed for hire within the city of San Mateo," except within the part of said city which lies without certain designated limits. By section 2 of the ordinance, "any public laundry or wash-house, established, maintained or carried on in violation" of the preceding section of the ordinance, is declared to be a public nuisance; and by section 3 the violation of the ordinance is declared to be a misdemeanor punishable by a fine not exceeding \$300, or by imprisonment not exceeding three months, or by both such fine and imprisonment. The petition, in addition to some matters which I do not deem material, alleges that the ordinance, if enforced, will deprive the said Hong Wah of his property and the good will of his business, and will operate as a direct prohibition of his pursuit of such business upon the premises occupied by him as a public laundry, and that such ordinance is in conflict with the constitution of the United States. Upon the other hand, it is alleged in the return to the writ "that said ordinance was passed and adopted by said board of trustees of said city of San Mateo as a reasonable police and sanitary regulation of said city"; and in this connection the return further avers that the city of San Mateo includes within its exterior boundaries about 1,000 acres of land, and that the district from which the business of conducting a public laundry is excluded by said ordinance comprises about 300 acres of land, and that there is no law of the state or ordinance of the city of San Mateo which makes it unlawful to conduct a public laundry upon any part of the remaining 700 acres lying within the limits of that city, and all of which land is alleged to be "available" for that purpose.

It is manifest from the foregoing statement that there is presented for decision the question of the constitutionality of the ordinance under which the respondent seeks to justify the imprisonment of the said Hong Wah; and that such an ordinance is in contravention of the fourteenth amendment to the constitution of the United States was decided by the circuit court for the district of California in the Stockton Laundry Case, 26 Fed. 611, in which case it was distinctly held that a public laundry is not a nuisance per se, and cannot be made so by the legislative declaration of a city council, and that, therefore, an ordinance which prohibited the maintenance of a public laundry within the inhabited and inhabitable portions of the city of Stockton could not be sustained as a police regulation. The rule of

law as thus declared was reaffirmed in *Re Sam Kee*, 31 Fed. 681, in which case, in speaking of an ordinance in all respects similar to the one under consideration here, it was said by Judge Sawyer:

"To make an occupation indispensable to the health and comfort of civilized man, and the use of the property necessary to carry it on, a nuisance, by a mere arbitrary declaration in a city ordinance, and suppress it as such, is simply to confiscate the property and deprive its owner of it without due process of law. It also abridges the liberty of the owner to select his own occupation and his own methods in the pursuit of happiness, and thereby prevents him from enjoying his rights, privileges, and immunities, and deprives him of the equal protection of the laws secured to every person by the constitution of the United States."

With the views thus expressed I entirely agree, and the decision of the court in this proceeding might well rest upon the authority of the cases above cited; but in *Re Hang Kie*, 69 Cal. 149, 10 Pac. 327, a different conclusion was reached,—the court in that case holding that an ordinance of the city of Modesto which prohibited the carrying on of any public laundry in that city, except within certain prescribed boundaries, was a valid exercise of the police power of the state. The respondent insists that this court ought, in deference to this decision of the highest court of the state upon the precise question involved here, deny the prayer of the petitioner herein; and it thus becomes proper for me to state more fully the fundamental principles which, in my judgment, are controlling in the present case. The opinion in the case just referred to undoubtedly supports the contention of respondent that the ordinance of the city of San Mateo now under discussion is valid; but that case has been virtually, although not expressly, overruled by the supreme court of the state of California, and I do not think would now be regarded as authority in that court. In *Ex parte Whitwell*, 98 Cal. 73, 32 Pac. 870, the provision of an ordinance which prohibited the maintenance of a private asylum for the treatment of inebriates and persons suffering from mild forms of insanity within 400 yards of any dwelling or school was held to be invalid. In passing upon that particular provision of the ordinance the court said:

"A law or ordinance, the effect of which is to deny to the owner of property the right to conduct thereon a lawful business, is invalid unless the business to which it relates is of such a noxious or offensive character that the health, safety, or comfort of the surrounding community requires its exclusion from that particular locality; and an asylum for the treatment of mild forms of insanity is not properly classed as such. If rightly conducted, such asylum would not render the occupation of dwellings or schools in its neighborhood uncomfortable to such a degree that its maintenance would be deemed a nuisance, or any impairment of the substantial rights of occupants of such dwellings or schools."

It will be observed that in the case just cited the decision of the court rests upon the broad proposition that the ownership of property, no matter where located, carries with it the right to use, and to permit the use of, such property in the prosecution of any legitimate business which is not a nuisance in itself, and that the exclusion of any such useful business from a particular locality can only be justified upon the ground that the health, safety, or comfort of the surrounding community requires such exclusion. A moment's reflec-

tion will show that any rule less broad would fail to give full effect to this comprehensive declaration of the fourteenth amendment to the constitution of the United States:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

The right to use property in the prosecution of any business which is not dangerous to others, nor injurious nor offensive to persons within its vicinity, is one of the legal attributes of the ownership of property, of which the owner cannot be deprived by the arbitrary declaration of any law of the state, or municipal ordinance; nor can the right of any person to engage in any useful occupation, not a nuisance per se, at such place as he may choose for that purpose, be denied by any law or ordinance. These are the fundamental principles underlying the decision in *Ex parte Whitwell*, before referred to, and the rule of law as thus declared is entirely inconsistent with the previous case of *In re Hang Kie*, 69 Cal. 149, 10 Pac. 327, unless the business of conducting a public laundry is to be deemed and treated as a nuisance per se; and that such business cannot be so regarded was not only decided in the cases first cited in this opinion, but also by the supreme court of California in *Ex parte Sing Lee*, 96 Cal. 354, 31 Pac. 245. It is certainly a matter of common observation that a public laundry is harmless in itself, and, if properly conducted with reference to sanitary and other conditions which may easily be complied with, not offensive or dangerous to the health of the community in which it may be located; and, this being so, a person has, under the constitution of the United States, the same right to engage in the business of conducting a public laundry as in any other, and has, equally with the grocer, the lawyer, or carpenter, the right to select the particular locality in which he shall conduct such business. The ordinance in question denies this right, and is for that reason in conflict with section 1 of the fourteenth amendment to the constitution of the United States; and the conflict is not removed by the fact, alleged in the return, that there are within the limits of the city of San Mateo, outside of the district from which laundries are excluded, places equally as well suited for their location as any within the district from which they are excluded. As already stated, a person desiring to carry on such a business has the right to select his own location, and cannot be required to go elsewhere. It follows from these views that the prayer of the petition must be granted, and the said Hong Wah discharged from his imprisonment. The respondent, however, will be allowed, if he desires, an appeal from this judgment, in which event the said Hong Wah will be required to give a bond in such sum as may be fixed by the court, with sufficient sureties, for his appearance to answer the judgment of the appellate court.

## UNITED STATES v. 1,150½ POUNDS OF CELLULOID.

(Circuit Court of Appeals, Sixth Circuit. October 11, 1897.)

No. 470.

## 1. CUSTOMS LAWS—FORFEITURES FOR FRAUDULENT ENTRIES—INTENT.

In order to enforce a forfeiture under the customs administrative act of June 10, 1890 (section 9), it is necessary that the acts made a ground of forfeiture shall be done by the owner, or some one for whom he is responsible, or under whom he derives title; and goods will not be forfeited which are unlawfully brought into this country by a mere trespasser, without the knowledge of the owner or his agent, and with intent to himself appropriate the money provided by the owner for the payment of the lawful duties.

## 2. SAME—CONSTRUCTION OF STATUTE.

The customs administrative act of June 10, 1890, provides, in section 9, "that if any owner, importer, consignee, agent or other person" shall make or attempt to make a fraudulent entry of goods such goods shall be forfeited, etc. *Held*, that the words "or other person" mean some one of the same general class as those described by the preceding words, and hence do not include a stranger who is a mere trespasser in respect to the goods.

In Error to the District Court of the United States for the Eastern District of Michigan.

This is a proceeding for the forfeiture, under section 9 of the customs administrative act of June 10, 1890, of 1,150½ pounds of celluloid, on the ground that it was smuggled into the United States by means of a false and fraudulent invoice. The claimant and owner of the celluloid, which has been seized as forfeited, is the Water Lily Kollar & Kuff Company, a corporation of the state of Michigan, doing business in Detroit, Mich. The claimant, by answer, denied all complicity in, or knowledge of, the fraudulent device by which this celluloid had been smuggled into the United States. The issues between the government and the claimant were submitted upon the evidence to the Honorable Henry H. Swan, judge of the district court of the United States for the Eastern district of Michigan, who made the following finding of facts:

"The United States government seized 1,150½ pounds of celluloid at the port of Detroit on the 18th day of May, A. D. 1892, claiming the same to be forfeited under the revenue laws of the United States. The celluloid seized was the property of the Water Lily Kollar & Kuff Company, a corporation organized under the laws of the state of Michigan, and having its office in the city of Detroit, in said state. The directors of the corporation are reputable business men of the city of Detroit, a majority of the directors being the owners of a large piano and organ manufactory in Detroit, established for upward of thirty years. The Water Lily Kollar & Kuff Company had imported 5,800 pounds of celluloid into Canada from Scotland and France. The celluloid was stored in Windsor, Canada, for the purpose, in part, of supplying the Canadian trade, and for the additional reason that such storage reduced the expenses of the business in Detroit in the matter of fire insurance and customs duties, duty only being paid on select stock and net weight, instead of upon the bulk packages. The storage of the celluloid in Windsor was open and notorious. It was stored with one Joseph H. Elliott in a storage shed upon his premises. Elliott was employed in the organ factory referred to; lived in Windsor, going and returning from his work each day. S. B. Warren was the secretary and manager of the Water Lily Kollar & Kuff Company, and acted, with reference to importations of celluloid, under the direction and control of the board of directors of the corporation. It was the custom in the business of the corporation to import celluloid from the place of storage in Windsor to Detroit in small quantities and selected lots, from time to time, as needed in the Detroit business. The first importation was made by Elliott bringing the celluloid desired across the river to Detroit, being there met by Mr. Warren; they together going to the custom house, and Mr. Warren there paying the lawful duties. Subsequently the celluloid was imported by Elliott alone, when in-

structed so to do by Warren, he being furnished the money with which to pay the duties by Mr. Warren. About 4,000 pounds out of the total 5,800 pounds was imported in this manner; the duties regularly paid thereon. A larger amount had been paid in duties than first appeared by the books of the government, but upon investigation the books of the government showed errors, and the books of the corporation showing payments made were found to be correct. On or about the 15th day of May, A. D. 1892, Elliott made a bargain with one Ellston, a friend of his, living in Detroit, by which Ellston agreed to allow Elliott to store the remainder of the celluloid in his (Ellston's) premises, in Detroit. This was without the knowledge or consent of any of the officers, agents, or employés of the corporation. Elliott then caused about 1,200 pounds of the celluloid to be taken from his storage shed, and concealed in the drawers of his household furniture, caused the household furniture to be packed and placed in a moving van, and on the 18th day of May, 1892, moved the celluloid, concealed in and among a portion of his household effects, to Ellston's house, in Detroit. Mrs. Elliott signed and swore to the invoice, and caused the goods to be entered as household effects, fraudulently concealing the fact that celluloid was contained in the packages. The expense of renting Ellston's premises, the hiring of the moving van, the freight, and other incidentals, were paid by Elliott from his own funds. He obtained \$25 from the cashier at the organ factory for this purpose, upon the false statement that he needed the money to pay the expenses of his wife to Toronto to attend the funeral of one of her relatives. Mr. Warren, who was the sole manager of the business of the corporation, was, at the time of this unlawful conduct on the part of Elliott, and had been for several weeks prior thereto, at his home, in Detroit, in attendance upon the sickbed of his wife. She died a few days prior to the seizure of the property. Mr. Warren's attendance at his business during the weeks mentioned was at long intervals, and for brief periods at each visit. No other person in the corporation had any share in the management or direction of its affairs. None of the directors, stockholders, agents, or employés of the corporation had any knowledge of the removal of the celluloid in question from the storage shed. None of the directors, employés, or agents had any knowledge or information of Elliott's arrangement with Ellston. No authority or direction of any kind had been given to Elliott to disturb the celluloid in question in its place of storage, or to bring the same, or any part of it, into the United States. There was no intention on the part of the directors, employés, or agents of the corporation, with the exception of Elliott, to defraud the government. Elliott was an agent at special times only, with limited powers, working under specific instructions. He had no authority to remove a pound of celluloid, excepting when so directed. Special orders were given to him in each instance as to the time and quantity of celluloid to be brought by him. At the time the celluloid was fraudulently entered, he had no right to the possession of the property excepting in its place of storage. He was a trespasser in its possession, endeavoring, for private and personal gain, to avoid the payment of the duties. He stated on several occasions after the seizure that, if he had been successful, he would have made a gain of \$800 in the transaction. This sum—\$800—is approximately the amount of customs duties for which the property seized would be legally chargeable. He did not report to the corporation, or any of its officers or agents, that he had removed the celluloid, until after its seizure by the government. After its seizure, the property was sold under a stipulation, and the proceeds are now held in lieu thereof. The remainder of the property still on storage in Windsor was regularly entered by the owner, and duty paid. Elliott was indicted for smuggling. Elliott and Warren were also indicted for conspiring together to defraud the revenue. Elliott pleaded guilty in the first case, the government entering a nol. pros., and he being set free. He then appeared as a witness against Mr. Warren, but the jury found Mr. Warren not guilty."

Upon the facts thus found, the proceeds of the seized celluloid were ordered paid over to the claimant. The record has been filed, and error assigned by the United States.

Chas. R. Whitman, for the United States.  
Thomas Lette, for defendant.

Before TAFT and LURTON, Circuit Judges, and CLARK, District Judge.

LURTON, Circuit Judge (after making the foregoing statement of facts), delivered the opinion of the court.

The facts found by the district court make a case where it is sought to forfeit the goods of an owner as a result of the wrongful conduct of one Elliott, a mere trespasser, who removed the celluloid from its lawful place of storage in another country, with the purpose and intent of defrauding the revenue laws of this country by smuggling them into the United States, to the end that he might himself profit by appropriating the lawful duties thereon when thereafter directed by the owner to make a lawful importation, and intrusted with the money to pay the duties. The owners, by the facts found below, are completely acquitted of all complicity with Elliott, and all knowledge of his purpose or conduct in respect of his fraudulent scheme. It is, nevertheless, insisted that this merchandise is forfeited as a result of the acts and conduct of Elliott, and that the innocence of the owners is no defense. If this celluloid has been forfeited under these circumstances, and as a consequence of the unauthorized acts of a mere trespasser, over whom the owners had no control, it must be the result of some very plain and positive provision of law by which the sins of one are to be visited upon another. Such has not been the spirit of the revenue laws of this country prior to the customs administrative act of June 10, 1890.

In the early case of *U. S. v. Cargo of Ship Favorite*, 4 Cranch, 347, a forfeiture was sought of certain wine and spirits saved from a wreck, because unaccompanied with such marks and certificates as were required by the collection law of 1799, and because they were removed, after being landed, by strangers to the owners, without the consent of the collector, and before duties were paid. The court held: (1) That merchandise saved from a wreck, and landed, as a necessary means for the preservation of the goods, was not thereby forfeited because found by the collector unaccompanied by the marks and certificates prescribed by the act of 1799. (2) That the removal of these wrecked goods from the place where they were deposited when landed, without a permit from the collector or the payment of duties, did not subject them to forfeiture where such removal was made by strangers to the title, and without the consent or procurement of the owners. Marshall, C. J., on this subject, said:

"That the removal for which the act punishes the owner with a forfeiture of the goods must be made with his consent or connivance, or with that of some person employed or trusted by him. If by private theft, or open robbery, without any fault on his part, his property should be invaded while in the custody of the officer of the revenue, the law cannot be understood to punish him with the forfeiture of that property. \* \* \* The court is of opinion that those penalties cannot be so applied in this case, not only because, from the whole tenor of the law, its provisions appear not to be adapted to goods saved from a vessel, under the circumstances in which the *Favorite* was found, but because, also, the law is not understood to forfeit the property of owners or consignees on account of the misconduct of mere strangers, over whom such owners or consignees could have no control."



In *U. S. v. Eighty-Four Boxes of Sugar*, 7 Pet. 453, a forfeiture was claimed of certain boxes of sugar as having been entered as brown sugar, when they should have been entered as white sugar, and subjected to a higher rate of duty. The court said:

"The statute under which these sugars were seized and condemned is a highly penal law, and should, in conformity with the rule on the subject, be construed strictly. If, either through accident or mistake, the sugars were entered by a different denomination from what their quality required, a forfeiture is not incurred."

In *Six Hundred and Fifty-One Chests of Tea v. U. S.*, 1 Paine, 499, Fed. Cas. No. 12,916, it was sought to declare a forfeiture of certain chests of tea because found without the certificates of importation required by section 43 of the collection act of 1799. It appeared that the owners were not at fault, these teas having been removed from a storage warehouse, where they were held under bond, without obtaining proper certificates showing duty paid, by persons not under the control of the owner, and not acting for him, and that the owner was guilty of no fault. Mr. Justice Thompson heard the cause on appeal to the circuit court, and decided against the forfeiture. Among other things, the learned justice said:

"I am not aware of a single instance where, by any positive provision of the revenue laws, a forfeiture is incurred, that it does not grow out of some fraud, mistake, or negligence of the party on whom the penalty has been visited."

In *U. S. v. Fifty-Three Boxes of Sugar*, 2 Bond, 346, Fed. Cas. No. 15,098, a forfeiture was sought of certain sugars as having been entered as of a lower grade, and subject to a lower duty, than their real quality demanded. The absence of any fraudulent intent upon the part of the owner was offered as a defense, and sustained. The case arose under the act of March 3, 1863, § 1, which provided for a forfeiture of any goods when the owner, consignee, or agent "shall knowingly make, or attempt to make, an entry thereof by means of any false invoice, \* \* \* or of any invoice which should not contain a true statement of all the particulars." The court said: "It is clearly incumbent on the government, in order to establish its right to a forfeiture, to bring the knowledge home to the parties charged with the fraud, as the basis of a judgment of forfeiture. \* \* \* The fraudulent intent must also appear, and such intent must be fairly inferable from the facts proved, and cannot rest upon mere suspicion."

In an action brought to recover a penalty accruing under the forty-fourth section of the act of March 2, 1799, for the purchase and removal of certain empty casks, which had contained imported spirits, and from which the brands showing importation had not been removed, as required by the section cited, the purchase and removal having been made by a clerk in the employment of defendant, the jury were instructed that if, in their opinion, the defendant had no agency in, or knowledge of, the purchase or removal of the casks, nor any acquiescence in the illegal proceedings of the clerk, although he might be the owner, in whole or in part, of the casks, he was not

liable to the penalties of the act, but the punishment should be visited on the offender, or the person who actually sold or removed the casks in violation of law. Upon the motion for a new trial the court overruled the motion, and, among other things, said:

"On general principles of responsibility of one for the acts of another, the defendant cannot be answerable penally, or even civilly, for acts not done by his direction, by his authority, with his knowledge, or within the scope of his authority. In the case of *Parsons v. Armor*, 3 Pet. 428, referred to by the district attorney, it is said that 'the general rule is that a principal is bound by the acts of his agent no further than he authorizes that agent to bind him.' It is truly added that 'the extent of the power given to an agent is deducible as well from facts as from express delegation.' In Daley's work on Agency (page 226): 'The responsibility of the master for the servant's negligence, or unlawful acts, is limited to cases properly within the scope of his employment.'" *U. S. v. Halberstadt*, 26 Fed. Cas. 68, Gilp. 262.

In *U. S. v. Two Hundred and Eight Bags of Kainit*, 37 Fed. 326, a forfeiture was sought of certain merchandise which had been feloniously taken when afloat on shipboard, and brought ashore in contravention of the revenue law, by persons unknown to the owner, and with the intention of depriving the owner of his property. Judge Simonton said:

"Whatever doubt may have existed on this subject, it has been removed by the act of 1874 (18 Stat. 189), which makes an actual intention to defraud an essential question in suits to enforce forfeitures under the customs laws. *Sinn v. U. S.*, 14 Blatchf. 550, Fed. Cas. No. 12,906; *Lewey v. U. S.*, 15 Blatchf. 1, Fed. Cas. No. 8,309. The question of fact which I must pass upon is 'whether the alleged facts were done with the actual intention to defraud the United States.' 1 Supp. Rev. St. p. 80, § 16; *The Purissima Concepcion*, 24 Fed. 358. This means an actual intent on the part of the owner, or of some person acting under his authority, or being his agent, or under whom he derives title. *U. S. v. Diamonds*, 30 Fed. 364. In this case the master and stevedore of the vessel had informed the claimant that all the cargo was discharged. Without the knowledge of the claimant, they concealed 208 bags of kainit in the ship. They left claimant's wharf and service, and then clandestinely and furtively sent the kainit ashore. Under the circumstances stated, the claimants cannot be charged with the consequences of this act, so as to forfeit their property."

In *The Cargo Ex Lady Essex*, 39 Fed. 765, a forfeiture of merchandise was sought upon the ground, among others, that the goods had been smuggled into the United States. The facts were that the schooner *Victor*, lumber laden, and bound from a Canadian port, arrived within the limits of the collection district of Port Huron, and there stranded. A part of her cargo was sold to the master of the schooner *Lady Essex* before the *Victor* had been authorized to unload, and contrary to section 2867, Rev. St. The master of the *Essex*, knowing that this cargo had not been properly unloaded, and the duty paid, fraudulently concealed the part purchased by him in the hold of his vessel, and proceeded to Mt. Clemens, and began to unload without reporting to the collector. Judge Brown (now Justice Brown) held that the lumber so sold the *Essex* and so smuggled in by the *Essex* was not forfeited, because the owner was not responsible for the wrongful acts of the master of either schooner. Among other things, the learned judge said:

"It is clear that goods taken and unloaded from a foreign vessel wrecked upon the coast are not subjected to a forfeiture because landed without a per-

mit. *The Gertrude*, 3 Story, 68, Fed. Cas. No. 5,370; *Pelsch v. Ware*, 4 Cranch, 347; *The Concord*, 9 Cranch, 387; *Merritt v. Merchandise*, 30 Fed. 195. The stranding of the *Victor* made a clear case of unavoidable accident, necessity, or stress of weather, within the meaning of this section; and the only irregularity in the proceeding was the failure to give notice to the customs authorities of such contingency. No forfeiture, however, is imposed for the failure to give such notice, though it would seem, from the following section, that the vessel receiving such lumber from the stranded vessel incurs the penalty of forfeiture, and the master of such vessel a penalty of treble the value of the merchandise. While it is possible that section 2867 might be construed by inference to work a forfeiture of the cargo where no notice has been given of accident, necessity, or distress; still, although the statute may not be subject to the strict construction of a penal one, a forfeiture ought not to be imposed unless the language will bear no other reasonable construction. *Sixty Pipes of Brandy*, 10 Wheat. 421; *U. S. v. Carr*, 8 How. 1; *U. S. v. Twenty-Four Coils of Cordage*, Baldw. 502, Fed. Cas. No. 16,566. So far as a forfeiture is claimed by reason of the goods having been smuggled into the United States at *Mt. Clemens*, or, in the language of the statute, having been knowingly and willfully imported into the United States, contrary to law, the case depends upon different considerations. The authorities are direct to the proposition that the forfeiture of goods for violation of the revenue laws will not be imposed unless the owner of such goods or his agent has been guilty of an infraction of such laws. *Pelsch v. Ware*, 4 Cranch, 347; *The Waterloo*, Blatchf. & H. 120, Fed. Cas. No. 17,257; *Six Hundred and Fifty-One Chests of Tea v. U. S.*, 1 Paine, 507, Fed. Cas. No. 12,916; *U. S. v. Two Hundred and Eight Bags of Kainit*, 37 Fed. 326. It is clear that, if goods be stolen from the owner, or if a person has obtained possession of them fraudulently, or without authority, no act of his can forfeit them as against the true owner. Section 16 of the act of 1874 declares, in express terms, that in cases of this description it is the duty of the judge to submit to the jury, as a separate and distinct proposition, whether the alleged acts were done with an actual intention to defraud the United States; or, if such issues be tried by the court without a jury, it shall be the duty of the court to pass upon and decide such proposition as a distinct and separate finding of fact. This language must apply to the owner of the goods, or his authorized agents, and not to a mere trespasser."

But it is argued that the decisions we have quoted were made prior to the act of June 10, 1890, and that such changes were made by that act in the law as to result in a forfeiture without regard to the conduct of the owner, or his control over the person violating the law. For the purpose of contrasting the provisions of the act of 1874, under which were decided the two cases of *U. S. v. Two Hundred and Eight Bags of Kainit* and *The Cargo Ex Lady Essex*, cited above, we here set out sections 12 and 16 of the act of 1874, and section 9 of the act of June 10, 1890:

Sections 12 and 16 of the act of 1874 are as follows:

"Sec. 12. That any owner, importer, consignee, agent or other person who shall, with intent to defraud the revenue, make or attempt to make, any entry of imported merchandise, by means of any fraudulent or false invoice, affidavit, letter or paper, or by means of any false statement, written or verbal, or who shall be guilty of any willful act or omission, by means whereof the United States shall be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof, embraced or referred to in such invoice, affidavit, letter, paper or statement, or affected by such act or omission, shall, for each offense, be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both; and, in addition to such fine, such merchandise shall be forfeited; which forfeiture shall only apply to the whole of the merchandise in the case or package containing the particular article or articles of merchandise to which such fraud or alleged fraud relates; and anything contained in any act which provides for the forfeiture or confiscation of an entire invoice

in consequence of any item or items contained in the same being undervalued, be, and the same is hereby, repealed."

"Sec. 16. That in all actions, suits and proceedings in any court of the United States now pending or hereafter commenced or prosecuted to enforce or declare the forfeiture of any goods, wares or merchandise, or to recover the value thereof, or any other sum alleged to be forfeited, by reason of any violation of the provisions of the customs-revenue laws, or any of such provisions, in which action, suit or proceeding, an issue or issues of fact shall have been joined, it shall be the duty of the court, on the trial thereof, to submit to the jury as a distinct and separate proposition, whether the alleged acts were done with an actual intention to defraud the United States, and to require upon such proposition a special finding by such jury; or, if such issues be tried by the court without a jury, it shall be the duty of the court to pass upon and decide such proposition as a distinct and separate finding of fact; and, in such cases, unless intent to defraud shall be so found, no fine, penalty or forfeiture shall be imposed."

Section 9 of the act of June 10, 1890, is as follows.

"That if any owner, importer, consignee, agent or other person shall make or attempt to make any entry of imported merchandise by means of any fraudulent or false invoice, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance whatsoever, or shall be guilty of any willful act or omission by means whereof the United States shall be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof, embraced or referred to in such invoice, affidavit, letter, paper or statement, or affected by such act or omission, such merchandise, or the value thereof, to be recovered from the person making the entry, shall be forfeited, which forfeiture shall apply only to the whole of the merchandise, or the value thereof, in the case or package containing the particular article or articles of merchandise to which such fraud or false paper or statement relates;

"And such person shall, upon conviction, be fined for each offense a sum not exceeding five thousand dollars, or be imprisoned for a time not exceeding two years, or both, in the discretion of the court."

For the United States it has been very earnestly argued that the omission of the words "with intent to defraud" from the ninth section of this act of 1890, and the repeal of the sixteenth section of the act of 1874, without the substitution of anything substantially the same, works a most significant change in the law, and that a forfeiture of the goods of the owner results from the doing of the acts forbidden, or the failure to do the acts required, by any person dealing with the merchandise seized, without any regard to the complicity of the owner, or his responsibility for the conduct of the person who actually violated the law. In other words, the contention is that the merchandise is forfeited, without any regard to the innocence of the owner, provided it appear that any person has done or attempted to do any of the acts prohibited in respect to the merchandise seized, or omitted to do any act required to be done for the protection of the revenue. The competency of the congress to impose the penalty of forfeiture upon merchandise which is unlawfully brought into this country, irrespective of the circumstances under which it came in, or the intent with which it was brought in, or the responsibility of the owner for the acts of those bringing it in, cannot be doubted. The maxim that crime proceeds only from a criminal intent has its exceptions, and is not of universal application. The lawmakers may declare any act criminal without respect to the motive of the doer of the act. In respect to statutory offenses, an evil intent is not nec-

essarily an ingredient, and the offense may be complete if such is the plain intent of the lawgiver. The cases are numerous in which these principles are recognized, and they are collected in *U. S. v. Curtis*, 16 Fed. 184, and in the argument of the attorney general in the case of *Halsted v. State*, 41 N. J. Law, 577-583. The statute under consideration is highly penal, and as such falls within the general rule which requires a strict construction. *U. S. v. Eighty-Four Boxes of Sugar*, 7 Pet. 453. We must so construe it as to carry out the obvious intention of congress; but, being penal, every case must come, not only within its letter, but within its spirit and purpose. We must have regard to the maxim, "*Actus non facit reum nisi mens sit rea*," and, unless it clearly and unequivocally appears that the lawmaker intended a forfeiture without regard to the conduct or intent of the owner, there can be no condemnation of the claimant's property. The case of *Reg. v. Tolson*, 23 Q. B. Div. 168, is an instructive case upon this subject of criminal intent as a prerequisite to crime; and in the able work of Mr. Sutherland upon *Statutory Construction* (sections 346-407) may be found an admirable consideration of the rigid rule applicable in the construction of penal statutes generally.

From the cases already cited it most clearly appears that under the act of 1874, as well as under the collection acts antecedent, a forfeiture was never declared of the goods of an owner unless there was an actual intent upon the part of the owner, or those under whom he claimed, or his authorized agent, to defraud the revenue; and the merchandise of an owner was not subjected to forfeiture by the acts and conduct of a mere stranger and trespasser. From a comparison of the acts of 1874 and 1890 it is evident that under neither can there be a condemnation unless there be an attempt to make an entry by means of some fraudulent or false invoice, affidavit, letter, or paper, or some other false or fraudulent practice or appliance, or there shall be some "willful act or omission," by means whereof the United States shall be deprived of the lawful duties. Now, it is clear that under either of these acts there may be a person who has done one or all of these acts, or used one or all of these means, in respect to goods not his own, and in respect to which he is a trespasser; and that his intent was, for his own private purposes, to cheat and defraud the United States. Such a person would undoubtedly be liable to the penalties of either act, for both acts contemplate and authorize a criminal proceeding, independently of a civil proceeding, for the condemnation of merchandise which has been the subject of the fraudulent acts mentioned in the law. If the person guilty of these violations of the law be also the owner of the merchandise, he may be punished by a forfeiture of his goods in addition to punishment by fine, etc. But a proceeding for the forfeiture of the merchandise may be instituted irrespective of any criminal proceedings, for the owner of the goods may be an entirely different person from the person liable criminally. *Origet v. U. S.*, 125 U. S. 240, 8 Sup. Ct. 846. Undoubtedly, Elliott was a person who, on the facts found below, might have been prosecuted criminally; but, unless he was the owner of the merchandise

which was the subject of his fraudulent practice, there could have been no valid condemnation of the celluloid as a part of a judgment against him.

If it be conceded that by the repeal of the sixteenth section of the act of 1874, and by the omission from the language of the ninth section of the act of June 10, 1890, of the words "with intent to defraud," that congress has intended to eliminate all question of the intent of the doer of the acts for which a forfeiture results,—a concession which we do not make,—how far has the government advanced its contention? That Elliott intended to defraud the United States is not debatable. If his intent would affect the claimant's title, then, even under sections 12 and 16 of the act of 1874, a case for the forfeiture of the goods of an innocent owner would be made out. But we have already seen by the cases heretofore cited that under all the preceding collection acts, including that of 1874, there could be no forfeiture unless the owner, or some agent for whose acts he was responsible, or some one under whom the owner claimed, had, with intent to defraud, done the acts prohibited, or left undone willfully some of the acts required, that there could be no forfeiture.

In *U. S. v. Two Hundred and Eight Bags of Kainit*, 37 Fed. 326, there was no doubt of the intent with which the trespasser had made the unlawful removal of the merchandise involved in that case. The forfeiture was defeated because the owner had not done or authorized these acts, and could, therefore, have had no guilty intent; and the case was decided against the government because it was necessary to show an actual intent on the part of the owner, or some person acting under his authority, or under whom he derived title. So, in the case of *The Cargo Ex Lady Essex*, 39 Fed. 765, there was no doubt of the intent of the master of the *Lady Essex*. But the owner of the merchandise had not attempted to smuggle the goods into the United States, nor authorized the acts of those who had made such an attempt, and therefore could have no intent to defraud; and the language of sections 12 and 16 of the act of 1874 was construed by Judge Brown to "apply to the owner of the goods, or his authorized agent, and not to a mere trespasser." The utmost effect which can be claimed as a consequence of the differences between the acts of 1874 and 1890 is that the intent with which the law was violated is not an ingredient in a proceeding for a forfeiture. That the acts made a ground for forfeiture shall be done by the owner, or some one for whom he is responsible, or under whom he derives title, is just as essential under the act of 1890 as it was under any of the preceding statutes. But it is said that by the ninth section of the act of June 10, 1890, it is provided that, if any "owner, importer, consignee, agent, or other person" do, in respect to the goods seized, any of the forbidden things, a forfeiture results, and that, if Elliott was neither the owner nor the consignee, importer, or agent, he is included in the words "other person." These words "other person" appeared in the same connection in the twelfth section of the act of 1874. The descriptive words preceding all describe some person having a relation to the owner,

and for whose conduct, in respect to his merchandise, he may be responsible. The words "other person," when a forfeiture of merchandise is sought, mean some one of the same general class as those described by the words with which it is associated. The rule "Noscitur a sociis" has application. *Newport News & M. Val. Co. v. U. S.*, 22 U. S. App. 145, 148, 9 C. C. A. 579, and 61 Fed. 488; 17 Am. & Eng. Enc. Law (1st Ed.) p. 280. We see nothing in the act of 1890 which would justify the court in holding it subject to the harsh and inequitable construction sought to be placed upon it. There is no language which indicates a purpose to so radically depart from the spirit of the former collection statutes, as to condemn the property of an innocent owner for the acts of a mere trespasser.

The writ of error must be dismissed, and the judgment of the district court affirmed.

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KING DRILL CO. et al. v. MULLEN et al.

(Circuit Court of Appeals, Seventh Circuit. October 15, 1897.)

No. 360.

PATENTS—INVENTION—GRAIN DRILLS.

The Mullen patent, No. 355,462, for a grain drill to be used in sowing grain between rows of corn, and having, for the purpose of sowing close to the hills of corn, pivoted side wings which swing laterally under the control of springs interposed between the wings and the main frame, is void for want of patentable invention. 75 Fed. 407, reversed.

Appeal from the Circuit Court of the United States for the District of Indiana.

This was a suit in equity by Winfield W. Mullen, Francis M. Mullen, George W. Blue, the Spring Grain Drill Manufacturing Company, and George W. Graves against the King Drill Company and others, for alleged infringement of a patent for a grain drill. The circuit court sustained the patent, found that it had been infringed, and entered a decree for complainant. 75 Fed. 407. The defendants have appealed.

The questions presented on this appeal are of the validity and infringement of letters patent of the United States, No. 355,462, issued January 4, 1887, to W. W. and F. M. Mullen, for improvements in grain drills. The first two claims, which alone are in issue, read as follows: "(1) The combination, in a grain drill, of the main or central frame, A, the usual drill mechanism and drill teeth, and the outer frame parts or wings, B; said wings being pivoted to the frame, A, with springs interposed between said wings and said frame. (2) The combination of the main frame, A, the usual seed box and feeding mechanism, the spring-mounted wings, B, and spouts leading from the seed box to the drill teeth, the spouts which lead to the teeth on said wings being of a telescopic construction, substantially as set forth." Referring to the accompanying drawings, the specification, in so far as it need be quoted, says: "In said drawings, the portions marked A represent the frame of the drill; B the side frames or spring-mounted wings; C the feed box or hopper; D the feed wheel; E our improved feeding regulator or cut-off; and F the drill teeth. The frame, A, is of any usual or desired construction, and is supported by the usual main wheel, A<sup>1</sup>, and carries the drill teeth, F, the handles, A<sup>2</sup>, and the feed box or hopper, C. The side wings or spring-mounted frames, B, are connected to the main frame, A, by pivot bolts, b, which pass through

ears, a, provided for that purpose on the frame, A, and also by slotted plates, b<sup>1</sup>, which are connected thereto by bolts, b<sup>2</sup>, and extend across the side beams of the frame, A, over pins, a<sup>1</sup>, therein. Springs, B<sup>2</sup>, are secured to the frame, A, by bolts, a<sup>2</sup>, and adjusting bolts, a<sup>3</sup>; and their free ends rest against the inner surfaces of the wings, B. By means of the bolts, a<sup>3</sup>, these springs may, of course, be adjusted as desired, and the wings, B, thus held outwardly with more or less force. Of course, we may use spiral or other springs instead of the variety shown, without departing from our invention. \* \* \* The

Fig. 1

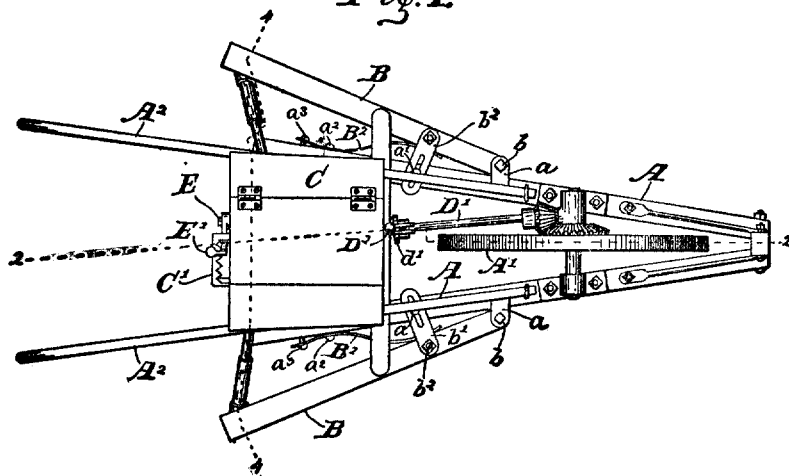
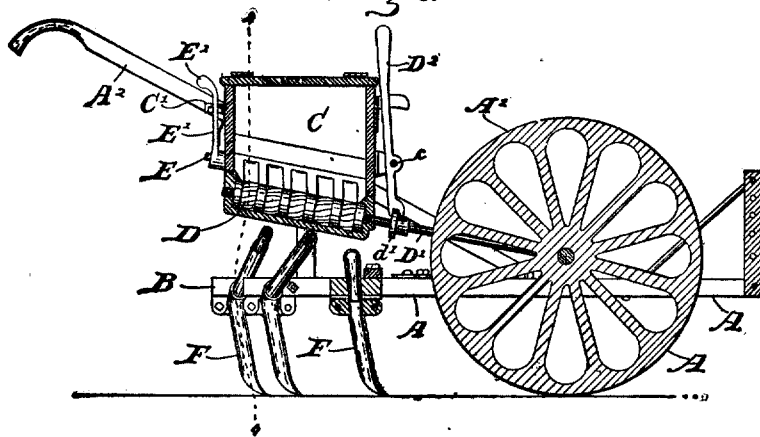


Fig. 2



drill teeth, F, are or may be of the usual or any desired construction, and are connected to the casing surrounding the feed wheel by spouts, as shown. The spouts leading to the two drill teeth, or the ones which are mounted upon the wings, B, are constructed in telescopic sections, one running inside of the other; so that, as said wings move in and out, the spout sections may slide over each other, and the length of the spouts, as a whole, be thus varied accordingly. This drill is mostly used where it is desired to sow grain between rows of corn, and its operation is as follows: The three central drill teeth, being rigidly mounted on the frame, A, move directly forward, as the drill



progresses through the field, in parallel lines; but the outer drill teeth, being mounted on the spring-mounted wings, B, as they move along next the hills, will swing in and out, and accommodate themselves to the inequalities in the ground produced by such hills, and leave a line of seed which practically follows the bases of the hills of corn. By this means any tearing up of the hills of corn is avoided, and at the same time the grain is drilled very close to them, which is very desirable. We are aware that the frames of cultivators and other like machines have been made with flexible side pieces, and that springs have been employed to hold said pieces outward. We therefore desire to be understood as limiting ourselves to the particular construction herein shown and claimed." The circuit court found that the claims were valid, and had been infringed by the defendants, and gave a decree for an injunction and an accounting. The substance of the court's opinion, as reported (75 Fed. 407), is that the legal presumption of novelty and utility of the patent had not been rebutted, but, on the contrary, strengthened by the evidence adduced; that no anticipation of the complainants' combination had been shown; and that infringement was admitted by defendants' expert.

L. L. Coburn and H. G. Strong, for appellants.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

We have not been aided by brief or argument for the appellees. It appears from the testimony of one of the complainants that the patentees thought themselves "the first to get an automatic side adjustment." The first claim of the patent was designed to cover that feature, but in view of the admission in the specification that the frames of cultivators and other like machines had been made with flexible side pieces and springs employed to hold the pieces outward, and in view of the prior art in evidence, consisting of the patents of Thomas and Mast, No. 55,742, W. T. Walker, No. 138,964, J. A. Barnett, No. 149,181, and W. H. and F. M. Mullen, No. 308,090, we deem it clear that patentable novelty is not shown in the combination either of the first or second claim. The distinction asserted by the expert between the side pieces and springs of this patent and of prior machines of like construction, referred to in the specification, is hardly intelligible. His position is that, according to the patent, the springs need not be of the particular construction shown, but need only be of such a nature that, when adjusted, they will hold the side frames or wings outwardly with more or less force, and that for this purpose the flat spring shown can be employed, or, as stated in the patent, spiral or other springs may be used; that the novelty of this part of the invention is in so mounting the side wings as to give them an adjustable support by which they can have a lateral swing under spring control; and that, while the claim specifies that the springs are interposed between the wings and the main frame, whether so interposed or placed as shown in the construction of the defendants' drill in a place above the wings, or in some other position, can make no difference if the springs employed be adapted to subserve the office contemplated in the patent. This is equivalent to a denial of the conceded and proven fact of adjustable side pieces controlled or moved by springs in some of the earlier machines in the art, unless the

springs of the earlier devices were too weak or too rigid to accomplish the purpose intended,—a proposition which, even in the absence of proof on the point, is not admissible, because it could have required no inventive power to substitute an efficient spring for one found to be defective either for lack or for excess of strength. The corn plow of Barnett shows a combination substantially identical and designed for a like purpose with the combination described in the first of these claims; and it certainly could not have involved invention or discovery to put into the Thomas and Mast seed planter, in lieu of the devices there shown for moving the pivoted side wings, the springs either of the Barnett plow or of the Walker cultivator. With such substitution, the Thomas and Mast planter would contain a complete exemplification of the first claim, as it does, also, of the telescopic spout, which alone distinguishes the second claim from the first. The decree below is reversed, with instruction to dismiss the bill.

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STEPHENSON et al. v. LYON.

(Circuit Court of Appeals, Seventh Circuit. October 5, 1897.)

No. 226.

**PATENTS—INFRINGEMENT—MACHINES FOR STUFFING MATTRESSES.**

The Stephenson patent, No. 376,399, for a machine for stuffing mattresses, consisting of a box in which the filling is molded, a plunger to press it forward into the tick, and a gate in front of the spout over which the tick is placed, and which is raised when the filling is pushed forward, construed, and *held* not infringed by a device in which the filling is not molded, but is reduced to appropriate dimensions by the pressure of feed rolls, which carry it forward and press it into the tick.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

This was a bill in equity by Edwin N. Stephenson and others against George Lyon for alleged infringement of certain patents granted to complainants, and relating to machines for stuffing mattresses. The circuit court dismissed the bill, and complainants have appealed.

John H. Whipple, for appellants.

James H. Peirce and Geo. P. Fisher, for appellee.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

SHOWALTER, Circuit Judge. This was a bill for an injunction and an accounting. The appellants were complainants in the court of original jurisdiction. The cause of action is an alleged infringement of letters patent of the United States numbered 376,399, and letters patent numbered 399,093. The case was abandoned in the trial court as to the latter patent, and after a hearing on the merits as to the former the bill was dismissed for want of equity. Complainants thereupon brought the record to this court.

As stated in the specification of letters patent numbered 376,399, the invention of that monopoly "relates to a machine for stuffing mattresses." In this machine the compartment for receiving the stuff-

ing material is a rectangular box, set with its greater longitudinal section horizontal. This box is of the width of the mattress to be made. The vertical extension of its longitudinal sides is somewhat greater than the thickness of such mattress. The bottom is firmly attached to the sides, and is a continuous horizontal plane. A gate, movable up and down in vertical side grooves, constitutes, when in its lower position, the front end of this box. Outwardly from this gate is a rectangular, horizontal extension, adapted in width and thickness to the form of the molded mattress stuffing, and called in the specification "the spout." Over this spout the mattress tick—being, for the purpose, open at one end—is drawn in numerous slight folds, and through this spout, when the gate is raised, the molded or formed stuffing material is thrust, carrying with it the enveloping tick; the latter, as the formed material enters, being gradually pulled off the spout, until completely filled. At the rear end of the compartment already mentioned, wherein the stuffing material is initially received, is an upright board, fixed transversely, and adapted, by means of a rack bar in the rear, to be moved over the stationary bottom of the box, and through the spout, in expelling the formed or molded stuffing material. This board constitutes, when in its rear-most position, the rear boundary of the compartment or receptacle for the stuffing material for a single mattress. This movable end piece is called in the specification "the plunger." The stationary portion of the compartment referred to, namely, the bottom and sides, is called in the specification "the box." At the rear end of the box, and extending transversely, between uprights, from one side to the other, is a horizontal bar, to which is hinged a cover, which is let down from its forward end when the material has been placed in the stuffing compartment. This hinged cover is thereupon further pressed down and held in its lowest position by means of a lever and crossbar. When the cover is so pressed down, the mattress filling is reduced to the thickness and width of the proposed mattress. The plunger is then moved forward until, by pressure from it and from the closed gate in front, the stuffing material (being meantime held between the sides, bottom, and cover) is reduced in length to that of the mattress. By this process the stuffing material is pressed, and in a manner molded or formed, so as to fit the tick. The gate in front, and covering the spout, is then raised; and by the further forward movement of the plunger the molded stuffing material is pushed so that it slides over the smooth bottom of the box, and through the spout, and into the tick. In this machine the box, the plunger, the gate, and the cover constitute, in substantial measure, a former or mold; and by pressure in this mold or former, as described, the mattress filling is first compacted to the dimensions of the tick, and then thrust forward by the plunger into the tick.

The alleged infringing machine has the spout over which the tick is drawn, and through which the material passes into the tick. Immediately in the rear of the spout are two cylinders or rollers, so placed that the approach to the rear opening of the spout is between them. One of these cylinders is immediately above the other, the axis of one being parallel with that of the other. The distance be-

tween the outer surfaces of these rollers is the thickness of the proposed mattress, and also, of course, the thickness of the spout. Immediately behind and adjoining these two cylinders is the gate, and at the rear end of the box or compartment in which the stuffing material is first received is what is called in that mechanism a "follower." The sides of the box are upright, as in the appellants' machine. A cover is also, or may be, made use of in the appellee's machine; but this cover is constructed of slats at considerable distances apart, and the function of this cover is to aid in getting or holding the material ready for pressure, rather than to assist in forming or molding the same, as in the appellants' machine. The follower in the appellee's machine is attached to the bottom of the box; and the bottom, instead of being a stationary and smooth structure, as in the appellants' machine, is flexible,—being made of cloth, or some such material, and having a continuous movement over the undermost roller, like an endless chain. In the process of making a mattress in this machine, the material is first distributed in the compartment here described. The cover, if it be used at all, is then lowered to a horizontal position, but not for the purpose of compressing the material to the thickness of the mattress. The gate in front is then removed. The cylinders or feed rolls are then made to revolve, and the material is carried forward, and by their action is drawn between them, being compressed from point to point as it passes through. The follower in one of the machines introduced in evidence, when it reached the point where the cylinders were, passed on through to the mouth of the spout; thus driving the rear end of the mattress through the spout, and into the tick. This follower in the machine spoken of was made of two upright boards set parallel with each other, and connected together with crosspieces so that when the rear board was at the rear end of the spout the front board was at the front end. The evidence shows, however, that in making mattresses in series on the appellee's machine this follower consists, ordinarily, of a single board, and the rear end of one mattress, after it has passed through the feed rolls, is driven out of the spout by the front end of the next mattress as it follows through the feed rolls. It will be seen that in the appellee's machines the mattress is not molded, but the stuffing material is reduced in thickness to the appropriate dimensions of the mattress by the pressure of the feed rolls. The mattress is not first formed or molded to the dimensions of the tick, and then thrust into the tick, as in the appellants' machine.

There are seven claims in the appellants' patent. Each of these claims is on a combination, and in each one "the box" is a factor. As already stated, "the box" in the appellants' patent consists of the two longitudinal upright sides, and the smooth stationary bottom. This box, the plunger, the gate, and the cover, together, constitute a former, in which the stuffing material may be compressed to the dimensions of the tick. The upright sides, and the moving, adhering bottom, of what must be considered, for the purposes of the argument, the box, in the appellee's device, are not the same as the box in the appellants'. The bottom is not stationary, the compressed material does not slide over it, and it and the sides are not the in-

strumentality for compressing the stuffing material. The function performed by the box in the appellants' machine is not performed by the corresponding parts in the appellee's. Again, the follower in the appellee's machine is not analogous to the plunger in the appellants' machine. The function of the plunger, aside from its aid in the molding or forming process, is to push the formed stuffing material between the cover, bottom, and sides, through the spout, and into the tick. Nothing of this kind takes place in the operation of the appellee's machine. The material is simply laid in the compartment constituted by the gate, follower, sides, and movable bottom, and is thence drawn, by force of the feed rolls and the movement of the bottom, through the feed rolls, and in that way the mattress is made. There is not in the appellee's device any factor or element which answers either to the box or to the plunger in the appellants' device. In each claim the box is a factor; in each, the plunger is a factor. Since the appellee's device shows no combination of elements which contains either of these features, there is no infringement. The decree dismissing the bill for want of equity is affirmed.

CONTINENTAL TRUST CO. et al. v. TOLEDO, ST. L. & K. C. R. CO.

(Circuit Court, N. D. Ohio, W. D. September 18, 1897.)

No. 1,205.

1. FEDERAL COURTS — ANCILLARY JURISDICTION — MORTGAGE FORECLOSURE — POSSESSION OF RES.

A federal court has ancillary jurisdiction of a mortgage foreclosure suit, irrespective of the citizenship of the parties, where all the property affected is already in its possession through its receiver in another suit.

2. SAME—ANCILLARY JURISDICTION—PLEADING AND PRACTICE.

The dependence of an ancillary upon an original suit for purposes of jurisdiction does not throw both suits into hotchpot, and dispense with the ordinary rules of pleading and practice as to parties proper and necessary to each cause of action. Parties to the original bill are not thereby made parties to the dependent bill, nor have they any more right to intervene in the dependent cause than if the court had independent jurisdiction thereof. And the dependent cause is proceeded in without regard to the pleading or course of the principal suit.

3. CONSOLIDATION OF CAUSES—ORIGINAL AND ANCILLARY SUITS.

Original and ancillary suits should be consolidated, where no one will be injured thereby and where their nature permits, as in the case of a creditors' bill and a foreclosure bill against the same insolvent railroad corporation.

4. SAME—PARTIES.

A receiver appointed in a creditors' suit against an insolvent railroad company is not a proper party to an ancillary suit against the same company to foreclose a mortgage on the property in his hands.

5. CREDITORS' BILL—PRACTICE—HEARING OF CLAIMS—ADVERTISEMENT BY MASTER.

In a creditors' suit against an insolvent railroad company, it is the proper practice to require the master to advertise the hearing of claims against the company, fixing a time for their presentation in his office, and a time for hearing objections to the same.

6. EQUITY PLEADING—INTERVENING PETITIONS—RESTRICTIONS BY THE COURT.

Where intervening petitions are filed without leave in a railway mortgage foreclosure suit three years after they might have been tendered, and where the delay has the appearance of laches, it is in the discretion of the

court to determine how much of such petitions may be regarded as making proper issues for the bondholders to meet.

**7. CONSOLIDATION OF CAUSES—CREDITORS' BILL AND FORECLOSURE SUIT—INTERVENING PETITIONS.**

The consolidation of a creditors' bill against a railroad company with an ancillary foreclosure suit does not so merge the former into the latter as to prevent general creditors from contesting the validity or amount of the mortgage lien.

**8. CREDITORS' BILL—INTERVENING CREDITORS—PLEADING.**

While an intervening creditor cannot defeat the judgment claim upon which the bill is founded and the court obtains jurisdiction, he is not concluded by collateral averments in the bill which concede the validity of certain bonds and mortgages affecting the property, and he is therefore free to attack the validity thereof.

**9. SAME—SUIT AGAINST CORPORATION—RIGHTS OF INTERVENERS.**

In a creditors' suit against a corporation, an intervening creditor cannot urge against the claim of mortgage bondholders the invalidity of the bonds, on the ground that the corporation never had any legal existence, since, if this were true, the interveners' debt would have no more validity than the bonds, and the court would have nothing upon which to exercise its jurisdiction.

**10. DE FACTO CORPORATIONS—RIGHTS OF CREDITORS AND BONDHOLDERS—ESTOPPEL.**

Creditors of a de facto corporation who have dealt with it as a corporation, and whose claims have arisen after the issuance of mortgage bonds, are estopped from attacking the validity of its organization for the purpose of invalidating such bonds and mortgage.

**11. SAME—HOW ARISING.**

When persons assume to act as a body, and are permitted by acquiescence of the public and the state to act, as if they were a legal corporation of a particular kind, for the organization, existence, and continuance of which there is express recognition by general law, such a body of persons is a corporation de facto, though the individuals thus exercising the franchise may have been ineligible or incapacitated by law to do so.

**12. CONSOLIDATION OF RAILROAD COMPANIES—STATUTORY AUTHORITY.**

In the Illinois statute authorizing certain railroad companies to "purchase" the franchises, etc., of other railroad companies (3 Starr & C. Ann. St. [2d Ed.] p. 3241, par. 33), the term "purchase" contemplates a consolidation.

**13. SAME.**

Rev. St. Ohio, § 3580, authorizing the consolidation of certain Ohio railroad companies with certain railroad companies in "adjoining" states, authorizes the consolidation of an Ohio corporation with an Indiana corporation and an Illinois corporation.

**14. CORPORATIONS—RIGHTS OF CREDITORS—IMPEACHMENT OF CONTRACT.**

Creditors of a corporation, who became such after an agreement or settlement effected in its behalf, cannot impeach the same for fraud, where no stockholder or officer of the company has taken steps to procure relief, and where the transaction had become an accomplished fact, constituting a condition of the situation of the debtor company at the time such creditor gave credit.

**15. RAILROAD COMPANIES—VALIDITY OF SECURITIES—OVERISSUES.**

The provision in the Illinois constitution (article 11, § 13) that "no railroad corporation shall issue any stock or bonds except for money, labor or property actually received, and applied to the purposes for which such corporation was created; and all stock dividends, and other fictitious increase of the capital stock or indebtedness of any such corporation shall be void," does not invalidate stock or bonds merely because the value of what is received in exchange for them is not equal to their par value, provided the transaction is a real one, and not entered into merely to evade the law.

**16. SAME.**

Rev. St. Ohio, § 3290, regulating the rates and prices at which railroad corporations may sell their bonds and other securities, does not invalidate

bonds received by a contractor for work done, unless it is clear that the cost of the work was palpably less than the statutory price of the bonds, so that the parties knew it to be so when the contract was made.

This cause comes before this court upon several motions made by the Rhode Island National Bank, Jules S. Bache, and others, creditors of the Toledo, St. Louis & Kansas City Railroad Company, the purport of which can hardly be understood without a short statement of the course of the litigation:

On May 13, 1893, Stout and Purdy, citizens of New York, filed a creditors' bill against the defendant company (hereafter called the "Kansas City Company"), which was a consolidated corporation, organized under the laws of Illinois, Indiana, and Ohio. The complainants were judgment creditors, and filed their bill on behalf of themselves and all other creditors of the Kansas City Company. Similar bills were filed in Indiana and Illinois, and the same receiver was appointed to take charge of and operate the railroad in the three jurisdictions. The receiver took charge of the road and operated it. Various creditors of the company filed intervening petitions. Among them were the owners of bonds issued by the defendant, and secured by a mortgage upon the road given to the Continental Trust Company, of New York, and John M. Butler, of Indiana, trustees. These bondholders were permitted, on their petition, to become parties as a committee representing themselves and all others of their class. Subsequently, in December, 1893, the trustees under the mortgage filed in this court a bill to foreclose it against the Kansas City Company, as a citizen of the three states of Illinois, Indiana, and Ohio, and made parties defendant with the company Calloway, the receiver, a citizen of Ohio, and several judgment creditors of the Kansas City Company, citizens of New York and other states. The receiver was made a defendant by leave of court granted in the creditors' suit. The receiver was continued in charge under the foreclosure bill. At the same time an order was made consolidating the action under the creditors' bill and the action of foreclosure, and directing that the consolidated cause take the same title as the foreclosure suit. In the creditors' suit, intervening petitions were filed by creditors claiming liens on part of the equipment prior in right to that of the mortgage bondholders. These petitions were answered by the trustees under the mortgage, and the issues thus made were referred to a master to take testimony. Answers were filed to the bill of foreclosure by the judgment creditors made defendants therein, and after replication the issues were referred to a master to take evidence, and the master has not yet reported. Intervening petitions have now been filed by the Signal Oil Works, the Rhode Island Locomotive Works, the Rhode Island National Bank, the Contracting & Building Company of Kentucky, Jules S. Bache, and Ferdinand E. Canda, as creditors of the Kansas City Company, and some of them by motions seek an order compelling the complainant trustees to answer the intervening petitions. The petitions of the Signal Oil Works and of Canda attack the validity of the mortgage bonds, (1) in that they were issued for an inadequate consideration, and in violation of the constitution of Illinois; and (2) on the ground that many of them were issued to directors of the company at less than par, and to others at less than 75 per cent. of par, in violation of the laws of Ohio rendering such bonds void. The other petitions, in addition to the foregoing, also attack the validity of the bonds and mortgage on the ground that they were issued by a pretended corporation purporting to be the result of a consolidation of three corporations, one of Illinois, one of Ohio, and one of Indiana, when there was no law authorizing such a corporation, and on this ground ask for relief of a peculiar character, more fully to be stated. Other motions have been filed by the petitioners as follows: (1) A motion to dismiss the foreclosure bill of the Continental Trust Company and John M. Butler, trustees, for want of jurisdiction, on the ground that the necessary diverse citizenship between complainants and defendants is shown on the face of the bill not to exist. (2) A motion to set aside the order granting leave to the complainant trustees to make Calloway, receiver, party defendant to the bill, and the decree pro confesso taken against him, on the ground that he was not a proper party to the action. (3) A motion to set aside the order consolidating the two causes.

(4) A motion to set aside the order appointing a special master to take and report the evidence, and to suppress the evidence already taken. (5) A motion for a decretal order in the creditors' suit, referring the same to the standing or a special master for proceedings in accordance with chancery practice in general creditors' bills, fixing a time in which all creditors may present their claims to the master, and a time when all parties in interest may file objections to the claims presented, and excluding from the benefit of the suit all creditors not presenting their claims to the master within the time fixed.

Cary & Whitridge and Henry Crawford for the Continental Trust Company.

Coudert Bros., J. D. Springer, and Squire, Sanders & Dempsey, for petitioners.

TAFT, Circuit Judge (after stating the facts as above). The motion to dismiss the foreclosure bill must be denied. It is conceded that the court had jurisdiction of the creditors' bill filed by Stout and Purdy, and that, at the time when the trustees under the mortgage filed their foreclosure bill, all the property of the railroad covered by the mortgage was in the possession of this court, by its receiver. The trustees could obtain no substantial relief by a foreclosure of the mortgage and a sale of the road in a state court, so long as this court had possession of it. To avoid injustice, this court was obliged, therefore, to exercise a jurisdiction ancillary in its nature, for the benefit of those otherwise injured by its possession of the property, and had power to entertain a foreclosure bill to which the parties complainant and defendant were not of such diverse citizenship as to give the court independent jurisdiction. The circuit court of appeals of this circuit has considered at length this kind of jurisdiction, and the basis upon which it rests, and the authorities sustaining it, in the case of *Compton v. Railroad Co.*, 31 U. S. App. 486, 522, 529, 15 C. C. A. 397, 68 Fed. 263. The foreclosure bill stated the fact that the railroad, the mortgage on which it was filed to foreclose, was in the hands of this court. That was the jurisdictional fact, and made immaterial the circumstances that one complainant was a citizen of New York and the other of Indiana, and that among the defendants were citizens of Indiana and New York. It cannot be of importance that the bill was apparently filed as an independent bill. If in fact the only way of maintaining jurisdiction of it is as a dependent bill, ancillary to the creditors' action, it is the duty of the court so to treat it, provided it appear, as it does, that it can be maintained as such. But care must be taken not to give too much effect to the dependence of one suit on the other for jurisdictional purposes. Such dependence does not throw both suits into hotchpot, and dispense with the ordinary rules of pleading and practice as to parties proper and necessary to each cause of action. Because the res acquired under the original bill gives ancillary jurisdiction to entertain a dependent bill seeking relief in respect of the res, parties to the original bill are not thereby made parties to the dependent bill. The parties to the original bill have no more right to intervene in the dependent cause than if the court had independent jurisdiction thereof. Hence the rule as to who may appear to a foreclosure bill and file answers is the same here as if the bill had in fact been an



independent bill. In other words, the relation between the two suits is principal and ancillary only so far as that, without possession of the res in the former suit, the court would have no jurisdiction of the latter; but, having thus acquired and thus maintaining its jurisdiction in the second suit, the court proceeds in it without further regard to the pleading or course of the principal action. In this view of their relation to each other, there cannot be the slightest objection to consolidating the two suits, if they are otherwise of such a character as to permit it. I shall not stop to discuss the power of the court in this regard. It suffices to say that the duty of the court to consolidate causes, where no one will be injured thereby, is plainly suggested by the federal statute on the subject (Rev. St. § 921), and one of the commonest instances of the exercise of this power is in the consolidation of a creditors' bill and a foreclosure bill against the same insolvent railroad corporation. The motions to dismiss the foreclosure bill and to set aside the order of consolidation are denied.

The motion to set aside the order making the receiver a party to the foreclosure bill, and the decree pro confesso against him, is granted. He is not a proper party to such a proceeding, and the decree against him is idle.

I see no reason for suppressing the evidence taken on any of the issues already framed and sent to a master, nor is there any reason to set aside the orders of reference. The motions for this purpose are denied.

The motion for an order requiring the master in the creditors' suit to advertise the hearing of claims against the railroad company, and fixing the time of their presentation in his office, and the time for objections to the same, in accordance with the usual practice in a proceeding by general creditors' bill, is granted. The order ought to have been made at a much earlier time in the proceedings, but it is not too late now. Such a course is expressly approved by the supreme court of the United States in *Trustees v. Beers*, 2 Black, 457; *In re Howard*, 9 Wall. 175; *Johnson v. Waters*, 111 U. S. 674, 4 Sup. Ct. 619; *Coal Co. v. McCreery*, 141 U. S. 476, 12 Sup. Ct. 28. The proper course to be taken is described in 2 Daniell, Ch. Prac. (Eng. Ed. 1837-40) 854. This is the edition to which Mr. Justice Bradley refers in a note to his opinion in *Thomson v. Wooster*, 114 U. S. 104, 112, 5 Sup. Ct. 788, as the most authoritative work on English chancery practice when the equity rules were adopted by the supreme court, in 1842, and as exhibiting that "present practice of the high court of chancery in England," which by the ninetieth equity rule was adopted as the standard of equity practice in cases not covered by the special provisions of the equity rules.

We must now return to the principal motion urged by the petitioners, to wit, that the trustees be ordered to answer their petitions. The action was begun in 1893. The creditors' bill of Stout and Purdy expressly recognized the validity and priority of the bonds which are now attacked in the petitions under consideration. Three years have elapsed since these petitions might have been tendered. Even if it be granted that the concession in the bill does not prevent interveners from attacking the bonds and their origin, certainly it lies with the

court, after this long delay, and after what looks much like laches, now to determine how much of these petitions which were filed without leave may be regarded as making proper issues in the case for the bondholders to meet at this stage of the proceedings. The power of the court to supervise and restrict the matter of pleadings filed under such circumstances is well established. *Ritchie v. McMullen*, 25 C. C. A. 50, 79 Fed. 522, 529; *Toler v. Railway Co.*, 67 Fed. 168, 175.

It is first said on behalf of the bondholders that the interveners should not be permitted to contest the validity of the bonds in this action, because since the consolidation the action on behalf of creditors has become so absorbed in the foreclosure bill that the latter action dominates the whole proceeding, and that, as in a foreclosure bill a general creditor could not contest the validity or amount of the mortgage lien, the same rule must prevail here. No such effect can be given to an order of consolidation. So to hold would be to construe the order into one dismissing the creditors' bill. Causes are consolidated only when they may proceed to judgment under one title without impeding or diminishing the remedial object and effect of the proceeding for each complainant. In a hearing on a creditors' bill, any creditor making himself a party by presenting a claim may be heard to contest the claim of every other creditor seeking payment out of the estate of the debtor. 2 *Daniell*, Ch. Prac. (6th Ed.) 1210, note 3; *Shewen v. Vanderhorst*, 1 *Russ. & M.* 347; *Owens v. Dickenson*, *Craig & P.* 48, 56; *Woodgate v. Field*, 2 *Hare*, 211, 213; *Whitaker v. Wright*, *Id.* 310, 314; *Field v. Titmuss*, 1 *Sim. (N. S.)* 218, 223; *Graves v. Wright*, 2 *Dru. & War.* 77, 79; *Woodyard v. Polsley*, 14 *W. Va.* 211. I can see no reason why any creditor intervening in this action under the creditors' bill may not attack the claim of any other creditor seeking the benefit of that bill. The bondholders have made themselves parties to the creditors' bill by a committee of their number, and have set up their claims and lien. Why may not another creditor attack their claims? It is said that every creditor is bound by the concession of the bill that the bonds and mortgage are valid. Why should this be so? Undoubtedly an intervening creditor may not defeat the judgment claim of the complainant, upon which the bill is founded and the court obtains jurisdiction. *Fuller v. Redman*, 26 *Beav.* 614; *Briggs v. Wilson*, 5 *De Gex, M. & G.* 12. But why should the collateral averments of the bill not necessary to the cause of action stated, or to the relief prayed in the bill, conclude the intervening creditors? I can see no reason, and I am not disposed to recognize or enforce unnecessary estoppels in procedure which would only increase the necessity for additional litigation. It must be held, therefore, that the petitioners may attack, under the creditors' bill, the validity and extent of the mortgage lien. And those creditors who have expressly conceded the validity and extent of the bonds may have leave to amend their petitions by striking out the concession.

Coming now to the matter of the petitions, the question is whether the issues the petitioners seek to make with the bondholders are sufficiently germane and important to justify the court, at this late day

in the litigation, in delaying the cause until they can be formally answered, heard, and decided. Let us consider first the averment that the Toledo, St. Louis & Kansas City Railroad Company is neither a corporation de jure nor a corporation de facto. Can such a defense be urged by one purporting to be a creditor of the pretended corporation? If the bonds are null and void because the corporation issuing them was a nullity, clearly the debts of the petitioners and the complainant are in no better condition, and the court has nothing upon which to exercise its jurisdiction. Anticipating this dilemma, the petitioners allege that the money they seek to recover was advanced by them to one Kneeland, the contractor who widened the gauge of the railroad, on his false representation that the extended corporation was a real corporation of Illinois, Indiana, and Ohio, the result of a lawful consolidation of three constituent corporations, one of Illinois, one of Indiana, and one of Ohio; that, by reason of his construction of the road, he has equitable claims against the three constituent corporations, and that, because of his insolvency, the petitioners, his creditors, are entitled in this action to subject such equities of Kneeland to the payment of his debts to them; and that, though these debts also purport to be debts of the pretended consolidated corporation, they are not obliged to rely on any such obligation, and may, without weakening their own position in the cause, show the nonexistence of the pretended consolidated corporation, in order to render null and void its pretended bonds. If this cause were a creditors' bill against the three constituent corporations, it is possible that this somewhat awkward method of escaping suicide might be successful, but the difficulty is that the only ground upon which interveners may invoke the action of this court is the sufficiency of the creditors' bill by which this cause was begun. They have no standing in court at all to take part in the distribution of the assets of the defendant debtor, save as they accept the tender of the benefit made to them by the complainant in his bill. If they would be independent of this restriction, they are at liberty to put their claims in judgment, and, after a nulla bona return, to file a creditors' bill of their own against any defendants they may select, and under it they may dispute all other claims. But, so long as they owe their right to be in court at all to the sufficiency of the averments of the bill for the relief asked, they cannot be heard to question the very basis upon which alone the court can act. If it is true that the defendant in the bill is not an entity at all, but only an empty name and nullity, the bill must fail for want of a defendant, and with it must fall all the petitions herein. We have seen at another part of this discussion that, according to the chancery practice under such bills, a creditor intervening will not be permitted to urge the statute of limitations against the complainant's claim, for the reason that, if that claim is utterly defeated, the whole proceeding must fail for want of jurisdiction in the court to grant any relief under the bill. *Fuller v. Redman*, 26 Beav. 614; *Briggs v. Wilson*, 5 De Gex, M. & G. 12; 2 Daniell, Ch. Prac. 1211. In the light of this rule of practice, it seems hardly necessary to point out that a defense urged by one creditor against the claim of another, which

must defeat, not only that at which it is aimed, but also that of the complainant and all other claims, and which denies the existence of the defendant against whom the action was brought, cannot be permitted to an intervener. But, aside from the difficulty it meets in the chancery practice, the defense has no merit in it. It is conceded that all the petitioners have dealt with the company as a corporation, and that they hold claims against it contracted with it as a real corporate entity. "It is too well settled to need discussion that both a de facto corporation and the persons exercising the rights of stockholders in such a corporation are estopped to assert its unauthorized existence as a corporation to avoid a debt incurred in the actual exercise of corporate franchises and the doing of corporate business." *Farmers' Loan & Trust Co. v. Toledo, A. A. & N. M. Ry. Co.*, 67 Fed. 49, 55, and cases cited. Certainly, if a pretended corporation is estopped to make a defense of this character against bondholders, its subsequent creditors, who must derive their right to make a defense at all through the debtor corporation, are equally estopped.

A distinction between this case and those authorities in which the foregoing rule is recognized is pressed upon the court. It is said that the principle that the acts of a de facto corporation can never be assailed collaterally has no application where the law makes no provision for a de jure corporation of the kind which the one in question here purports to be, and that, as there was no law of Illinois or Ohio authorizing the consolidation of the three corporations which it was attempted here to consolidate, there could be no de jure corporation, and so no de facto corporation. The case of *American Loan & Trust Co. v. Minnesota & N. W. R. Co.*, 157 Ill. 641, 42 N. E. 153, is cited and relied on to support the argument. In that case it was held that the attempted consolidation of an Illinois corporation with one of another state at a time when there was no general law in force permitting the consolidation of an Illinois corporation with that of another state was void, and that the force and validity of attempted action by the pretended consolidated corporation must be denied, even when collaterally attacked. It is certainly true that the rule of public policy which validates, for all purposes save that of direct inquiry by the sovereign, acts of those who, without lawful authority, assume an official or corporate character, and actually exercise official or corporate functions, must have the limitation that the character assumed and functions exercised are those which it is the declared purpose of the sovereign to have some one lawfully assume and discharge. The limitation is declared and fully explained in the case of *Norton v. Shelby Co.*, 118 U. S. 425, 6 Sup. Ct. 1121. In that case it was sought to hold a county of Tennessee liable for bonds issued by persons purporting to be a board of county commissioners. The supreme court of the state had held the act creating the board void, and that the board was a body not known to the constitution of the state, and was an anomaly in its system of administering county affairs. It was sought to make the county liable on the ground that the board was a de facto board. It was held by the supreme court of the United States that the pretended commissioners could not be de facto incumbents of an office which could not exist, and that

the idea of an officer implies the existence of an office which he holds. It is to be observed, however (and this distinction seems to have escaped the attention of learned counsel for petitioners), that the validity of the acts of a *de facto* officer or corporation in a collateral proceeding is not affected by the circumstances that the particular persons or constituents assuming and discharging the official or corporate functions could not by any steps have acquired the requisite legal qualifications for lawfully exercising such functions. They may be completely ineligible, and yet, if they are allowed to discharge the duties and exercise the powers of an office or a corporation which the law recognizes as in existence or capable of lawful existence, their acts as such cannot be impeached as invalid in a collateral proceeding. In *Ashley v. Board of Sup'rs*, 16 U. S. App. 656, 668, 8 C. C. A. 455, 60 Fed. 55, a case decided by the circuit court of appeals for this circuit, the action was on certain bonds issued by the county of Presque Isle, in the state of Michigan. In that state, by constitutional restriction, no county could be organized until more than one township had been organized in the proposed county territory. The county of Presque Isle had been organized under an act of the legislature when it had within its borders only one township. This was offered as a defense to the suit upon the bonds issued by the acting authorities of the pretended county, but the circuit court of appeals, in an extended opinion by Judge Severens, held that, because a county was a public corporation of a kind recognized by the organic law of the state, the persons assuming to act and exercise powers as the county of Presque Isle, without direct interference by the state, would be treated as a *de facto* corporation, and would be held liable upon their bonds issued as such. The whole question of who are *de facto* officers was elaborately examined in the case of *State v. Carroll*, 38 Conn. 449, and a definition given to cover all cases. For the purposes of this case, it suffices to quote from the definition the following:

"An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where the duties of the office were exercised—First, \* \* \*: second, \* \* \*: third, under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing board, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public; fourth, \* \* \*."

This language is quoted with approval in *Norton v. Shelby Co.*, 118 U. S. 425, 6 Sup. Ct. 1121. See, also, *Blackburn v. State*, 3 Head, 690. It is true that the authorities just quoted related to officers *de facto*, and not to corporations *de facto*, but the cases are quite analogous; and it may be safely stated as the rule that when persons assume to act as a body, and are permitted by acquiescence of the public and the state to act, as if they were legally a particular kind of corporation, for the organization, existence, and continuance of which there is express recognition by general law, such body of persons is a corporation *de facto*, although the particular persons thus exercising the franchise of being a corporation may have been ineligible and incapacitated by the law to do so.

In the light of this statement of the law, the averments of the petitions are quite insufficient to show that the Toledo, St. Louis & Kansas City Railroad Company was not at least a de facto corporation. It is not denied that under the general laws of Illinois, Ohio, and Indiana a corporation may be organized by consolidation which shall be a corporation of each of the three states. Indeed, the petitions themselves refer to a corporation known as the Toledo, Cincinnati & St. Louis Company, a former owner of the railroad here in controversy, as a lawfully consolidated corporation of Illinois, Indiana, and Ohio. If there could be a de jure consolidated corporation of the three states, as there undoubtedly could be, then the Kansas City corporation, in exercising the functions of such a consolidated corporation, was a de facto corporation of the three states.

The averments of the petitioners and their arguments in this behalf ought, perhaps, to be stated a little more in detail. They allege that when the property of the Toledo, Cincinnati & St. Louis Railroad was about to be sold in foreclosure under two mortgages, the one covering what was known as the "St. Louis Division," and the other the "Toledo Division," the bondholders under each mortgage made a contract with one Kneeland by which he agreed to buy in for them at the judicial sale the two divisions of the road; to organize three corporations, one in Illinois, one in Indiana, and one in Ohio; to convey to each the part of the road lying in the state of its origin in exchange for all its shares of capital stock; and then to bring about the consolidation of the three corporations as a consolidated corporation of the three states. Part of the line of railroads operated by the Toledo, Cincinnati & St. Louis Railroad Company was 67 miles in length, running from the state line between Indiana and Illinois to Frankfort, Ind., owned and built by the Frankfort & State Line Railroad Company, a corporation of Indiana. The petitions aver that a contract of sale was made by which all the stock of this company became the property of the Toledo, Cincinnati & St. Louis Company, and its road was turned over to the latter company as its property, and was operated by it as part of its line; that much of the line was built by money borrowed by the St. Louis Company on mortgage security; and that formal consolidation proceedings merging the Frankfort Company in the St. Louis Company were not had for fear that such a merger or consolidation might forfeit certain legal aids and municipal subscriptions. At the time of the consolidation by Kneeland, in 1886, there was a statute of the state of Illinois permitting consolidation of railway corporations with those of other states, passed in 1883, which provided as follows:

"Whenever any railroad which is situated partly in this state, and partly in one or more other states, and heretofore owned by a corporation formed by consolidation of railroad corporations of this and other states, has been sold pursuant to the decree of any court or courts of competent jurisdiction, and the same has been purchased as an entirety and is now or hereafter may be held in the name or as the property of two or more corporations incorporated respectively under the laws of two or more of the states in which said railroad is situated, it shall be lawful for the corporation so created in this state to consolidate its property, franchises and capital stock with the property, franchises and capital stock of the corporation or corporations of such other state

or states in which the remainder of such railroad is situated and upon such terms as may be agreed upon between the directors, and approved by the stockholders owning not less than two-thirds in amount of the capital stock of such corporations." 3 Starr & C. Ann. St. (2d Ed.) p. 3241, par. 33.

The counsel of the petitioners contend that this statute did not authorize the consolidation here—First, because the line of railroad from St. Louis to Toledo was not, prior to the judicial sale, owned by a consolidated corporation of Illinois and other states, for there were 67 miles of the line from the Illinois and Indiana state line to Frankfort owned by a distinct corporation, to wit, the Frankfort & State Line Railroad Company; and, second, that the road was not "purchased as an entirety," because, though the whole road was bought in by Kneeland at the same time, the sales of the two divisions were separate, being covered by separate mortgages. With deference, it seems to me that this is too refined. The averments of the petitions clearly show that in equity the St. Louis Company owned the 67 miles of road between the state line and Frankfort, both by owning all the capital stock of the Frankfort Company, and by having built the road with money raised by its own bonds, and that it was in fact a part of the through line from St. Louis to Toledo. The same petitions also show that the chief purpose of the preliminary contracts between the bondholders under the two mortgages and Kneeland was to bring about the purchase of the whole line as an entirety. I cannot doubt that if the question were raised in a direct proceeding, and the averments of the petition were proven, it would be held that the consolidation here shown was within the letter and the spirit of the act of 1883 of Illinois. But, even if it were not, there was in force another law of Illinois at the time of the consolidation which fully authorized it. An act approved June 30, 1885 (3 Starr & C. Ann. St. [2d Ed.] p. 3243, par. 36), provided:

"That all railroad companies now organized, or hereafter to be organized under the laws of this state, which now are or hereafter may be, in possession of and operating in connection with or extension of their own railway lines any other railroad or railroads in this state, or in any other state or states, or owning and operating a railroad which connects at the boundary line of this state with a railroad in another state, are hereby authorized and empowered to purchase and hold in fee simple or otherwise and to use and enjoy, the railway property, corporate rights and franchises of the company or companies owning such other road or roads upon such terms and conditions as may be agreed upon between the directors and approved by the stockholders," etc.

Although this act uses the word "purchase," it plainly contemplates consolidation, and this is the holding in Illinois. *Railway Co. v. Ashling*, 56 Ill. App. 327. Now, it is quite manifest that after Kneeland's purchase and conveyance of the road, in three parts, to the three separate corporations, the Illinois corporation owned and was operating a line in connection with a line of railroad extending into Indiana and into Ohio, which was owned partly by an Indiana and partly by an Ohio corporation, and that under this statute the Illinois corporation was authorized to acquire the whole line on terms and conditions which might include consolidation. And even if I am wrong in my construction of these two laws, and it is true that the consolidation here under discussion was defective, nevertheless these

laws plainly show that a consolidated corporation of Illinois, Indiana, and Ohio, authorized to operate a line of railroad through the three states, was a possible legal entity recognized by Illinois statutes. Therefore any body of persons assuming to act and permitted to act as such a corporation would be a corporation de facto, according to the principles above stated.

It is also objected that the consolidation under the Ohio statute was a nullity. Section 3380 of the Revised Statutes of Ohio, in force at the time of the consolidation of this case, provided that:

"A company organized in this state for the purpose of constructing, owning and operating a line of railway or whose line of road is made or is in process of construction to the boundary line of this state or to any point either in or out of the state may consolidate its capital stock with the capital stock of any company in an adjoining state organized for a like purpose and whose line of road has been projected, constructed or is in process of construction to the same point where the several roads so united and constructed will form a continuous line for the passage of cars."

It is contended that although the Ohio corporation organized by Kneeland might, under this statute, have been consolidated with the Indiana corporation organized by the same person, it does not permit an Ohio corporation to be consolidated with an Indiana and an Illinois corporation, because Illinois does not adjoin Ohio. It cannot be denied, however, that under the Illinois statute the Illinois and Indiana corporations might have united, and that then the consolidated corporation, being a corporation of Indiana, could be consolidated with the Ohio corporation; and we should have had just what the corporation under consideration purports to be, to wit, a legally consolidated corporation of Ohio, Indiana, and Illinois. It is obvious that, if such a corporation could have been legally formed, the mere mistake in the mode by which the union was brought about (if it was a mistake, which I do not decide) does not prevent the corporation from being a de facto corporation, under the principles stated at length above. In so far, then, as the petitions base any defense against the bonds and mortgage on defects in the corporate origin of the consolidated company, they do not need an answer from the bondholders, and to this extent the motion is denied.

We come now to the alleged irregularity, illegality, and fraud set up in these petitions. The Toledo, Cincinnati & St. Louis Railroad Company, a consolidated corporation of Illinois, Indiana, and Ohio, in 1882 owned and operated a narrow-gauge railroad, 450 miles in length, from St. Louis to Toledo. The mortgage indebtedness of the company aggregated \$9,500,000, of which about \$5,000,000 were first mortgage bonds, and the remainder were income bonds. The company had also issued \$2,000,000 of preferred stock and \$19,000,000 common stock. The two separate mortgages on the Toledo and the St. Louis Divisions were foreclosed, and the two divisions were sold, in December, 1885. The road was bought by S. H. Kneeland for the first mortgage bondholders of the two divisions. The sale was subject to the lien of an indebtedness of about \$1,200,000. A new consolidated corporation was formed by Kneeland, and it issued bonds secured by mortgage on the entire road amounting to \$9,000,000, preferred stock



amounting to \$5,805,000, and common stock amounting to \$12,250,000, and deposited all the securities with trustees. The purchase of the road, the organization of the new corporation, and the issue of the bonds and stock were in accordance with an agreement made between Kneeland and the bondholders under the two mortgages which were being foreclosed. In effect, the agreement provided that Kneeland should buy the road, making the down payment, and using the old mortgage bonds to complete the purchase price; that he should reconstruct the road, renew its equipment, and widen its gauge; that he should pay the claims against the road, subject to which it was bought, should pay all attorney's fees and expenses not included in, and provided for in, the final decree in the foreclosure suit; and that he should pay the interest on the bonds to be issued pending the reconstruction. As compensation, he was to receive bonds at the rate of \$20,000 and common stock at the rate of \$25,000 per mile of reconstruction, to be delivered by the trustees as the work progressed, according to its value, on certificates of the company's engineers. Kneeland was to receive in advance \$2,000,000 of the bonds and \$2,500,000 of the stock. He was also to be given so much of \$1,000,000 of preferred stock as he paid off of the prior lien claims against the road. \$4,805,000, par value (i. e. the remainder), of the preferred stock, was to be distributed by the trustees to the holders of the bonds secured by the foreclosed mortgages. Ten shares of stock were to be exchanged for one bond under the St. Louis Division mortgage, and ten shares for one bond and one-half under the Toledo Division mortgage. By another and secret agreement, Kneeland stipulated that the holder of ten shares of the preferred stock might, by paying \$1,000, receive one mortgage bond and ten shares of common stock. It also appears that each member of the committees of bondholders received seven bonds as compensation for his services. It also appears that each member of the committee who chose to do so was given the privilege, after a certain time, of purchasing the preferred stock not exchanged for the old mortgage bonds by paying a certain portion of the purchase price of the road at judicial sale, but it is not averred how much stock was taken under this privilege. Kneeland proceeded with the reconstruction, and received all the bonds and stock to which he was entitled under the contract. Of these bonds and shares of common stock, he sold to the old bondholders under the above privilege bonds to the par value of \$1,382,000, and common stock of the same par value, for the cash price of \$1,382,000. Kneeland paid off all but \$500,000 of the prior lien debts on the road. It is averred that Kneeland did not expend more than \$6,000,000 in the reconstruction of the road; that he did not do the work as it should have been done; that, by reason of his ownership of the common stock, he was able to control the board of directors, and secure the appointment of his creatures as the company's engineers, whose reports of work done were fraudulent; that he had as a secret partner in his contract, one Quigley, the chairman of the two bondholders' committees, and the president and a director of the company; and that the deliberate intention of the contractors was to make an inordinate profit, by a corrupt failure to do the work of construction as provided in the contract. An examination of the evidence

already taken on some of the issues made in the case shows a controversy between the company and Kneeland over the manner in which the work had been done, and other stipulations of the contract had been performed, and one or two contracts of settlement made between him and the trustees, against which others in interest protested. As has already been stated, the debts against the company held by these petitioners were all contracted several years after the work of reconstruction was concluded, and long after the formation and execution of the plan of reorganizing the old company into the new. Upon these facts and averments the petitioners contend: First. That the mortgage bonds are void because the contract of January 23, 1886, made between the old bondholders, on behalf of the company to be formed, and Kneeland, the contractor, was conceived in fraud, and was brought about by the secret interest which Quigley, the chairman of the committee of the old bondholders, and subsequent president of the company, was given by Kneeland in the profits of the contract; and because there was fraud in the execution of the contract, in that Kneeland, through his ownership of common stock, controlled the officers of the road and the engineers who supervised the performance of his stipulations. Second. That the bonds are void because of the violation of the thirteenth section of the eleventh article of the constitution of Illinois. Third. That they are void because they are issued at a price less than 75 cents on the dollar of par value, in violation of the laws of Ohio. Fourth. That in any event many of the bonds are void because issued to the directors of the company at a price less than par, which, by the laws of Ohio, renders them void.

1. It is said that these bonds were issued in pursuance of a corrupt and fraudulent agreement, and that they are, therefore, not valid obligations of the company. At the time the contract of January 23, 1886, was made, the petitioners had no relation whatever to the company or its incorporators. The debts of petitioners were none of them contracted until 1892 and 1893. The real parties to the contract of January, 1886, were the bondholders under the old mortgages, the then owners of the road, and Kneeland, who proposed to rebuild and improve it. By the incorporation of the company the real parties to the contract did not change,—so far, at least, as to the interests actually conflicting. The contractor became, by the plan of reorganization and the rebuilding, the owner of much of the common stock and of the bonds, while the preferred stockholders continued to be those for whom the work was being done, and whose interests would be prejudicially affected by fraud either in the inception of the contract or in its execution. The contract was made in 1886, and was executed, so far as it was executed, in 1890. Disputes arose between Kneeland and the company which resulted in agreements of settlement before the debts of petitioners were contracted. Now, it may be that these settlements can be set aside by the company for fraud. It may be that the contract itself can be impeached for fraud by the company or some of its stockholders. But it is very certain that until the company, or some one interested in it as a stockholder, shall take the proper steps to secure such relief, it is not in the power of creditors, who became such after the transaction with respect to which fraud is charged was an ac-

completed fact, and was a condition of the situation of the debtor company when they gave it credit, to impeach the obligations arising out of the transactions. This is a well-settled principle of equity jurisprudence, affirmed by the supreme court of the United States in *Graham v. Railroad Co.*, 102 U. S. 148, and in *Porter v. Steel Co.*, 120 U. S. 673, 7 Sup. Ct. 1206. In the latter case the court announces it as "a well-settled principle that subsequent creditors cannot be heard to impeach an executed contract, where their dealings with the company of which they claim the benefit, occurred after contract became an executed contract." It follows that in the case at bar the averments of the petitions as to the fraud which entered into the inception or execution of the Kneeland contract do not properly raise issues which the bondholders can be compelled to meet, even in the creditors' suit. I do not mean by this to express an opinion upon the right of the corporation itself, or of the preferred stockholders in its name, to raise such an issue against the bondholders.

2. It remains only to inquire whether there are any provisions of positive constitutional or statutory law to which petitioners can appeal as having the effect of absolutely nullifying the bonds here in question on grounds of public policy. Section 13, art. 11, of the constitution of Illinois, provides as follows:

"No railroad corporation shall issue any stock or bonds, except for money, labor or property actually received, and applied to the purposes for which such corporation was created; and all stock dividends, and other fictitious increase of the capital stock or indebtedness of any such corporation, shall be void."

This section, it is contended, renders void all the issues of bonds and stock under the plan of reorganization, because they were, in effect, a fictitious increase of stock and indebtedness. An article exactly like this in the constitution of Arkansas has been construed by the supreme court of the United States, in the case of *Railroad Co. v. Dow*, 120 U. S. 287, 7 Sup. Ct. 482. In that case the bondholders under two mortgages securing a total debt of about \$4,000,000 foreclosed the mortgages and bought the road. A new company was organized, which issued to the bondholders \$1,300,000 of paid stock and \$2,600,000 of new bonds in exchange for the road. It was admitted that the actual value of the road did not exceed \$1,300,000, and the contention was that, as the stock to that amount had first been issued, the subsequent issue of bonds was fictitious, and was void, under the article in question. To this the supreme court, speaking by Mr. Justice Harlan, replied as follows:

"We do not concur in this view of the case. It does not, we think, rest upon a sound interpretation of the state constitution. The prohibition against the issuing of stock or bonds, except for money or property actually received or labor done, and against the fictitious increase of stock or indebtedness, was intended to protect stockholders against spoliation, and to guard the public against securities that were absolutely worthless. One of the mischiefs sought to be remedied is the flooding of the market with stock and bonds that do not represent anything whatever of substantial value. In reference to a provision in the constitution of Illinois, adopted in 1870, containing a prohibition, as to railroad corporations, similar to that imposed by the Arkansas constitution upon all private corporations, the supreme court of the former state, in *Railroad Co. v. Thompson*, 103 Ill. 187, 201, said: 'The latter part of the clause of the constitution in question, which declares that "all stocks, dividends, and

other fictitious increase of the capital stock or indebtedness of such corporation shall be void," we think, clearly points out the chief object which the constitutional convention sought to accomplish in adopting it; and to this we must look, in a large degree, for a solution of the language which precedes it. The object was doubtless to prevent reckless and unscrupulous speculators, under the guise or pretense of building a railroad, or of accomplishing some other legitimate corporate purpose, from fraudulently issuing and putting upon the market bonds or stocks that do not, and are not intended to, represent money or property of any kind, either in possession or expectancy, the stock or bonds in such case being entirely fictitious. \* \* \* Under this provision of the constitution, railroad companies have no right to lend, give away, or sell on credit their bonds or stock, nor have they the right to dispose of either except for a present consideration and for a corporate purpose.' Recurring to the language employed in the Arkansas constitution, we are of opinion it does not necessarily indicate a purpose to make the validity of every issue of stock or bonds by a private corporation depend upon the inquiry whether the money, property, or labor actually received therefor was of equal value in the market with the stock or bonds so issued. It is not clear, from the words used, that the framers of that instrument intended to restrict private corporations—at least, when acting with the approval of their stockholders—in the exchange of their stock or bonds for money, property, or labor, upon such terms as they deem proper, provided, always, the transaction is a real one, based upon a present consideration, and having reference to legitimate corporate purposes, and is not a mere device to evade the law and accomplish that which is forbidden. We cannot suppose that the scheme whereby the appellant acquired the property, rights, and privileges in question, for a given amount of its stock and bonds, falls within the prohibition of the state constitution. The beneficial owners of such interests had the right to fix the terms upon which they would surrender those interests to the corporation of which they were to be the sole stockholders. And, that subsequent holders of stock might not be misled, each certificate of stock states upon its face that the holder takes this stock subject to \$2,850,000 of mortgage bonds of the company, which are secured by two mortgages duly recorded. All that was done was to reorganize the Little Rock & Memphis Railroad Company upon the same basis, substantially, as to capital stock and bonded indebtedness, as existed, in respect to these properties, rights, and privileges, before the adoption of the state constitution, and while they were held and controlled by the companies which preceded the appellant in the ownership. There was consequently no fictitious increase by appellant of its stock or indebtedness. Under these circumstances, it cannot be fairly said that the bonds secured by the mortgage were issued without any consideration whatever actually received in property."

I do not think the case at bar can be distinguished from that considered in the opinion cited. The Toledo, Cincinnati & St. Louis Railroad Company had a mortgage indebtedness of nearly \$10,000,000, and capital stock of \$21,000,000, and the reorganized company called the Toledo, St. Louis & Kansas City Railroad Company, by this plan, had a mortgage indebtedness of \$9,000,000 and a capital stock of about \$18,000,000, and, by the plan, added to the actual value of the road in cash not less than \$6,000,000, and probably more. This would seem to have been a scaling down of the new company's securities about one-third below those issued by the old company, in proportion to the actual value represented by them. But it is said the case here differs from the Dow Case, in that here all the bonds and a large part of the stock were issued to a stranger, whereas in the Dow Case it was merely a distribution of securities among the former owners of the same road. If the stranger received the bonds and stock as a gift, merely, that might make a difference; but where, as here, in exchange for the bonds and stock he actually rebuilt the road, it seems to me to

make the present a much stronger case for refusing to apply the article of the constitution than the Dow Case. The bonds and stock were issued to Kneeland "for money, labor and property actually received and applied to the purposes for which such corporation was created." And the Dow Case expressly holds that the mere fact that that which is received is not equal in value to the par value of the stock and bonds issued in exchange for it does not invalidate the stock and bonds, provided the transaction is a real one, and not one entered into merely to evade the law. The petitioners here are concerned only with the bonds. The stock does not interfere with the collection of their debts. Now, certainly, the bonds are not within the mischief which the article was adopted to remedy; for they do represent substantial value, and the public, in purchasing the bonds, were not misled into paying value for securities which were worthless. The bonds are practically a first lien on property which was bonded with a first mortgage of at least \$9,000,000, and to which at least \$6,000,000 in improvements was added. The suggestion that the property was worth \$9,000,000 before the sale will not meet the concurrence of the petitioners, who rely on the price bid to show much less value. It is true that the upset price of the property at the judicial sale before reorganization was but \$1,500,000, and that the price actually bid exceeded this very little; but I venture to think that no one who has any experience in railroad foreclosures would regard the price bid by a committee of bondholders, with bonds in their possession enabling them to bid double the amount without the additional outlay of one dollar, as evidence having any weight as to the money value of the property purchased. It may be conceded that the common stock of the new company had little actual value except that incident to the control of the company's policy; and if, when it was issued, or shortly thereafter, any one interested in the road, or the state, had sought to have it declared void, it is possible that another question might have been presented than the one under discussion. But I am very clear that subsequent creditors cannot now avoid bonds, representing real value, issued to a contractor for money, services, and property actually delivered to the company, because, in addition to such bonds, the contractor at the same time received common stock, which, by reason of the amount of prior securities made a lien on the road, represented very little of real value. The petitions, so far as they are based on the thirteenth paragraph of the eleventh article of the constitution of Illinois, do not require any answer from the mortgage bondholders or their trustees, and to this extent the motion is denied.

3. It is contended that the bonds are invalid under section 3290 of the Revised Statutes of Ohio, relating to railway corporations, which provides as follows:

"The directors of the company may sell, negotiate, mortgage or pledge such bonds or notes as well as any notes, bonds, scrip or certificates for the payment of money or property which the company may have theretofore received, and shall hereafter receive, as donations, or in payment of subscriptions to the capital stock or for other dues of the company, at such times and in such places, either within or without the state, and at such rates and for such prices at not less than seventy-five cents on the dollar, as in the opinion of the directors will best advance the interests of the company; and if such notes

or bonds are thus sold at a discount, without fraud, the sale shall be as valid in every respect, and the securities as binding for the respective amounts thereof, as if they were sold at their par value."

The argument is that Kneeland received \$9,000,000 of bonds and \$12,000,000 of stock for an outlay of only \$6,000,000, and that he therefore paid for the bonds only two-sevenths of their par value, and that the old mortgage bondholders, the present preferred stockholders, who exercised the privilege of taking one bond and ten shares of common stock for \$1,000, paid only one-half of the par value for the bonds which they bought, to the amount, in the aggregate, of \$1,382,000; that, as in both instances the purchasers paid less than 75 per cent. of the par value of the bonds, the transaction was in violation of the charter power of the corporation, and the bonds are void. There is nothing in the claim. Kneeland's contract was to do certain work for \$9,000,000 of bonds and \$12,000,000 of common stock. There was no stipulation as to how much money he should expend in doing the work, and there is nothing to show that those with whom he contracted expected him to spend only \$6,000,000. He had a right to make a profit on the transaction if he could, and the mere averment as to what he actually expended can have little or no bearing upon the question whether the contract was, to the knowledge of the parties making it, and at the time of making it, a sale of the bonds at less than 75 cents on the dollar, and a violation of the section. The mere fact, as alleged, that he failed to fulfill his contract, would sufficiently explain the failure to expend more money than \$6,000,000. It must certainly appear, before such a contract as that with Kneeland can be said to be a violation of the section above quoted, that the cost of reconstruction which he agreed to do was palpably less than 75 per cent. of the par value of the bonds and the actual value of the stock, so that the parties to the contract knew it to be so when made. There are no averments of this kind in the petitions. The preferred stockholders gave \$1,000 for a bond and ten shares of stock. Until it is averred or made to appear that the stock was worth more than 25 per cent. of par, it may be inferred that, of the amount paid, at least 75 per cent. of it was paid for the bonds, and the remainder only for the stock. The petitioners make no averment as to the actual value of the stock, and their petitions, therefore, fail to make a case under the statute relied on.

4. It is averred by the petitioners that certain of the bondholders acquired the bonds while they were directors of the company by the purchase from the company at a price less than par. Section 3313 of the Revised Statutes of Ohio provides that "all capital stock, bonds, notes, or other securities of a company, purchased of a company by a director thereof, either directly or indirectly, for less than the par value thereof, shall be null and void." The petitioners seek to apply this section first to certain bonds held by one Quigley, who was the chairman of the two committees of old bondholders who made the contract of January 23, 1886, with Kneeland. It is charged in the petitions that Quigley was jointly interested with Kneeland in the contract of January 23, 1886, as a secret partner, that Kneeland and Quigley quarreled after the contract had been partially executed, and that Quigley retired after receiving several hundred bonds. It

is averred that as, by the contract, the services and work to be done by Kneeland and Quigley were not equal to the par value of the stock and bonds to be delivered to Kneeland as compensation, the bonds which Quigley obtained from the transaction are within the section above quoted. The petition expressly avers that Quigley's connection with the contract as a partner of Kneeland was secret, and it is therefore to be inferred that the others, who represented the corporation to be formed, and who acted for the corporation after it was formed, did not know that in making the contract they were dealing with one of their own directors. It would certainly be an unreasonable construction of this statute to hold that, because Quigley was secretly interested in the contract for the issuing of the bonds, that invalidated all the bonds issued by reason of the contract, and coming into the hands of those who were not advised that Quigley had any connection with them. The attack, therefore, upon the bonds, growing out of the connection that Quigley had in the matter, could only affect those which were received by him when he settled with Kneeland. I think, however, without deciding any question involved in the issue, that I ought to allow the present petitioners to raise the issue whether the bonds which Quigley acquired (as averred in the petition) from Kneeland by virtue of this secret partnership were not obtained by him indirectly from the company for less than par. If they were, the question would still remain whether section 3313 avoids them in Quigley's hands, so that their invalidity can be availed of by subsequent creditors. I must reach the same conclusion with reference to the averments as to the application of section 3313 to the case of those bondholders who received bonds, while they were directors of the company, from Kneeland, at the price of \$1,000 for a \$1,000 bond and ten shares of the common stock. In the absence of proof, I suppose it must be assumed that the common stock is worth something, because it would hardly be offered as an inducement if it did not have some value. If it did have any value, then it would seem that the bonds, under such a contract, must have been sold at less than their par value. If the purchase from Kneeland of these bonds was a purchase from him, and not from the company, of course, the transaction would not be within section 3313, because that section only applies to purchases, direct or indirect, from the company. The petitioners, however, aver that, while the purchases seemed to be from Kneeland, they were the result of an option secured by the old bondholders from Kneeland at the time of the contract of January 23, 1886, and therefore were a part of that contract. Their contention is that any acceptance by directors of the company thereafter affirming the option thus secured would, in effect, be a purchase from the company, because it would be a privilege secured by the company to the old bondholders with reference to the sale of the stock to Kneeland. I do not intend to decide the question thus raised. I think it sufficiently serious to require that the issue should be regularly framed to raise it, that evidence should be taken, and that the question should be fully discussed. The intervening petitioners will be given leave to file new petitions which shall raise the question as to the part of the bonds, if any, purchased directly

or indirectly by the directors of the company from it, and held by them, or by persons acquiring the bonds from such directors. Whether bona fide purchasers of such bonds, who had no knowledge of their origin, would be exempted from the effect of the statute is a question the decision of which may be postponed till a regular hearing of the petitions.

The last averment in some of the intervening petitions which remains to be considered is that which charges that the receiver is in possession of a large amount of property, the title to which is in Sylvester H. Kneeland. The intervening petitioners aver that they are the holders and owners of notes made by the company to S. H. Kneeland, and by him indorsed to them; that Kneeland is wholly insolvent; and that they, as creditors of Kneeland, are entitled to subject the property of Kneeland held by the company, and subsequently by the receiver, to the payment of the indebtedness of these written obligations. I do not think that the petitioners are in a condition to raise any such question. They do not aver that they have taken judgment against Kneeland, or that they have issued execution on judgments against him, and have had them returned nulla bona. They have, therefore, no equitable interest, which they can assert in a federal court, in Kneeland's assets. They have not filed a creditors' bill against Kneeland, and they are not entitled to make this action such a proceeding by intervening petition. It is true that if they had acquired a judgment against Kneeland, and then had levied execution, they, *pro interesse suo*, might then come to this court, as a court of equity having possession of Kneeland's assets, and ask that the assets be subjected to the payment of their debts. But they cannot, in the absence of a suit against Kneeland to establish their claims, intervene in this suit, which is a creditors' suit, not against Kneeland, but against the railroad company, to assert an interest in Kneeland's assets held by the company and its successor, the receiver. If the receiver has any property which belongs to Kneeland, Kneeland himself may intervene and assert his interest in the same; but certainly his general creditors cannot until they have reduced their claims to judgment, and brought a proceeding in the nature of a creditors' bill. This principle is so clearly settled in the federal equitable jurisprudence that it is sufficient to cite, as conclusive upon the point, *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712; *Cates v. Allen*, 149 U. S. 451, 13 Sup. Ct. 883, 977; *Wehrman v. Conklin*, 155 U. S. 314, 15 Sup. Ct. 129; *Whitehead v. Shattuck*, 138 U. S. 146, 11 Sup. Ct. 276.

These intervening petitions were filed without leave. The order of the court will be that they are stricken from the files, with leave to the petitioners to file intervening petitions against individual bondholders under the first mortgage issued by the Toledo, St. Louis & Kansas City Railway Company, against whom they can aver that the bonds held by them were purchased from the company by a director of the company at less than the par value, and that they are now held by such director, or by persons purchasing the same from the director. The scope of the petitions will be limited, in so far as they attack the validity of the bonds of the first mortgage, to the subject-matter above stated.



## JOHNSON &amp; JOHNSON v. BAUER &amp; BLACK.

(Circuit Court of Appeals, Seventh Circuit. October 4, 1897.)

No. 389.

## TRADE-MARK—INFRINGEMENT.

Where medicinal and surgical plasters had long been put up in packages bearing a red Greek cross, so that they had become known and were asked for as "Red Cross Plasters," *held*, that the use by another of a Greek cross of somewhat different form, with a large red circle in the center, was an infringement, though bearing on its face letters and marks not on the other, and though there was little resemblance in the packages or other indicia. 79 Fed. 954, reversed.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Johnson & Johnson, the appellant, a corporation existing by virtue of the laws of the state of New Jersey, brought suit in the court below against Bauer & Black, a corporation existing by virtue of the laws of the state of Illinois, to enjoin the alleged infringement of the trade-mark of the appellant, and brings this appeal from a decree dismissing its bill for want of equity. The appellant had long been engaged in the manufacture and sale of medicinal and surgical plasters of various kinds, put up in various descriptions of boxes, and has adopted as a trade-mark, in addition to other insignia, a red Greek cross, the panels of the boxes containing words and letters indicating that the appellant is the manufacturer, and announcing directions for the use of the contents. The appellee, since the adoption and use of such trade-mark by the appellant, has engaged in the like business, one of the members of the corporation being formerly in the service of the appellant, and acquainted with its business and methods. The appellee uses upon its goods a Maltese cross in white and gilt, with a red circle thereon, and the words and letters "B & B Trade Mark," except that upon its boxes having a red groundwork the circle of the cross is black. The following are sufficiently accurate representations of the respective trade-marks:



Red Cross.



Red Cross.

The evidence discloses that the plasters of the appellant had become known and were ordered and sold as "Red Cross Plasters." Otherwise than the marked resemblance in these crosses, there was but little, if any, similarity between the packages containing the goods of the appellant and those containing the goods of the appellee. The court below dismissed the bill for want of equity, upon the ground that there was no infringement shown, stating: "The complainant's sole individuality, if he has any at all, rests on that red Greek cross. I do not think that is sufficient to mark to him an exclusive right to use the Greek cross. I do not think that the defendant so nearly imitates his trade-mark, or comes anything like so nearly imitating it, as to deceive the public who are looking for the complainant's goods." 79 Fed. 954.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

Rowland Cox and William O. Belt, for appellant.

Moran, Mayer & Shrimski and Walter H. Chamberlain, for appellee.

JENKINS, Circuit Judge. We have reached a conclusion upon the evidence in this case directly opposed to the finding of the court below. It sufficiently appeared by the testimony that the goods of the appellant have come to be known, and are offered, ordered, and sold, as "Red Cross Plasters"; and we cannot but think that the Maltese cross adopted by the appellee, in so far as it contains a red circle, has a tendency to promote confusion, and will interfere with the legitimate trade of the appellant. It may be true that those engaged in the trade and acquainted with the manufactures of both parties would not be deceived; but as the goods of the appellant have come to be known as "Red Cross Plasters," and notwithstanding a discriminating examination would detect the distinctions in the trade-marks, the casual observer might easily be mistaken, and imposition would be easy. The red cross speaks to the eye, and the article being known by that designation speaks also to the ear by that name. It is the one peculiar and commanding feature imposed upon the package to designate its origin, and, in the absence of critical examination, the one manufacture may readily be imposed upon the purchaser desiring the other. This is peculiarly true where, as here, the mark is displayed upon the package containing the articles, and not upon the article itself.

In *Pillsbury v. Flou■Mills Co.*, 24 U. S. App. 395, 64 Fed. 841, and 12 C. C. A. 432, we observed with respect to the ground upon which courts of equity interfere in such cases that:

"Disguise defeats the very end and object of legitimate competition, which is the free choice of the public. One may not legally use means, whether marks or other indicia, or even his own name, with the purpose and to the end of selling his goods as the goods of another. If such means tend to attract to himself the trade that would have flowed to the person previously accustomed to use them, their use will be restrained by the law."

And we also there said:

"A specific article of approved excellence comes to be known by certain catchwords easily retained in memory, or by a certain picture which the eye readily recognizes. The purchaser is required only to use that care which persons ordinarily exercise under like circumstances. He is not bound to study or reflect, he acts upon the moment. He is without the opportunity of comparison. It is only when the difference is so gross that no sensible man acting on the instant would be deceived that it can be said that the purchaser ought not to be protected from imposition. Indeed, some cases have gone to the length of declaring that the purchaser has a right to be careless, and that his want of caution in inspecting brands of goods with which he supposes himself to be familiar ought not to be allowed to uphold a simulation of a brand that is designed to work a fraud upon the public. However that may be, the imitation need only to be slight, if it attaches to what is most salient, for the usual inattention of a purchaser renders a good will precarious if exposed to imposition."

Within these principles, we cannot doubt that the use of the red Maltese cross upon the goods of the appellee is wrongful. If a less quantity than a full package is ordered under the name of "Red Cross Plasters," there would be no means of discovering the imposition upon the purchaser, the trade-mark not being attached to the goods themselves. If full packages of Red Cross plasters be ordered by one knowing of and desiring the goods of the appellant, a package of the appellee's goods bearing this salient feature of the red cross

would be well calculated to deceive. The red crosses being the distinguishing marks of the goods of both parties, it would naturally result that the goods of each would come to be known, as the evidence shows the appellant's goods have come to be known, as "Red Cross Plasters," and such infringement upon the appellant's rights ought not to be permitted.

Thus, in *Seixo v. Provezende*, 1 Ch. App. 192, it was said:

"If the goods of a manufacturer have, from the mark or device he has used, become known in the market by a particular name, I think that the adoption by a rival trader of any mark which will cause his goods to bear the same name in the market may be as much a violation of the rights of that rival as the actual copy of his device."

In one case before the United States patent office there was an interference with respect to two trade-marks for hams, the one of which consisted of the word "Bouquet," and the other of a bouquet of flowers; and the one was held, and we think properly, an infringement upon the other, because, as stated by Mr. Brown in his work upon Trade-Marks (section 449), while it was true that there was an utter lack of physical resemblance, and the one delineation could not be mistaken for the other, yet the test is:

"Would the use by different houses of the two things cause confusion? The ear is the medium to mislead the purchaser. He might ask this question, 'Have you the bouquet ham?' and either of the traders could truthfully reply in the affirmative. The picture and the word could not lawfully co-exist as marks for rivals dealing in the same class of merchandise."

So, also, in *Read v. Richardson*, 45 Law T. (N. S.) 54, the complainant's beer had acquired, because of the manner of its identification, the name of "Dog's Head Beer." The label consisted in part of the representation of a dog's head. The defendant used a label upon his beer utterly unlike complainant's, but consisting in part of a dog's head, but the representations were wholly unlike. The master of the rolls observed:

"Of course, they are both dogs and dog's heads, but I think the resemblance stops there. They are differently colored. One is yellow and white, and the other is brown and tan. They are a very different kind of dog,—remarkably different. This bulldog's head is a most emphatic bulldog's head, whereas the terrier is a remarkably mild species of terrier. They are very different animals indeed. The terrier looks somewhat like a cat. It is a very mild specimen. The dogs, too, have different collars on. I don't think that ordinary people would take one of these for the other."

Yet, notwithstanding, the court of appeals sustained the complainant's right, Lord Justice Brett asserting:

"If the goods of a manufacturer have, from a mark or device which has become known in the market, acquired a particular name, the adoption by a rival trader of any mark which will cause his goods to bear the same name in the market is a violation of the rights of his rival."

And Lord Justice Cotton observes:

"It merely comes to this: Is it possible from the use of this label that the defendant's beer may be called or be passed off on unwary or ignorant purchasers as 'Dog's Head Beer'?"

The cases of *Reddaway v. Banham* [1896] App. Cas. 199, *Saxlehner v. Apollinaris Co.* [1897] 1 Ch. 893, and *N. K. Fairbank Co. v.*

**R. W. Bell Manuf'g Co.**, 45 U. S. App. 190, 77 Fed. 869, and 23 C. C. A. 554, may profitably be consulted in this connection.

It has been urged to our attention by supplemental brief that the trade-mark of the appellant is in the nature of a false representation, inducing the public to purchase and deal with the article under the belief that it is an article manufactured by the International Red Cross Society, or which had its sanction and indorsement. No such defense is asserted by the answer, nor are we advised that the International Red Cross Society, which we understand to be a society composed of charitable and benevolent individuals, associated to relieve suffering upon the battle field, and to mitigate the horrors of war, has ever engaged in the production and sale of medical and surgical plasters. Unless the matter be brought to our attention in proper pleadings and by proper proofs, we are not at liberty to consider the suggestion. *Bell v. Bruen*, 1 How. 187; *Badger v. Ranlett*, 106 U. S. 255, 1 Sup. Ct. 346, 350; *Burbank v. Bigelow*, 154 U. S. 558, 14 Sup. Ct. 1163.

The decree will be reversed, and the cause remanded, with direction to the court below to enter a decree in favor of the appellant here (complainant below), restraining the use of the Maltese or other description of cross of red color upon the goods and packages of the appellee, and for an accounting with respect to the damages which have accrued by reason of the use of the infringing design.

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#### THE COLIMA.

(District Court, S. D. New York. July 24, 1897.)

#### 1. CAPSIZING AT SEA—SEAWORTHINESS—TENDER MODEL—DECK LOAD—DISTRIBUTION OF CARGO—STORMS.

The steamship *C.* on a voyage from San Francisco to Panama capsized in a storm about 25 miles off the Mexican coast not far from Manzanillo, at about 11 a. m., May 27, 1895. The weather did not amount to a gale until 8 a. m., but at 6 p. m. the master, in order to head the seas, had turned the ship two points off her course. The ship could not be kept head to the seas, and occasionally fell off into the trough of the sea where she rolled heavily, and in three successive larger waves was turned over completely with nearly a total loss of ship, passengers and crew. She carried a deck load of 47 tons of lumber. Deck loads were customary on such trips. Such storms were not expected at that time; but the disaster was within five weeks of the season of dangerous storms on that coast. The ship had run for 20 years on that line. Her beam was somewhat narrower in comparison with her depth than in most steamers of her class. Upon very great conflict in the evidence as to the nature and severity of the storm: *Held*, that the storm was not phenomenal in character, nor more severe than every steamer should be prepared to meet; that a steamer is not seaworthy, which in such a storm can neither keep out of the trough of the sea, nor ride safely in it; that though a deck load was justifiable under the custom of San Francisco, no custom can validate navigation by an unstable ship, nor excuse the neglect to load sufficient heavy weights below; that such neglect combined with the naturally tender model of the ship was the cause of this catastrophe, through shifting of the cargo when rolling heavily in the trough of the sea, constituting unseaworthiness for which the ship and owners are answerable, except so far as relieved by statute.

**2. HARTER ACT—NEGLIGENCE IN LOADING—LIMITATION OF LIABILITY—REV. ST. § 4283.**

It being found that the disaster was caused through neglect to load the vessel in such a manner as to secure reasonable and necessary stability, and that the loading was done by the stevedore under the immediate supervision and direction of the master and first officer of the ship, but without any other supervision or immediate control by any of the general officers of the corporate owner: *Held* (1) that this negligence was in law imputable to the owner so far as to render inapplicable the exemption from liability provided by the third section of the Harter act, requiring the "exercise of due diligence by the owner"; (2) that the owner was entitled to the limitation of liability provided by section 4283 of the Revised Statutes, inasmuch as the negligence was in the superintendence of the loading, which was properly committed to the master and the first officer of the ship, and specially belonged to their duties, and the neglect was not in fact, nor by construction of law, within the knowledge or privity of the owner, or any of its general officers; (3) that the cargo was entitled to participate with other claims in the distribution of the proceeds of the ship and freight.

Hoadly, Lauterbach & Johnson, for petitioner the Pacific Mail Steamship Co.

R. D. Benedict and Maxwell Evarts, advocates.

Butler, Notman, Joline & Mynderse, Convers & Kirlin, and Cowen, Wing, Putnam & Burlingham, for creditors.

**BROWN, District Judge.** The petition in the above matter was filed by the above-named company, a New York corporation and owner of the steamship Colima, for a limitation of liability under section 4283 of the Revised Statutes, against claims arising out of the loss of that steamer by capsizing in a storm about 25 miles off the coast of Mexico, at about 11 a. m. of May 27, 1895. The steamer and her cargo were totally lost; and out of about 209 persons, composing her passengers and crew, only 29 or 30 were saved. The sum of \$23,846.58, freight, has been paid into court or secured.

The petitioner alleges that the loss of the steamer arose through perils of the seas, without any negligence or fault; or if there was fault, that the loss and damage were done, occasioned or incurred without the privity or knowledge of the owner; that due diligence was used to make the ship seaworthy, and exemption is therefore claimed also under the act of 1893. Six answers to the petition have been interposed by various damage claimants, for the loss of life, loss of cargo, baggage, and effects, and for personal injuries and suffering. The answers deny that the loss was by sea perils and aver that it arose through the negligence of the petitioner and of the persons in charge of the ship, with the petitioner's privity and knowledge; that the steamship was sent to sea in an unseaworthy condition by reason of an improper deck load, and of bad stowage of the cargo, and that she was not properly manned and equipped for the voyage. Several of the answers also allege that the petitioner failed to exercise due diligence to make the ship seaworthy; and that the loss also occurred through the incompetence and inefficiency of her master and officers, and through their negligent and unskillful management of the ship. The principal question litigated is whether through her model and the mode of loading and distributing her cargo, she was so lacking in stability as to be deemed unseaworthy.

The Colima was one of a line of steamers engaged in the carriage of passengers and cargo between the ports of San Francisco and Panama, and intermediate ports. She was built of iron, in 1873, 312 feet long, 40 feet extreme beam on her steerage deck (architecturally her main deck) with a tumble home of 4 feet, to 36 feet beam on the hurricane deck; depth  $36\frac{1}{4}$  feet from the floor of the hold to the hurricane deck, 29 feet 1 inch to the main deck, and  $20\frac{1}{4}$  feet to the steerage deck. Her tonnage was 2,906 gross tons, 2,143 tons net. Her bottom plates were about 23 inches below the floor of the hold, and her keel 10 inches deeper. Forward of her engine room she had five decks above the hold, namely, the orlop, freight, steerage, main, and hurricane deck; aft, there was no orlop deck. On her hurricane deck she carried two houses, one 4 feet long, the other 25 feet, each about 7 feet high.

The steamer sailed from San Francisco on May 18, 1895,  $4\frac{1}{2}$  feet by the stern, with a mean draft of  $20\frac{1}{2}$  feet. Her Lloyd's load mark allowed  $22\frac{1}{2}$  feet. She had on board a mixed cargo, amounting in all to about 1,476 long tons weight, viz.: 1,166 tons of heavy dead weight cargo, and 666 "measurement" tons of light cargo, weighing 310 long tons. She also carried 140 tons of ballast, 500 tons of coal in her bunkers, 65 tons of stores, and about 13,000 gallons of water for use on the voyage. Of her dead weight cargo, about 821 long tons consisted of flour and corn, the larger part of which probably was stored in the lower hold and on the orlop deck. But light and heavy goods destined for the same port, were generally stored together, for convenience in unloading at the eight or nine way ports. A deck load of lumber, about  $3\frac{1}{2}$  to 4 feet high, and of from 39 to 43 long tons (43 to 47 short tons) was carried on the hurricane deck, extending forward from a few feet aft of the fore rigging to within three or four feet of the capstan, and across the ship to within about  $2\frac{1}{2}$  feet of the rail on each side, to which the lumber was securely lashed. Mr. Bingham, the stevedore, thought that two loads or about four tons of the lumber were put below the hurricane deck, but as he spoke from information only, the objection to that testimony must be sustained, and there is no competent evidence, therefore, that any of the 47 tons of lumber were below deck.

On leaving San Francisco the ship rolled heavily in crossing the bar, so that Pilot Kerts found difficulty in getting off the ship. He says the bar was very rough, though not breaking. Others say the bar was not very rough; if it was, the tide gauge on shore did not indicate it. At the way ports of Mazatlan, San Blas and Manzanillo, 67 long tons of cargo were discharged and 77 long tons taken on board. While lying at these way ports, as well as in crossing the bar, several witnesses testify to the excessive rolling of the ship; and the seamen Zangaree and Johnson then considered the ship cranky. The pilots say she behaved well.

The steamer left Manzanillo at 4 p. m. of May 26th, with her mean draft diminished to about  $19\frac{1}{2}$  feet, through the consumption of fuel during the previous eight days. The weather was then clear, and the sea calm, with swells from the southeast. A blood-red sunset was thought by some seamen to indicate wind; and later the captain

predicted a storm. Between midnight and 4 a. m. the weather became squally, with increasing wind. At 3:40 a. m. in rounding a point, the ship's course was changed from S. E. to E. S. E. At 6 a. m., as the ship was rolling considerably, she was again turned to the S. E., in order to head the seas; and that course, so far as possible, was thereafter maintained. It was not until 8 a. m. that the weather amounted to a gale, but the wind and seas were still increasing. By 9 a. m. she was rolling heavily and began to have difficulty in keeping steerageway. At that time she fell off into the trough of the sea for about 5 minutes, then came up, but soon fell off again, for almost 15 minutes, during which time she shipped a sea aft which carried away the after-house and injured one seaman at the relieving tackle. More steam was ordered and given; she came up again head to the sea, but did not maintain herself steadily and continued to fall off from time to time. Nearly all the witnesses say that by this time the ship was rolling very heavily.

Between 9 and 10 a. m. oil was thrown over to ease the ship, but without much avail. About 10:15 she again fell off into the trough of the sea, took a heavy lurch, and shipped a sea on the lee side, so as to carry away three of the starboard life boats, shift her cargo, and give her a strong list to starboard, from which she never recovered. Eight of the twelve witnesses from the Colima testify to this strong list about a half hour before the ship went down; five of them testify to great noises heard from below at the same time, which they describe as a rumbling, a thundering, or a blow. The judgment was then formed that the cargo had shifted, and I have no doubt that such was the fact. Several witnesses speak of a slight list from the time of leaving San Francisco. I do not find sufficient evidence of any material list until that above stated. When the storm came on the natural inclination of the ship to leeward, increasing in the increasing wind and sea, affords a sufficient explanation of the witnesses' impressions as to an increasing list prior to that above referred to.

From the time of this heavy roll and list taken about half an hour before she sank there was much general alarm on board, though three of the petitioner's witnesses disclaim any such alarm. Several of the witnesses testify to a gradual increase of the list to starboard thereafter.

There is no evidence of any further efforts to relieve the ship until just before the final disaster. She had two masts, schooner rigged, and a full set of sails below; but except one, or at most two, of the head sails, none of the sails were bent or ready for use; so that the spanker could not be set in order to assist in keeping head to the sea, by the use of which as two of the seamen testify, the steamer might possibly have been saved.

At 10:40 a. m., the ship being again in the trough of the sea and heading S. by W., the third mate was ordered by the captain to cut loose the deck-load, which was done at once. It did not move, however, immediately; but just as the lashings were cut, three heavy seas came in succession, and the ship, not recovering from the one before she was struck by the next, was carried over completely upon her beam ends, so that her masts touched the water and her decks

were perpendicular, and in five minutes after she filled and sank stern first. The captain remained on the bridge to the last.

Before the vessel sank a few of the passengers and crew had been carried away by the lee wash; many others made their way to the outside of the ship and along the keel, where a few, including the third mate, jumped overboard, while the rest remained there until the ship went down. Soon afterwards the sky partly cleared, the sun became visible, and the wind was much abated; but after 15 or 30 minutes, a squall broke forth with a violence that seemed much greater than before. The small boats, rafts, or wreckage on which the passengers and crew had taken refuge, or to which they were clinging, were overturned; pieces of the floating lumber or wreckage were caught up from the crests of the waves by the circling wind, carried for considerable distances through the air and dashed against the persons who could not avoid them, by which some were killed and many others injured. This soon abated and after a time, variously estimated from one to three hours, the weather again became calm. Most of the 29 or 30 survivors were picked up the next day by the steamer San Juan; a few reached the shore on rafts. Hansen, the third mate, was the only officer who was saved.

Of the survivors, twelve have been examined as witnesses in the present case; four for the petitioner and eight for the claimants. Many other witnesses have also been called. The testimony is voluminous, and conflicting as respects the nature and severity of the storm, and the loading, the stability, the behavior and the seaworthiness of the ship. Some of the apparent conflict is no doubt due to the lack of distinction between the weather before the ship sank and the weather that followed. All that is material to the Colima is its character before she went down, not what it became afterwards.

1. To exempt the petitioner from all liability under section 4283, it must appear that the loss or damage was "done or incurred without the petitioner's privity or knowledge." To exempt it under the Harter act from the claims of cargo owners (27 Stat. 445; 2 Supp. Rev. St. p. 81), it must appear that the ship was seaworthy in fact, or that "due diligence" was used to make her so. The burden of proof is upon the petitioner. It accordingly accounts for the disaster by the severity of the storm, contending that the storm was so extraordinary, that the loss of the ship affords no presumption of her unseaworthiness, and that it was only one of the unavoidable risks and perils of the sea.

This is a crucial point. For no steamship can be deemed fit for a sea voyage if in an ordinary storm, when not disabled, she can neither keep out of the trough of the sea, nor ride safely in it. Steamers ought not to capsize, except under most extraordinary circumstances. As respects stability, they have naturally a double advantage over sail vessels, in the great weight of their engines and boilers below, and in the absence of heavy spars and sails aloft. They should be stable enough to lie safely, in ordinary storms, in the trough of the sea; because they are liable at any time to be forced into that situation, and often are forced into it, for considerable periods, by the accidental disabling of their machinery. Mr. Vining and Mr. Martin, experts of great experience, say that the Colima was of a tender model, from



the narrowness of her beam (40 to 36 feet) in proportion to her depth (29.1 to 36 feet). Their testimony is to some extent confirmed by a comparison of her dimensions with recognized standards of stability and with other vessels of her class. Her extreme breadth of 40 feet, as against a depth of 29.1 feet, was nearly 7 per cent. below the average proportion; and her "tumble home" of 4 feet materially increased this disadvantage. She was naturally, therefore, a somewhat tender ship, and required more than usual care in the distribution of her cargo to keep abundant heavy weight in the hold. Walton's Know Your Own Ship, 136, 137, 110, 111. Unless, therefore, the weight of evidence shows that this storm was really one of such extraordinary severity that a steamship could not reasonably be expected to weather it, the fact that the Colima capsized in it, in the absence of any certain evidence of the amount of heavy weight cargo in the hold, warrants the inference that she was lacking in seaworthy stability through her tender model and the mode of loading combined; and such is my conclusion.

As to the character of the storm the petitioner has examined four witnesses from the Colima; the claimants, eight. The witnesses for the former are Hansen, third mate; Carpenter, the ship's storekeeper; Avilas, the engineer's storekeeper; and Sutherland, a passenger. Of the claimants' eight witnesses from the Colima, four were seamen, viz.: Johnson and Aikman, belonging to the Colima's crew, and Ross and Zangaree, who were seamen in the United States navy, returning as passengers to New York. The other four were passengers and all intelligent witnesses. The testimony of Ross, boatswain's mate on the battle ship Texas, I consider specially valuable, from his long experience of 31 years in the navy, and 39 years as seaman. From his familiarity with the sea, he apparently did not make much account of the excessive rolling of the vessel, to which most of the witnesses testify, until about half an hour before she went down. He says that she then began to roll very heavily, and in a heavy roll, took a list to starboard, from which she did not afterwards recover; that she shifted her cargo at that time, as he judged, agreeing on that point with six of the other witnesses. From that time he was alarmed for their safety.

Both Ross and Zangaree say that the storm was an ordinary gale, or only a little more, and nothing like a hurricane or a cyclone. Johnson and Aikman and the four passengers say the same. Aikman says the storm before the ship went down was "nothing out of common, nothing that a vessel ought to take any notice of." Johnson also says that the Colima acted cranky from the start; that in passing over the bar she "rolled deep and recovered slowly"; because top-heavy in the whole loading from having too much on deck, and because the aft hold was only about half full; to which Aikman also testifies in a general way, though it appears on cross-examination that he did not fully examine the hold in the darkness. Johnson further says that the Colima always acted a little cranky, and would always roll in the outside ports down the coast, and was "never considered a steady ship, in his opinion and in that of everybody else." Zangaree also says that she acted cranky; and that on the coast, before the storm,

she "rolled more than any other vessel he was ever in." Other witnesses speak of her excessive rolling before the storm; and nearly all testify to her heavy rolling after 9 a. m., when she fell into the trough of the sea; and with this agrees the shifting, about that time, of the loosely piled salt on the steerage deck, and of the cases and drums of oil on the main deck. Nine of the witnesses testify to the heavy list taken a half hour before she went down. Zangaree, Boyd and Cushing say this list was from  $20^{\circ}$  to  $30^{\circ}$ . Six of the witnesses testify to the rumbling noises heard below, indicating a shifting of the cargo at that time, and to the increasing list subsequently, as would naturally ensue. Water temporarily taken on deck by the lee wash, does not account for such a list.

Hansen, on the other hand, who had been on the Colima 22 months and made 10 voyages in her, and who came on watch at 8 a. m., says that the weather was then a gale and increasing, with a cross, choppy sea, and the wind in puffs, squally, unsteady and varying all the time from three to four points viz., from E. x S. to S. Several witnesses state the contrary; and with that agrees Hansen's statement, that at 10:40 a. m. when the ship was in the trough of the sea, five minutes before she went down, "she was heading W. x S." He says he was in a storm in the Colima about a year before; but that this storm after 10 a. m., was the worst he was ever in. He was not used to the Atlantic. After the ship went down, there was a lull, and after that a squall which seemed fiercer than before, with the wind circling. The ship fell off, he says, because she could not get headway enough against wind and sea to answer her helm; he had had no similar difficulty before with the Colima, or in any other steamer; and he says she showed no signs of being cranky, or of excessive rolling, but behaved well throughout, until the three seas came that carried her over; and that he would call her "a very stiff ship, very steady indeed." He says nothing of any permanent list taken a half hour before the three waves, though at 10:40 a. m., five minutes before she went down, he says "she was leaning about 10 degrees to starboard," and that the cargo did not shift. Up to 9 a. m., he says there was nothing particular calling for mention in the log beyond what he had noted at 4 a. m.; that they "were used to heavy wind and squalls, and didn't count that much of anything."

Avilas was below in the engine department until about half an hour before the ship went down, when he was sent up to call all hands in order to right the things that had gone adrift below; he confirms the heavy list taken at that time, which he says he noticed below, but which was more noticeable on deck. The passenger Sutherland had never been in a storm at sea before; he had seen heavier seas, but the wind he says was the worst he ever saw. His account is very confused and untrustworthy. Carpenter says that at 5:30 a. m. the weather was not bad, but squally and stormy; that it began to increase about 8 a. m., and that the wind and seas got heavier; before the three seas struck her, the wind, he says, was blowing heavy and a big sea running, but she was behaving well enough; he noticed her rolling, but it was not very heavy before the three seas. He was then on the main deck, but when those seas came he ran to the hurricane

deck, just as Hansen had cut loose the lumber. He heard nothing of any shifting of cargo, and he makes no mention of any previous list, or heavy lurch. I find nowhere any contradiction of Johnson's testimony, that from the first the Colima "rolled deep and recovered slowly"; the latter a circumstance of the greatest significance. Carpenter further says that the storm was the worst he was ever in; but from the context this seems to refer to his experiences when he was in the water in the subsequent squall after the ship sank. It is at that time, and not before, that the squall is described by some of the witnesses as a cyclone; and though the testimony derived from the impressions and experiences of the witnesses while struggling in the water, does not afford a very trustworthy basis for a comparison of the storm as it was then with the preceding storm, as felt on shipboard, or with other storms; still it may be, from the graphic incidents narrated, that after the short clearing up after the ship went down, the squall that broke out afresh was much severer than before, and for a brief period had the character of a local cyclone or whirlwind. It is evident, however, that this character was not long retained, and in from one to three hours, the weather was again calm. The question here is not whether there was a brief cyclone or whirlwind in the squall that arose after the ship sank, but what was the weather up to the time she went down. Up to that time no incidents are mentioned analogous to those occurring afterwards, nor anything suggesting a whirlwind, hurricane, or cyclone, as that word is ordinarily understood. The weight of evidence is that when the ship went down the storm was "but little more than an ordinary gale," "nothing that a vessel like the Colima ought to take any notice of."

The testimony of the claimants' witnesses is, indeed, given in their own interest, as all have claims which their evidence supports; but I have not found that mere pecuniary interest is usually more productive of distorted testimony than is often caused by the bias of officers and seamen when testifying in behalf of their own ship, and their own employers. The claimants' testimony seems for the most part free from extravagance and inconsistency. Carpenter's statement on the other hand, that the ship was not rolling heavily until the "three seas" that capsized her, is not consistent with a "big sea running," to which he testifies; and Hansen's statement that he "should call the Colima a very stiff ship, very steady indeed," is so contrary to the great weight of evidence, that I cannot give much credit to any of his testimony as to matters of opinion, judgment, or estimate. The fact also that Hansen, Carpenter and Sutherland make no mention of the strong and permanent list to starboard, taken about half an hour before the ship sank, to which the other nine witnesses testify and of which I cannot have any doubt,—a circumstance of vital import, which they must have observed and could not have forgotten,—seriously discredits the candor of their narratives, and the confidence to be placed in their testimony.

As respects the character of the storm before the ship went down, the weight of the direct evidence, therefore, as I have already said, seems to me decidedly with the claimants; that this storm was not a hurricane, nor a cyclone, as that word is commonly understood, nor a

storm of such severity, nor accompanied by any such extraordinary features, as to account for the shifting of cargo and capsizing of a seaworthy steamship. Although most of our extensive storms are rotary or cyclonic in movement, the term as thus used does not denote unusual violence; many of such storms are not severe; and all seagoing vessels are expected to be prepared to meet them. The weight of evidence, and even Hansen's testimony itself, carefully examined, does not show any such continuous or permanent change of wind as to justify the conclusion that this storm was of a cyclonic character. It was, moreover, comparatively brief and limited in extent. It did not amount to a gale for more than six or seven hours altogether; consisting, as Zangaree describes it, of two heavy squalls, one from 8 to 11 a. m. and the other from 12 to about 3 p. m., with the sun shining out between. No maritime reports give it any wide area. The San Juan felt it 125 to 150 miles to the southward of the Colima, and lay to until 4 p. m.; but without damage or any other incidents mentioned. Of two or three schooners making a harbor on the Mexican coast, one ran upon the rocks. No other casualty is reported; while a little 20-foot sailing boat weathered it, and came into Manzanillo the next day, without damage.

Other negative circumstances confirm the moderate character of this storm, at least up to the time the Colima sank. No seas were shipped forward, nor anywhere on the weather side; nothing on deck was carried away or damaged there. While the ship was kept head to the sea or nearly so, she suffered no damage. It was only when she was in the trough of the sea and rolling heavily that any seas were shipped or injury done; viz. once at about 9 a. m., when a sea damaged her houses aft; and again at about 10:15, or a half hour before she went down, when the three starboard boats were carried away by the lee wash, at the time of the heavy lurch that shifted her cargo. I accept this shifting as a fact; not merely from the direct testimony as to the noises heard below, at that time, but because in no other way can the heavy and increasing list to starboard from that time on, which so many witnesses testify to, be explained. Again, many persons, while the ship lay upon her beam ends and in the trough of the sea, clambered upon the outside along the keel, and remained there, neither blown off, nor washed off, till the vessel went down. None of these circumstances are compatible with an extraordinary wind or sea.

My conclusion therefore, on this branch of the case, from the direct and circumstantial evidence is, that the Colima capsized in a heavy squall or brief storm but little above an ordinary gale, because from her tender model and mode of loading combined, she lacked the usual and requisite stability, or righting power; that in consequence of that fault, she rolled deeply and recovered slowly, and not being able to keep head to the sea, her rolling was still deeper in the trough of the sea when she fell off; that in that situation, a deep roll at 10:15 caused her cargo to shift to starboard; that this again still further enfeebled and retarded her righting power, so that when three larger seas came in succession, as ordinarily happens from time to time in all storms, and caught her in the trough of the sea, she was unable to recover, through feebleness of righting power, and was consequently carried over upon

her beam ends. This is but the natural progress of an unstable ship in an ordinary storm, when she cannot keep out of the trough of the sea. Nothing phenomenal is needed to explain it. If she had seaworthy stability and was properly managed, something phenomenal would be needed to explain this disaster; the weight of evidence does not indicate the presence of any such phenomenal cause. It is a significant circumstance, also, that in order to head the seas, the master at 6 a. m., put the ship 2½ points off her course. This is not usually done by a steamship, even in the midst of an ordinary gale. That the master did this two hours before the weather became an ordinary gale, is, in the absence of any other explanation, persuasive evidence that the ship was not in condition to meet a storm, and that he knew it, either from knowing the mode of loading, or from the behavior of the ship up to that time.

2. It is urged that the Colima ought to be held seaworthy, because she had run upon this route for 20 years without accident, loaded during the preceding 5 years by the same stevedores, in the same general manner, and in a way testified to as first class; and because upon the mode of loading described, competent experts in San Francisco have testified that she was perfectly seaworthy, and that the deck load had nothing to do with the disaster; and also because at that season storms were not to be anticipated.

(a) But if the above conclusion as to the character of this storm is correct, none of these considerations meet the case. If the Colima had been making these voyages for 20 years, she must have been in many such storms before. How she behaved in them is not shown, except that Hansen says she never before fell off into the trough of the sea during the 22 months he was in her, including one storm about a year before. If she had no previous trouble, the present trouble presumptively arose from her different trim and stability, or from some other defects in the ship or her machinery not disclosed. It was not till 10 a. m., that even Hansen says this storm became such as he was never in before; but the ship fell off in the trough of the sea from 9 a. m., on; if, therefore, she did not fall off before this voyage, the trouble here was not in the storm, but in the Colima.

(b) As respects similarity of loading on prior voyages, the evidence furnishes no data for comparison; and even if this were shown it would not suffice, unless the stability of the ship with such loading were established, either by experience in storms, or by definite proof of the distribution of the heavy weight cargo.

(c) It is this lack of definite proof of the mode of distributing the heavy-weight cargo, or of the weight that went into the hold, that makes it impossible, as it seems to me, to solve this case from that side; and requires its solution upon the evidence as to the character of the storm and the behavior of the ship. All that the stevedores can say is, that the heavy cargo went mostly in the lower hold and on the orlop deck; stating also the decks where the goods for different ports were stowed. How large a fraction the word "mostly" represents does not appear; while it does appear that there was more or less heavy cargo on every one of the five decks, including the 43 to 47 tons of lumber on top. It appears that the cargo for Acapulco, for example, was

379 tons (the largest for any single port, except that for San José) and consisted largely of flour; but all of the cargo for this port that was stowed aft, went on the freight deck, and not in the hold. In fact all of the cargo for Panama and for Acapulco itself; and parts of the cargo destined for Acajutla, Champerico, San José and the ports of transfer (at Acapulco) were stored on the freight and steerage decks; and the goods for these ports comprised two-thirds of the cargo, both of heavy and of light goods. None of the San José cargo (531 tons), which was nearly one-third of the whole, went into the lower hold. The practice in loading was, as Woolnough repeatedly states, to put all of the cargo destined for the same port together in the same part of the ship, that is, heavy and light weight together, for convenience in unloading; and the cargo in the lower hold was mixed. Twenty tons of oil, combustibles and live stock, were also on the main deck, which architecturally constituted deck cargo. I have not been able, therefore, to ascertain with any certainty the weight of the goods stored in the hold; but the evidence does indicate that a large proportion of the heavy goods was stored above the hold.

(d) Other evidence makes it doubtful whether the stowage was as full or as compact as the stevedores assert. I have already referred to the statements of Johnson and Aikman, that the aft hold was only about half full. They may be mistaken in this; if not mistaken, the reasons for leaving that space might be for taking in way goods; or because there were not goods enough for the ports represented in the aft hold, to fill the space, on the principle of convenience, which in part governed the loading.

(e) But aside from this, the draft of the ship, her tonnage, and the amount of her cargo spaces, indicate that she was only about two-thirds full. Her "net tonnage" was 2,143 tons; her net cargo capacity, much greater. The entire weight of this cargo was but 1,476 (long) tons. Frear, p. 1084. Mr. Bingham says he has put aboard of her over 2,300 (short) tons, weight and measurement; here she had but 1,950 short tons, weight and measurement. Again, her draft on leaving Manzanillo was 3 feet less than the Lloyd's load mark, equivalent to about 720 long tons less than a full-draft load. So also the cargo spaces occupied for her dead weight and measurement cargo, computed with a pretty wide allowance for variation (*Steamship Co. v. Grace*, 22 C. C. A. 7, 75 Fed. 1019-1021), seem to me to show that at least one-fourth of the net cargo space was unoccupied. All these circumstances make it probable that the stowage was not so full, nor so compact as it might easily have been; nor such as to prevent shifting under circumstances calculated to cause shifting unless the cargo was very securely stowed.

(f) The testimony of the experts Metcalf and Goodall, as to the seaworthiness of the Colima for this voyage, is materially affected by the uncertainty as to the stowage. The hypothetical questions put to them did not locate the place or places where the supposed 900 tons of flour or heavy cargo were stowed; but their answers are conditional; Metcalf's, upon its stowage in the hold and on the orlop deck (pages 171, 178); Goodall's, upon its stowage "in the bottom of the ship." The latter adds: "Any seafaring man would place that weight in the

lower hold, to see that the vessel, no matter what vessel it is, was stiff enough." Page 210. Evidence that that weight was so placed is precisely what is lacking. There were but 821 tons of flour and corn in all; and it is certain that a considerable part of the flour and corn was not stowed in the lower hold, but above it; some on the orlop deck, and other parts of it above the orlop and on the two decks above. The deck load of lumber was of 43 to 47 (short) tons, instead of 30 to 40, as given in the hypothetical questions; and Metcalf's answer assumed portions of it to be stored on both decks; whereas even if Bingham's information was correct, 43 (short) tons would be on the hurricane deck, and only four tons below. Mr. Metcalf also on cross-examination, says: "If she had any extraordinary light cargo in the lower hold, I would say that she could not carry a deck load. It is a question of stability." Page 170. There was considerable light cargo on board and Woolnough says "there might be furniture all over the ship; he could not tell." Thus evidence of the necessary exclusion of light furniture from the hold is wanting. Page 619.

(g) The usages of the time and port are material in questions relating to the equipment of the ship, the carrying of a deck load, or of different kinds of cargo on the same voyage; the amount and arrangement of dunnage; the proximity of different kinds of goods to each other, and the mode of stowing and securing them. *The Titania*, 19 Fed. 101; *Tidmarsh v. Insurance Co.*, 4 Mason, 439, Fed. Cas. No. 14,024. But such usages can have little application to questions affecting the stability of the ship. For no custom can validate navigation by unstable ships, nor can custom determine whether a given vessel with a given loading is stable or not. Ships vary greatly in model, and the requirements of loading in order to insure stability vary accordingly. These requirements are matters of positive knowledge, which no usage can affect or vary. Each ship presents her own problem. Custom has little, if any, scope for application. And as the limits of stable loading are determinable by rule for any given ship, no usage or practice can justify a departure from it.

(h) Nor is the fact that storms were not anticipated, or were not usual at that particular time, even if true, any legal justification for sending the *Colima* to sea unprepared to meet them. The Pacific coast is not exempt from storms. Hansen had been in one about a year before in the *Colima*, and says they often had heavy squalls; they were used to that, and didn't count that much of anything. Goodall had "met the *Colima* at sea, sometimes in heavy weather," and Bingham, in accounting for her loss, says: "She got in a gale of wind, and in the center, I suppose, and that is what a good many get in that locality every few years." This catastrophe, moreover, happened within five weeks of the date when, according to the hydrographic office, "the season of dangerous storms sets in." It would be trifling with human life to justify legally a voluntary disregard of the liability to such storms so near the ordinary time of their occurrence.<sup>1</sup> I should add that the superintendent makes no such claim, but states his belief that the ship

<sup>1</sup> See *The Queen*, 78 Fed. 163, as to boisterous weather to be expected at this period.

was fully seaworthy in fact, and that he would not otherwise have allowed her to go to sea. It is, nevertheless, possible, and even probable, that this disaster arose from this single cause, viz.: overconfidence by the master and mate in a continuance of the usual mild weather, and that this led to more regard for the easy and convenient handling of the cargo than for the requirements of stability in loading; and that the aft sails were not bent for the same reason; so that when the storm came, the ship was equally unprepared for it, above deck and below; and hence the unusual order of the master to put the ship off her course in order to head the seas two hours before the weather amounted to a gale.

(i) Considering the height of the hurricane deck, I do not understand how the deck load of from 43 to 47 (short) tons of lumber can be regarded as an immaterial factor in causing this loss. The objection is not to the mere fact that it was a deck load; for the custom of San Francisco is clearly proved to allow that, and the Colima had often carried greater deck loads than this. Its importance here is merely as a part of the distribution of the heavy cargo weights; and this distribution, however legal in other respects, is subject to the prime requirement that it must not prejudice the requisite stability of the ship. Whatever be the model of the ship, a deck load may be safe if there is sufficient weight in the bottom to offset it; otherwise not. The different language of all the experts alike imports this. The influence of a high deck load on a rolling ship, depends not merely on the dead weight and the long leverage that its height gives, but also on its momentum acquired in the movement of rolling and tending to heel the ship over; and the momentum is in proportion to the velocity, or leverage length. Its inertia in resisting the ship's recovery when she is heeled over is in the same proportion; and this is perhaps of still greater importance. Here the center of the deck load being about 2 feet above the hurricane deck, was according to Mr. Frear's computations, about  $21\frac{1}{2}$  feet above the water line, while the bottom of the hold was but  $16\frac{2}{3}$  feet below it. Again, the bottom of the cargo was  $14\frac{1}{2}$  feet below the center of gravity of the whole ship and cargo as he estimates; while the center of the deck load was about 24 feet above it. Its influence on the rolling of the ship and upon her righting power would therefore be equal to that of many times the same weight of cargo on the freight deck, and to about three times its weight on the main deck. I think this factor, therefore, was important, as Mr. Vin- ing and Mr. Martin testified.

(k) I do not consider the very interesting question presented touching the metacentric height of the Colima: (1) Because the metacentric height "is no guide for a vessel's range of stability, but only for small angles of 10 to 12 degrees of inclination." Walton's *Know Your Own Ship*, p. 131. (2) Because the data upon which Mr. Frear was obliged to work, were not sufficiently fixed. They involve the question of the distribution of cargo in another form.

3. If the Colima had not sufficient stability to cope with the storms she was liable to meet and was on that ground unseaworthy, was "due diligence" used to make her seaworthy, so as to exempt the petitioner



under the third section of the Harter act from all liability to cargo owners? I think not.

This section has been in several cases adjudged to require due diligence, not merely in the personal acts of the owner, but also on the part of the agents he may employ, or to whom he may have committed the work of fitting the vessel for sea. The act requires in other words, due diligence in the work itself. *The Mary L. Peters*, 68 Fed. 919; *The Flamborough*, 69 Fed. 470; *The Alvena*, 74 Fed. 252, affirmed 25 C. C. A. 261, 79 Fed. 973; *The Rossmore* [1895] 2 Q. B. 408. On any other construction, owners would escape all responsibility for the seaworthiness of their ships by merely employing agents of good repute, whether any diligence and care to make their vessels seaworthy were in fact exercised or not. On reason and sound policy no such intent in the statute can be supposed. The context and the pre-existing law indicate that the intent of the act is to relieve the shipowner from his previous warranty of absolute seaworthiness in fact, and to substitute for that warranty a warranty only of diligence, to make the ship seaworthy. This difference is of great importance, as it avoids responsibility for latent and undiscoverable defects. But the warranty of diligence remains; and this requires the application of the usual rule, that the acts and negligences of the agent are deemed those of the principal.

From other language in the third section of the act the same result follows. For it exempts only from losses by fault "in the navigation or management" of the vessel, and from "dangers of the sea." But a danger of the seas (the clause here invoked), by its settled meaning, does not include a danger which would have been avoided by the use of due diligence in loading or management, and that part of the section would therefore not apply.

The agents of the petitioner to whom the loading of the *Colima* was committed, were the master and the first and third mates, who directed to which parts of the ship the lots designed for the different ports should go, and the stevedore, whose foreman and employes acted in stowing the cargo under such directions. The master and the first mate having perished in the disaster, there is no evidence as to what rules or cautions they observed, or attempted to observe. But the testimony of Hansen, the third mate, and of Woolnough, the acting stevedore's foreman, does not indicate that they recognized any need of caution in loading on account of the *Colima's* comparatively narrow beam. On the contrary, Hansen, who had charge of stowing the forehold and forward end of the ship, expressly says he should call her "a very stiff ship." If he believed this, he would not naturally distribute the cargo forward with the care that a more tender model requires. The repeated statements of both those witnesses, that convenience in unloading at the different way ports governed the placing of cargo; the fact that a considerable part of the cargo was light goods; that the cargo in the lower hold was mixed, and that heavy cargo and light cargo were in fact put upon every deck below the hurricane deck, with at least 43 (short) tons of lumber there, do not indicate diligence in attending to the requirements of the *Colima* as a

ship of somewhat tender model. In other words, there is an entire lack of evidence that any diligence was exercised of the character required, viz.: a consideration of the exceptional model of the Colima and of what she could safely bear. The burden of proof being upon the petitioner, and no such evidence appearing, the exemption claimed under the Harter act, on the ground of "due diligence," cannot be sustained.

It is further urged that the master's acts in stowing the ship with reference to her stability and seaworthiness, have to do with "the management of the ship," and are therefore within the third section: and some language is cited to that effect from the decision in *Worsted Mills v. Knott*, 76 Fed. 584. But that case arose upon acts done at a port of call in the course of the voyage; and what was there said had reference to acts designedly done for the management of the ship in the course of the voyage. It is to "management" on the voyage, that the third section of the Harter act refers, as the context indicates, and not to acts like those in the present case, in preparation for the voyage, before it begins.

4. I think the petitioner upon surrender of the freight (\$23,846.58) is entitled to the exemption provided by section 4283 of the Revised Statutes as not being privy to the defects in loading, or in the management of the ship at sea, nor having knowledge of them. Privy and knowledge are chargeable upon a corporation when brought home to its principal officers, or to the superintendent who is its representative; and if such privy or knowledge were here brought home to Mr. Schwerin, the petitioner's superintendent, they would be chargeable upon the corporation. But the privy or knowledge referred to in this statute is not that which arises out of the mere relation of principal and agent, by legal construction; if it were, the statute would have nothing to operate upon; since the owner does not become liable at all except for the acts of himself or his agent. The object of this statute, however, was to abridge the liability of shipowners arising out of a merely constructive privy with their agents' acts, by introducing the rule of limited liability prevailing in the general maritime law, upon the terms prescribed by the statute,—so far at least as respects damages for torts; while the act of 1884 extends this limitation to contracts also, except as to seamen's wages. 23 Stat. 57, § 18; 1 Supp. Rev. St. p. 443; *Chappell v. Bradshaw*, 35 Fed. 923-925; *Force v. Insurance Co.*, Id. 778, 779; *Miller v. O'Brien*, Id. 779, 783, 59 Fed. 621, affirmed 168 U. S. 287, 18 Sup. Ct. 140; *Gokey v. Fort*, 44 Fed. 364-367; *The Annie Faxon*, 66 Fed. 575; Id., 21 C. C. A. 366, 75 Fed. 312, 318, 319. The knowledge or privy that excludes the operation of the statute, must therefore be in a measure actual, and not merely constructive; that is, actual through the owner's knowledge, or authorization, or immediate control of the wrongful acts, or conditions, or through some kind of personal participation in them. *The Republic*, 9 C. C. A. 386, 61 Fed. 109, 112, 113, and cases there cited.

If Mr. Schwerin, the superintendent, had been either charged personally with the duty of directing or managing the distribution of this cargo, with reference to the stability of the ship, or had assumed that

function, the company would perhaps have been "privity" to any defects in loading, arising from the negligence of workmen under his immediate direction and control, whether he had actual knowledge of their delinquencies or not; since it is the duty of the person in immediate charge and actual control to see and know that proper directions are carried out. However that may be, Mr. Schwerin had no such duty, and assumed no such function. That duty, as the evidence shows, was committed to a competent stevedore, who acted under the immediate direction of the master and first mate, or in conjunction with them. The master and mate were the proper persons to determine and insure the necessary trim and stability of the ship, and are supposed to be specially qualified to do so. *Lawrence v. Minturn*, 17 How. 100, 111, 116. Whatever mistakes or negligence may have occurred in that work, there is no evidence that Mr. Schwerin knew of them; nor would they naturally have come to his knowledge; and I do not see the least reason to doubt his testimony that he believed that the ship was properly loaded and perfectly seaworthy. The deck load was no indication to the contrary, because deck loads were customary, and safe with proper loading below.

The failure of the master to have the spanker bent, whereby it was not in readiness for use when wanted to keep the steamer head to the seas, was plainly negligence on the voyage without the knowledge or privity of the owner. Though the ship, as I find, was not safely loaded, her real trouble arose from falling off into the trough of the seas, and it was only in that situation that she suffered any damage. From the fact that after 8 a. m., when the storm first became a gale, she fell into the trough of the sea but a few times and for the most part maintained her head to the seas, the inference is strong that, if her spanker had been set as customary under such circumstances, she might have been kept continuously headed to the seas and avoided this calamity, as two of the seamen testify. If that is so, and it seems to me impossible to affirm that it was not, the master's negligence in that regard was one of the immediate causes, though not the sole cause, of this disaster. If, therefore, the accident is to be ascribed, as I think it should be, to bad loading and bad management combined, it is still true that there was no unseaworthiness or fault in the ship herself, or her equipment, and that both of the causes of disaster fell within the special and peculiar duties of the master as such; and considering that neither of them were within the knowledge, or any actual privity or actual personal superintendence of the petitioner or its managing agent, but did belong to the master of the ship in that capacity only and in the exercise of one of his special functions as master, the case is, I think, within the intent as well as the language of section 4283. *Butler v. Steamship Co.*, 130 U. S. 527, 9 Sup. Ct. 612; *Craig v. Insurance Co.*, 141 U. S. 638, 647, 12 Sup. Ct. 97; *Quinlan v. Pew*, 5 C. C. A. 438, 56 Fed. 111, 115-118; *The Annie Faxon*, *supra*; *The Republic*, *supra*; *In re Meyer*, 74 Fed. 881.

Decree for petitioner for limitation of liability on payment into court of the balance of the freight, and that the cargo owners participate in the distribution.

## THE HENRY B. HYDE

## MONTAGUE et al. v. THE HENRY B. HYDE.

(District Court, N. D. California. August 31, 1897.)

No. 11,088.

1. CARRIERS OF GOODS—CONTRACT OF CARRIAGE—BILL OF LADING.  
A bill of lading, when signed by the carrier, and delivered to and accepted by the shipper without objection, in the absence of fraud, constitutes the contract of carriage, and binds the shipper, though not signed by him.
2. SAME—STIPULATIONS STAMPED ON BILL OF LADING.  
Stipulations stamped on the face of a bill of lading before its delivery to the shipper, and by express terms included therein, become a part of the contract.
3. SAME—SPECIAL CONTRACT LIMITING LIABILITY.  
In the absence of statutory provision to the contrary, a carrier of goods may, by special contract, contained in the bill of lading, stipulate for a more limited liability than that which the law would otherwise impose upon him.
4. SAME—CONSTRUCTION OF BILL OF LADING—PLACE OF CONTRACT.  
A contract made in New York for the carriage of goods from there to a point in another state is governed by the laws of New York unless a different intention clearly appears.
5. SAME—PRESUMPTION AS TO LAW OF ANOTHER STATE.  
Where the contract evidenced by a bill of lading is to be construed and enforced in accordance with the law of another state, where it was made, and there is no evidence as to the statutes of such state, the presumption is that the general commercial law governing bills of lading is there in force.

O. M. Jennings, for libelants.  
Andros & Frank, for respondent.

DE HAVEN, District Judge. Libel to recover damages alleged to have been sustained by the breakage of certain articles of hardware shipped at the port of New York on board the ship Henry B. Hyde, to be thence carried by said ship and delivered to the libelants at the port of San Francisco. The evidence shows that the articles of merchandise referred to in the libel were received on board the ship at New York in good order, and were broken before the ship delivered the same to the libelants at San Francisco. The several bills of lading under which the merchandise was shipped each contained the following stipulations, plainly stamped upon the face thereof:

"Weight, contents, and value unknown. Not accountable for leakage, rust, or breakage. Deliverable within reach of vessel's tackles. If the consignees neglect or refuse to receive their goods for twenty-four hours after being notified of their being ready for delivery, the same will be landed and stored for account and at the risk and expense of whom it may concern; the vessel having a lien upon the goods for amount of freight charges and expenses."

In addition to the foregoing, there was also stamped upon its face, in still larger letters, in the space just above the signature of the person signing the bill of lading for the ship, the words, "Stamped Clauses Included." Neither of the bills of lading was signed by the shipper, but all of them were signed in behalf of the carrier as follows: "For the Captain, W. A. Robinson, Atty.,"—and were delivered to and accepted by the shippers, and introduced by the libel-

ants as part of the evidence in this case, the libelants giving notice, however, at the time of so offering them in evidence, that they contested the validity and binding force of the stipulations above set out and stamped upon the face of such bills; and whether such stipulations are binding upon the libelants is the principal question involved in the decision of this case.

The libelants do not dispute the general proposition that a carrier may, by special contract with the shipper, exempt himself from the liability imposed by the general rule of law which makes common carriers insurers of goods intrusted to them against all loss or damage not occasioned by the act of God or the public enemy; but they insist that, as they did not sign the bills of lading under which their goods were shipped, they are not bound by the special stipulations contained therein, and which are above set out; and in support of this contention reliance is placed on the case of *Brittan v. Barnaby*, 21 How. 527, and section 2176 of the Civil Code of this state. I do not think the opinion in *Brittan v. Barnaby*, when considered as a whole, and with reference to the particular question before the court in that case, can be deemed authority for the proposition contended for by the libelants. The question before the court in that case was in relation to the effect to be given an unsigned memorandum stamped on the back of the bill of lading, not referred to upon its face, and in the absence of proof that the shipper ever assented to it as a modification of the contract appearing upon the face of the bill of lading. Upon such state of facts the court there held, and properly, that such unsigned memorandum constituted no part of the contract of carriage; and that is all that was decided upon that point. It is true, the court, in the course of its opinion, after stating that the carrier may enter into particular engagements with the shipper, and that such stipulations are not uncommon between shipowners and shippers in charter parties and in bills of lading, proceeded to say:

"But, when done in either, they must be made in words sufficiently intelligible to indicate an agreement that the operation of the law merchant in respect to those instruments is not to prevail; and the stipulation must be in writing, and be signed by the parties, before it can be received as an auxiliary to explain how the contract is to be performed."

But, when the foregoing quotation is read in connection with its context, it becomes apparent that the expression relied upon by the libelants here, to the effect that bills of lading containing such stipulations must be signed by all the parties before such stipulations can be given effect as a part of the contract of carriage, was inadvertently used. A bill of lading is an instrument well known to the commercial law, and according to mercantile usage is signed only by the master of the ship, or other agent of the carrier, and delivered to the shipper. When thus signed and delivered, it constitutes not only a formal acknowledgment of the receipt of the goods therein described, but also the contract for the carriage of such goods, and defines the extent of the obligations assumed by the carrier. The *Delaware*, 14 Wall. 579. In my opinion, the rule which governs the

point now under consideration is that a common carrier may, by special contract with the shipper, stipulate for a more limited liability than that which he assumes under the ordinary contract for the carriage of goods; and such special contract, in the absence of any statute to the contrary, may be contained in a bill of lading signed by the carrier alone; and the acceptance of such bill of lading by the shipper at the time of the delivery of his goods for shipment, in the absence of fraud on the part of the carrier, is sufficient to show the assent of the shipper to the terms set out in the bill of lading. It is the rule, rather than the exception, for common carriers to stipulate for a release from the stringent liability of an insurer, and which otherwise the law would impose upon them; and according to the customary course of business such stipulations are contained in the bill of lading issued by the carrier. This custom is so general that all persons receiving such bills of lading must be presumed to know of such custom, and they are also charged with the knowledge that it is one of the offices of such instruments to state the terms and conditions upon which the goods therein described are to be carried; and for this reason the acceptance of such a paper by the shipper, without dissent, at the time of the delivery of his goods for shipment, when no fraud or imposition has been practiced upon him, is to be regarded as conclusive evidence that he agrees to be bound by all lawful stipulations contained in such bill of lading, and this I understand to be the rule sustained by the supreme court of the United States in the case of *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174, and is supported by the following well-considered cases: *Kirkland v. Dinsmore*, 62 N. Y. 171; *Grace v. Adams*, 100 Mass. 505; *Dorr v. Navigation Co.*, 11 N. Y. 485; *Railroad Co. v. Pontius*, 19 Ohio St. 221; *McMillan v. Railroad Co.*, 16 Mich. 79. In the case last cited, Mr. Justice Cooley, speaking for the court, said:

"Bills of lading are signed by the carrier only; and, where a contract is to be signed only by one party, the evidence of assent to its terms by the other party consists usually in his receiving and acting upon it. This is the case with deeds poll, and with various classes of familiar contracts; and the evidence of assent derived from the acceptance of the contract without objection is commonly conclusive. I do not perceive that bills of lading stand upon any different footing."

It follows from what has been said that the stipulations stamped upon the face of the bills of lading under which the goods of the libelants were shipped are to be treated as parts of such bills of lading, and binding upon the libelants, unless this case is governed by section 2176 of the Civil Code of this state, which declares, in substance, that, with the exception of certain stipulations, not involved here, the acceptance by the shipper of a bill of lading or written contract for carriage of his goods, containing modifications of the general liability of the carrier, is not binding upon the shipper unless signed by him. But the contract under consideration here was made in the state of New York, and the rule as declared by the supreme court of the United States in the case of *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469, is that "con-

tracts are to be governed, as to their nature, their validity, and their interpretation, by the law of the place where they were made, unless the contracting parties clearly appear to have had some other law in view." The contract for the carriage of the libelants' goods contemplated that performance thereof should commence in the state of New York, where it was made, and be completed in this state. The fact that its performance was to be completed here is not sufficient to show that the parties thereto intended that such contract should be governed by the law of this state, and not by the law of the place where it was made. The law of the state of New York must, therefore, be looked to for the purpose of determining whether or not the stipulations contained in the bills of lading are binding upon the libelants. There is in this record an entire absence of evidence as to the law of the state of New York on this point. This being so, I think it is the duty of the court to find in accordance with the presumption that the principles of the general or commercial law had not been, at the date of this contract, so changed by the legislature of the state of New York as to require bills of lading to be signed by the shipper as a condition precedent to his being bound by special stipulations therein, limiting the general liability of the carrier. In other words, there is no presumption that the legislature of the state of New York had, prior to the shipment of the libelants' goods, enacted a statute similar to section 2176 of the Civil Code of this state. That there is no presumption that the general commercial law relating to bills of lading has been changed by the legislature of the state of New York, see *Murphy v. Collins*, 121 Mass. 6; *Ellis v. Maxson*, 19 Mich. 186; *Whitford v. Railroad Co.*, 23 N. Y. 465. See, also, what was said by the court in *Forbes v. Scannell*, 13 Cal. 278, and *Norris v. Harris*, 15 Cal. 252. It may be that the later decisions of the supreme court of the state of California, commencing with the case of *Brown v. Gas-Light Co.*, 58 Cal. 426, announce the contrary rule, to the effect that in every case in which there is an absence of proof to the contrary the law of another country or state will be presumed to be the same as that of the forum. In my opinion, however, the cases first cited state the correct rule; and in admiralty cases this court is not bound to follow decisions of the highest court of this state upon questions relating to the general law of evidence, and this is such a question, relating, as it does, to the presumption by which the court shall be governed in its determination of the fact whether the libelants gave their assent to all the stipulations contained in the bills of lading accepted by them. The question as to the effect of the delivery and acceptance of the bills of lading under the circumstances disclosed here is, therefore, to be determined by the general rules of law concerning the formation of contracts, and the formalities necessary to be observed by the parties to manifest their assent thereto; and it necessarily follows from what has been said that the stipulations stamped upon the bills of lading are binding upon the libelants, and, the goods having been damaged by one of the causes for which, by such special agreement, the carrier was not to be *prima facie* liable, the burden of proof was upon the libelants to show that the breakage

was the result of the carrier's negligence. *Clark v. Barnwell*, 12 How. 272; *The Invincible*, 1 Low. 225, Fed. Cas. No. 7,055. It is sufficient to say, in conclusion, that the evidence fails to show that the breakage was caused by the negligence of the carrier, or any of its agents or servants. Let a decree be entered dismissing the libel, the claimants to recover their costs.

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BOUTIN et al. v. RUDD.

(Circuit Court of Appeals, Seventh Circuit. October 14, 1897.)

No. 398.

1. ADMIRALTY JURISDICTION—EXECUTORY MARITIME CONTRACTS.

The fact that a contract of a maritime character has never been executed, but remains executory, does not affect the admiralty jurisdiction to award damages for the breach thereof. *Insurance Co. v. Dunham*, 11 Wall. 1, applied.

2. SAME—SUITS IN REM AND IN PERSONAM.

The existence of admiralty jurisdiction in a suit in personam is not dependent upon the existence of a right to proceed in rem; for jurisdiction depends, not upon the existence of a maritime lien, but on the subject-matter of the contract.

3. DAMAGES FOR BREACH OF CONTRACT.

If a contract is made under special circumstances, communicated to both parties, the damages recoverable for a breach are not only those arising naturally, according to the usual course of things, but also those which would ordinarily follow from a breach under the special circumstances so known and communicated.

4. SAME—TOWAGE CONTRACT.

A tug owner, who failed for several days to fulfill his contract to go and tow in a small schooner which had broken from her moorings in a gale, and had been found, and placed, in a leaky condition, in an unsafe place, held liable for the loss of the schooner, which was driven upon the rocks by a subsequent storm, it appearing that the fact of her danger and her leaky condition was communicated to him at the time of the contract.

Appeal from the District Court of the United States for the Western District of Wisconsin.

The appellee, Charles P. Rudd, the owner of the schooner *Annie R.*, filed his libel in personam in the district court against the appellants, who were the owners of the steam tug *N. Boutin*, asking the court to pronounce for the damages sustained by the loss of the schooner through breach of an executory contract made by the appellants. The case disclosed was this: On the 25th day of September, 1894, the schooner *Annie R.* broke from her anchorage at Bass Island, in Lake Superior, during a gale from the south, and drifted to Oak Island. The fact became known to the agent of the libellant at Bass Island early in the morning of that day, who proceeded by boat to Bayfield on the mainland, and, as he claims, communicated to the respondents below, appellants here, the facts stated with respect to the schooner, and employed them to go with their tug to the rescue of the vessel, to which Boutin responded, as the agent states, that he would go with his tug, and tow the vessel to Bayfield, but that he was then fixing the tug, and it was blowing heavily, but that, if it calmed that night or the next day, he would go to the rescue of the schooner, and tow her to Bayfield, and that the agent might depend upon him to tow the vessel, and moor her at Pike's dock, Bayfield; and it was promised that the owners of the tug should receive compensation for the service to be rendered. The vessel was seen about 7 o'clock in the morning of that day by one Conlin,



who was logging at Oak Island, drifting up the channel from Bass Island, and afterwards to strike on the rocks at Point Detour. He thereupon, with the assistance of two or three men, heaved the vessel off from the shore, made sail, attempting to return her to Bass Island, but, being unable, on account of the quantity of water in the vessel, to sail her against the head wind, proceeded with a fair wind to Presque Isle, and moored her there at a stone quarry dock, 150 feet in length, fastening the vessel with a rope, chain, and two pieces of cable. The vessel at that time was leaking, and had about a foot and a half of water in her hold. The location of the vessel was communicated to the agent of the libellant on the following day, and he thereupon sent a messenger from Bass Island to Bayfield, who, on the afternoon of that day, notified Boutin that the vessel was at Presque Isle dock. The latter asked if there was much water in her, and the messenger replied that she had considerable water in her. He states that to his request that the tug should go for the boat Boutin replied that, as soon as his son, the captain, returned, they would go for the boat, and tow her to one of the slips in Bayfield. It was further proven that Boutin, Jr., returned on Thursday, the 27th. The respondents below claim that the tug was out of commission, and that their agreement was that the tug would go for the boat if they could get an engineer, and that they were unable to obtain one. There were other tugs employed in like service at Bayfield. The vessel was seen on Saturday afternoon, the 29th of September, at the dock at Presque Isle. This dock was in an exposed situation, and was a dangerous place for vessels during a storm. Calm weather prevailed until Saturday night or Sunday, September 30th, when a heavy gale sprung up. On Monday, the 1st of October, it was discovered that the schooner had broken from her moorings, and had gone ashore upon the rocks, and was a total wreck. The court below pronounced for the libellant, and its decree is brought here for review.

C. E. Kremer and W. M. Tompkins, for appellants.

F. E. Searle and H. R. Spencer, for appellee.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

JENKINS, Circuit Judge, after stating the facts, delivered the opinion of the court.

It is objected to this decree that the contract in question, being executory, and having never been performed, does not come within the admiralty jurisdiction. After 55 years of contention touching the correctness of the doctrine declared by Mr. Justice Story in the celebrated case of *De Lovio v. Boit*, 2 Gall. 398, Fed. Cas. No. 3,776, in which that distinguished jurist repudiated the limitation upon the admiralty jurisdiction declared by the courts of England that it related only to "things done upon the sea," and asserted that its jurisdiction extended to "things pertaining to the sea," the supreme court, in *Insurance Co. v. Dunham*, 11 Wall. 1, 26, ruled that the true criterion of admiralty jurisdiction with respect to contracts "is the nature and subject-matter of the contract, as whether it was a maritime contract having reference to maritime service or maritime transactions," and that the maritime nature of the contract is not dependent upon locality, but upon subject-matter. If the contract contemplate maritime service, and have reference to maritime transactions, it is within the jurisdiction of the admiralty. This doctrine is no longer subject to contention. Since that decision, and within the principle declared, it has been held, and, we think, without dissent, that executory contracts of a maritime character are within the jurisdiction of the admiralty, and that damages for breach of such a contract may be award-

ed by the courts of admiralty. *The James McMahon*, 10 Ben. 103, Fed. Cas. No. 7,197; *The Williams, Brown*, Adm. 208, Fed. Cas. No. 17,710; *Mauzy v. Culliford*, 10 Fed. 388; *The Monte A.*, 12 Fed. 331; *The J. F. Warner*, 22 Fed. 345; *The Alberto*, 24 Fed. 381; *The Calabria*, Id. 607; *The Gilbert Knapp*, 37 Fed. 215; *The Electron*, 48 Fed. 689; *Haller v. Fox*, 51 Fed. 298. In some of the reported cases prior to the decision of the supreme court referred to, there were shadowy and overnice distinctions with regard to the maritime nature of contracts, and with respect to proceedings in a court of admiralty for their enforcement; some of them asserting that there could be no proceeding in personam unless a proceeding in rem could also be sustained. This distinction cannot be upheld upon principle, nor, since the decision in *Insurance Co. v. Dunham*, upon authority. The jurisdiction of the admiralty is not dependent upon the existence of a maritime lien. It is rested upon the subject-matter of the contract. A proceeding in personam is not ancillary to a proceeding in rem. The one is to enforce a right growing out of a maritime transaction; the other, to assert a right against the vessel as a *jus in re*,—a proprietary right, claim, or privilege in the thing itself. But, as Mr. Benedict observes, this distinction between proceedings in rem and in personam has no proper relation to the question of jurisdiction (Ben. Adm. § 204); and, as Mr. Henry states the proposition, the maritime lien is said to arise from the jurisdiction of the court, not the jurisdiction from the lien (Henry, Adm. § 15). We have no occasion here to determine whether, for breach of an executory contract, a maritime lien is allowed upon the contracting vessel, and express no opinion upon that subject. The contract here alleged was to render towage service to a vessel in distress, and, beyond question, was maritime in its character. The admiralty, therefore, has jurisdiction, at least in personam, to pronounce for a breach of it.

With respect to the facts of the case, we cannot differ from the conclusion to which the court below arrived. It is undoubted that the appellants agreed to go to the assistance of the vessel in distress. We cannot credit the statement that the engagement so to do was dependent upon the appellants' securing the services of an engineer. It is not credible that the agent of the libellant would have rested upon any such contingency when he could have procured other tugs for the service; and it is clear that his subsequent inaction was because, as he thought, he could rest securely at his home at Bass Island in the belief that the appellants had performed their contract, and secured the vessel in the harbor at Bayfield. A review of the evidence, to state which would serve no good purpose, satisfies us that the claim with respect to the engineer is a mere subterfuge to avoid responsibility for a broken contract.

The last objection raised to the decree has respect to the measure of damages for the breach of the contract. It is claimed that the damages are remote, and that the breach of the contract was not the proximate cause of the loss of the vessel. The rule with respect to damages arising from breach of contract is thus stated and settled: The damages which one ought to recover in respect to a breach of contract

should be such as may fairly and reasonably be considered either arising naturally—that is, according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it; and, if the special circumstances under which the contract was made were communicated and known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of the contract under the special circumstances so known and communicated,—that is, that both the consequences naturally following from the breach and such consequences as seem natural only in the light of special circumstances communicated to the defendant at the time of the contract can be recovered. It would be otherwise, however, if the special circumstances were unknown to the party breaking the contract. *Hadley v. Baxendale*, 9 Exch. 347; *Hobbs v. Railway Co.*, L. R. 10 Q. B. 111; *Hamlin v. Railway Co.*, 1 Hurl. & N. 408; *Cory v. Ship-Building Co.*, L. R. 3 Q. B. 181; *Hammond v. Bussey*, 20 Q. B. Div. 79; *Griffin v. Colver*, 16 N. Y. 489; *Baldwin v. Telegraph Co.*, 45 N. Y. 744; *Booth v. Mill Co.*, 60 N. Y. 487. Here the special circumstances were fully disclosed. The appellants, at the time of entering into the contract, were informed that this vessel was adrift or ashore at Oak Island. The next day they were informed that she had been moored at the dock at Presque Isle. They knew that the vessel was leaking, and had water in her hold. They knew that she was in distress. They knew that she was moored at a dangerous place, and at a season of the year when gales are usual, and should reasonably have been anticipated. They had no right to suppose that the vessel had a crew. She was used to carry wood, and was not in commission, and had drifted from her moorings in a gale without a crew. She was rescued, for the time being, from her dangerous position on the rocks, and moored at Presque Isle, at the only available, but yet an unsafe, place. The circumstances demanded immediate and diligent action, not laggard performance nor shuffling effort to evade. All necessary facts were communicated to the appellants, which disclosed the emergency, and advised them of the need of immediate action. That the vessel might be lost through delay was apparent, and was, manifestly, we think, a result to be reasonably contemplated from failure of performance of the contract, and one which would ordinarily and naturally flow from such failure to perform. The exposed location of the vessel, the time of year, the customary season of storms, her leaky condition, all demanded promptness in discharge of the duty assumed. Under such circumstances the owners of the tug must be held responsible for the loss of the vessel. *The W. E. Cheney*, 6 Ben. 178, Fed. Cas. No. 17,344; *The Elmira*, Fed. Cas. No. 4,417; *Connolly v. Ross*, 11 Fed. 342; *The Snap*, 24 Fed. 504; *Wilson v. Sibley*, 36 Fed. 379; *The Sarah and The Tucker*, 38 Fed. 252; *The A. M. Ball*, 43 Fed. 170; *The American Eagle*, 54 Fed. 1010; *The Charles Runyon*, 5 C. C. A. 514, 56 Fed. 312; *Phoenix Towing & Transp. Co. v. Mayor, etc.*, 60 Fed. 1019. The decree is affirmed.

## MASON et al. v. DULLAGHAM et al.

(Circuit Court of Appeals, Seventh Circuit. October 20, 1897.)

No. 396.

**FEDERAL JURISDICTION—DIVERSE CITIZENSHIP—DISMISSAL OF PARTIES.**

In an action where jurisdiction depends on diverse citizenship, and where the interests of certain defendants, whose citizenship is not such as to confer jurisdiction, are separable from those of the others, plaintiff may before judgment dismiss the action as to them; and the objection arising out of their citizenship cannot thereafter be raised by the others as to whom the necessary diversity exists.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

W. W. Gurley and Howard Carter, for plaintiffs in error.

James C. McShane, for defendants in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

JENKINS, Circuit Judge. This was an action in trover, brought by the defendants in error against Horatio P. Mason and Charles P. Hoge, the plaintiffs in error, and against John King, Stephen P. Meyer, William F. Dandridge, Dennis A. Shannahan, and Cornelius N. Shannahan, for the conversion of certain personal property. The declaration alleged that the plaintiffs in the suit were citizens of the state of Illinois, and that the defendants in the suit were citizens of the state of Kentucky. The writ of summons was served upon Horatio P. Mason alone, but a plea of not guilty was filed on behalf of all the defendants. Pending the trial of the cause, plaintiffs dismissed the suit as to defendants Meyer, Dandridge, Dennis A. and Cornelius N. Shannahan, and thereon a verdict was taken against the defendants Mason, Hoge, and King. After verdict the plaintiffs dismissed the cause as to the defendant John King, and judgment was entered upon the verdict against the defendants Mason and Hoge, who take this writ of error.

The only question presented to our consideration relates to the jurisdiction of the court. Upon the trial, on the examination of the defendant King, it appeared that the year before the suit he had removed from the state of Kentucky, and at the time of the suit was a citizen of the state of Illinois. This testimony was stricken out by the trial judge, upon the ground that it was not within the issues, and that, by his plea and general appearance, King had submitted himself to the jurisdiction of the court without objection, and could only raise the question by plea to the jurisdiction. This ruling is said to have been predicated upon the decision of the supreme court in *Hartog v. Memory*, 116 U. S. 588, 6 Sup. Ct. 521. It is contended that certain obiter remarks in the opinion in that case are overruled by the cases of *Morris v. Gilmer*, 129 U. S. 315, 9 Sup. Ct. 289, and *Nashua & L. R. Corp. v. Boston & L. R. Corp.*, 136 U. S. 374, 10 Sup. Ct. 1004, construing the fifth section of the act of March 3, 1875 (18 Stat. 472), under which it is claimed that whenever and however it shall appear to the satisfaction of the circuit court that the suit does not really and substan-

tially involve a dispute or controversy properly within the jurisdiction of the circuit court, or that the parties have collusively joined to create a case cognizable or removable under the act, the court should proceed no further therein, but should dismiss the suit, or remand it to the court from which it was removed. We are not called upon at this time to pass upon the question whether one who has pleaded generally can afterwards, and without a proper plea to the jurisdiction, raise the question of citizenship. This action was joint, and several, and, if the court below erred in its ruling, the error was cured by the dismissal of King from the suit after verdict and before judgment. Thus, in *Horn v. Lockhart*, 17 Wall. 570, it was held, where objection was taken to the jurisdiction of the court by reason of the citizenship of some of the parties, the question was whether to a decree authorized by the case presented they are indispensable parties. If their interests are severable from those of the other parties, and a decree without prejudice to their rights can be made, the jurisdiction of the court should be retained, and the suit dismissed as to them. Here the interests of the defendants were severable, and the plaintiff had right at any time before judgment to dismiss as to either defendant. Having dismissed as to those defendants over whom it is said the court had no jurisdiction notwithstanding their appearance, its jurisdiction cannot be impugned by the plaintiffs in error here, as to whom the necessary diversity of citizenship existed, so that the jurisdiction of the court over them is undoubted. The judgment is affirmed.

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SOUTHERN PAC. CO. et al. v. EARL.

(Circuit Court of Appeals, Ninth Circuit. October 18, 1897.)

No. 325.

1. APPEAL FROM ORDER GRANTING PRELIMINARY INJUNCTION—REVIEW.

The granting of an injunction pendente lite being a matter in the discretion of the trial court, the only question which the appellate court determines on an appeal therefrom is whether there was an abuse of such discretion; and, if there was before the circuit court evidence having a reasonable tendency to make out a prima facie case for plaintiff, the order will generally be affirmed, though there may be a material conflict in the evidence.

2. PRELIMINARY INJUNCTION—PRIOR ADJUDICATION.

When a prior judgment is offered as the basis for the issuance of a preliminary injunction, it is necessary that the record shall show that the precise points involved were determined in that case.

3. SAME—PRIOR ADJUDICATION IN ACTION AT LAW.

When a prior adjudication in an action at law is offered as the basis for a preliminary injunction, and the instructions given to the jury, as exhibited in the judgment roll, show that, if the jury obeyed them, their verdict must necessarily have been based upon a finding that certain claims were valid and infringed, it will be presumed that their findings were to that effect, since it is a presumption of law that the jury have obeyed the instructions of the court.

4. CIRCUIT COURTS—JURISDICTION IN PATENT CASES.

The provision of the judiciary act of 1888 (25 Stat. 434) that no civil suit shall be brought in any circuit court against any person by original process in any other district than that whereof he is an inhabitant, does

not apply to patent infringement suits. In *re Hohorst*, 14 Sup. Ct. 221, 150 U. S. 659, and In *re Keasbey & Mattison Co.*, 16 Sup. Ct. 273, 160 U. S. 231, followed.

Appeal from the Circuit Court of the United States for the Northern District of California.

Wheaton, Kalloch & Kierce, E. S. Pillsbury, and Lewis L. Coburn, for appellants.

John H. Miller, John L. Boone, and Guy C. Earl, for appellee.

Before GILBERT, Circuit Judge, and HAWLEY and DE HAVEN, District Judges.

DE HAVEN, District Judge. Appeal from an order granting a preliminary injunction. The suit was brought by Edwin T. Earl against the defendants for the purpose of restraining the infringement of reissued letters patent No. 11,324, granted to him April 18, 1893, for an invention entitled, "Ventilator and Combined Ventilator and Refrigerator Car." The bill of complaint is verified, and alleges, among other things, a prior judgment of the circuit court for the Northern district of California, in which the appellee herein was plaintiff, and Robert Graham, one of the appellants, was defendant, and that by such judgment it was determined that plaintiff's reissued letters patent were valid, and that the defendant, Robert Graham, had infringed upon the same, and that, notwithstanding such judgment, the defendants in this action continued to use the same identical ventilating device which was thereby adjudged to be an infringement upon plaintiff's said letters patent. On the filing of this bill the circuit court made an order requiring the defendants to show cause why a preliminary injunction should not be granted. The defendants filed no answer to the bill, and the motion for the preliminary injunction was heard upon the bill of complaint, the judgment roll in the action at law referred to in the complaint, and an affidavit of the plaintiff, Edwin T. Earl, and a large number of opposing affidavits and exhibits of prior patents submitted on behalf of the defendants, whereby they sought to show the invalidity of the plaintiff's patent, and also that there had been no infringement thereof by the defendants.

1. The principles which govern courts in granting preliminary injunctions in this class of actions are the same upon which courts of equity constantly act in granting such injunctions in other cases of equitable cognizance. The order for such an injunction does not finally determine the rights of the parties to the action, and its only purpose and effect are to preserve the existing state of things until the case has been fully heard by the court, and the entry of a final decree therein. And it is equally well settled that the granting of a provisional injunction rests in the sound discretion of the trial court, and that it is not necessary that the court should, before granting it, be satisfied from the evidence before it that the plaintiff will certainly prevail upon the final hearing of the cause. On the contrary, to adopt the language of the court in *Georgia v. Brailsford*, 2 Dall. 402, "a probable right, and a probable danger that

such right would be defeated without the special interposition of the court," is all that need be shown as the basis for such an order. See, also, *Blount v. Société, etc.*, 3 C. C. A. 455, 53 Fed. 98, and cases therein cited.

Inasmuch as the granting of an injunction *pendente lite* is committed to the discretion of the trial court, it necessarily follows—and so the authorities uniformly hold—that upon an appeal from such an order the only question which the appellate court is called upon to determine is whether the court, in making such an order, abused its discretion. If there was before the court evidence having a reasonable tendency to make out a *prima facie* case for the plaintiff, the order granting the injunction will generally be affirmed, notwithstanding there may have been a material conflict in the evidence submitted to the court at the time of making its order; or, stating the same rule in different words, the decision of the judge who made the order will not be reversed unless it appears, after a consideration of all the evidence upon which his action was based, that his legal discretion to grant or withhold the order was improvidently exercised. *Duplex Printing-Press Co. v. Campbell Printing-Press & Manuf'g Co.*, 16 C. C. A. 220, 69 Fed. 253; *Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co.*, 19 C. C. A. 25, 72 Fed. 550. We proceed, then, to consider whether the circuit court exceeded its legal discretion in making the order appealed from. The particular facts necessary to be shown in order to justify the issuance of an injunction *pendente lite* in this character of cases are stated with great clearness and accuracy in the case of *Blount v. Société, etc.*, 3 C. C. A. 455, 53 Fed. 98, above cited. In that case, which was, like this, an appeal from an order granting a provisional injunction in an action brought to restrain the alleged infringement upon letters patent, it was said:

"The prerequisites to the allowance and issuance of such an injunction are that the party applying for the same must generally present a clear title, or one free from reasonable doubt, and set forth acts done or threatened by the defendant which will seriously or irreparably injure his rights under such title, unless restrained. \* \* \* In such suits the plaintiff's application for a provisional or *pendente lite* injunction should present a title to the patent sued on, the probable validity of such patent, and infringement thereof by the defendant."

That the appellee has a clear title to the patent referred to in the bill of complaint is not denied, and we think the other facts were sufficiently shown by his affidavit and the judgment roll in the action of Earl against Graham, and which judgment is pleaded in the bill. That was an action at law tried in the same court, and in which the present plaintiff was the plaintiff and one of these defendants was defendant, and involved, not only the validity of plaintiff's patent, but also the question whether the ventilating device now used by the defendants is an infringement upon such patent. The rule in relation to the effect of a prior adjudication of patent rights in a suit between different parties was thus stated by Hawley, District Judge, in *Norton v. Can Co.*, 57 Fed. 929:

"I understand the rule to be well settled that where the validity of a patent has been sustained, as in this case, by prior adjudication in the same circuit, the only question open before the court on motion for a preliminary injunction

in a subsequent suit against other parties is the question of infringement, and that the consideration of all other questions should be postponed until all of the testimony is taken in the case, and the case is presented upon final hearing. There is, perhaps, an exception to this rule, that in cases where new evidence is presented, that is itself of such a conclusive character that, if it had been presented in the former case, it would probably have led to a different conclusion. The burden, however, of showing this, is upon the respondent."

It is claimed, however, by the appellants, that no such effect can be given the judgment in the action of Earl against Graham, and that the circuit court erred in giving it such effect, and in regarding it as sufficient basis for the order appealed from. There are seven claims in the appellee's patent, and the injunction in this case restrains the appellants from infringing upon claims 3 and 4 of such patent; and it is argued by the appellants that, as the verdict of the jury was general in the action of Earl against Graham, it cannot be determined from the judgment in that case that the jury found either that appellee's patent was valid as to such claims, or that the ventilating device used by appellants was any infringement upon said claims 3 and 4; and in support of this position *Russell v. Place*, 94 U. S. 606, is cited. In that case it was held that a judgment establishing the validity of a patent containing two claims, but not disclosing whether the judgment was based upon one or both of such claims, would not, in the absence of extrinsic evidence indicating the precise ground of the judgment, constitute an estoppel in a subsequent action between the same parties, in which the validity of the same patent was involved. The court, in passing upon the question there presented, said:

"It is undoubtedly settled law that a judgment of a court of competent jurisdiction upon a question directly involved in one suit is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record,—as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered,—the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible."

In the case from which the foregoing quotation is made the question related to the certainty required in the record, in order for a judgment to be given the effect of an estoppel; but in our opinion it is necessary that the same certainty should be made to appear in relation to the issues actually adjudicated, when a prior judgment is offered as the basis for the issuance of a preliminary injunction, in cases of this character. *Coburn v. Clark*, 15 Fed. 807; *Sewing-Machine Co. v. Williams*, 2 Fish. Pat. Cas. 137, Fed. Cas. No. 5,847. But we think there was sufficient in the judgment roll in the action of Earl against Graham, when considered in connection with the affidavits used upon the hearing, to warrant the court in assuming that the verdict and judgment in that case were based upon the validity of the appel-



lee's patent as to its claims 3 and 4, and that the same ventilating device now used by the appellants was an infringement of those claims. The instructions given to the jury constitute a part of the judgment roll in the action of Earl against Graham, and, assuming that the jurors were governed by such instructions, their verdict must necessarily have been based upon a finding that claims 3 and 4 of appellee's patent were valid, and that the Kerby device used by the appellants was an infringement upon such claims. That the jury obeyed the instructions of the court is a presumption of law. *State v. Watkins*, 9 Conn. 54. And the court in this case properly acted upon such presumption. Our conclusion upon this point is that the record before us does not show that the circuit court improperly exercised its discretion in making the order appealed from.

2. The circuit court, by the service of its process upon the appellant Graham, within the limits of its district, obtained jurisdiction over his person, irrespective of the question whether he was an inhabitant of such district or not. The act of August 13, 1888 (25 Stat. 434), and which provides, "But no person shall be arrested in one district for trial in any civil action before a circuit or district court; and no civil suit be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant,"—does not apply to suits for the infringement of patents, or other actions of which the circuit court has exclusive jurisdiction. In *re Hohorst*, 150 U. S. 659, 14 Sup. Ct. 221; *In re Keasbey & Mattison Co.*, 160 U. S. 231, 16 Sup. Ct. 273.

The opinion this day filed in *Graham v. Earl*, 82 Fed. 737, renders unnecessary the discussion of other points urged by the appellants. Order affirmed.

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BREWER v. GEORGE KNAPP & CO.

UNION ASSOCIATED PRESS v. SAME.

(Circuit Court, E. D. New York. October 12, 1897.)

SERVICE OF PROCESS—FOREIGN CORPORATIONS—RESIDENT AGENTS.

An agent of a nonresident newspaper corporation, who is empowered to solicit advertisements, make contracts therefor, and receive payment, and who carries on the business at an office having the name of the newspaper on its windows, is "a managing agent," through whom the corporation may be served, under Code Civ. Proc. N. Y. § 432.

Motions to Set Aside Service of Summons.

These are two actions for libel brought by William S. Brewer and the Union Associated Press against George Knapp & Co., a corporation organized under the laws of the state of Missouri. The actions were commenced in the supreme court of New York, by the service of a summons in each case upon one Wallace G. Brooke, as managing agent of the defendant in the city of New York. The defendant has specially appeared in each case, and removed both actions from the state court into the United States circuit court for this district. Motion is now made by the defendant, upon affidavits, to set aside the service of the summons in both actions, on the ground that the said Brooke was not the managing agent of the defendant, within the meaning of section 432 of the New York Code of Civil Procedure. The defendant is a foreign

corporation, and it is claimed that the person served is its managing agent in this state. It appears from the motion papers that Brooke, upon whom service was made, was in the employ of the defendant, at a stated salary, to solicit advertisements in New York for the defendant's newspaper, the St. Louis Republic, to make contracts therefor at schedule rates, to receive payment for such advertisements, and to transmit the same for publication in said newspaper; that he had an office at 146 Times Building, New York City, with the name of the paper painted on the door and window in large, golden letters; that there was a leased telegraphic wire running from his office directly to the office of such newspaper in St. Louis, Mo., over which he transmitted many of his advertisements; and that a file of the St. Louis Republic was kept continually in his office. It further appears that Brooke held himself out, in giving receipts for payments of advertisements, as manager of the advertising department of such newspaper at its Eastern office, 146 Times Building, New York; and that on July 20, 1897, one Hugh Coyle wrote the defendant, asking who its agent was in New York City, and the location of his office, and on the 22d of the same month he received a letter from the St. Louis Republic containing the following statement: "The Republic has a regular, salaried representative in New York City, in the person of Wallace G. Brooke, Room 146, Times Building. We have written Mr. Brooke, under even date, requesting that he call upon you and discuss the matter of advertising, as a personal interview will better fix details than correspondence at long range. Mr. Brooke has complete authority to make and sign conclusive contracts on the same basis and conditions as the home office."

Shaw, Baldwin & Stotesbury, for the motion  
Campbell & Hance, opposed.

TENNEY, District Judge. It seems hardly necessary that a formal opinion should be given upon the facts presented in these two cases, especially after the lucid opinions that have already been published in several reported cases in both the federal and state courts bearing upon this same subject. But it is contended by counsel for the defendant that the facts presented in the cases at bar are different, and should be distinguished, from the facts presented in the reported cases, and especially in the cases of *Brewer* and the *Union Associated Press* against the *Ohio State Journal Company*, recently decided, without opinion, by this court. After a careful review of the facts in all these cases, I am unable to see any substantial difference in the controlling facts. The leading facts are substantially the same. In the case at bar and in the adjudicated cases, or in some of them, at least, the parties served with process solicited advertisements for their respective newspapers, entered into contracts therefor at schedule rates, received pay for such advertisements, and transmitted the same for publication to their respective newspapers, and had offices upon the door or windows of which the name of their paper appeared. It is true, the party served with process in the cases at bar received as compensation for his services a fixed salary, while in the adjudicated cases, or in most of them, the party served received a commission. This is not a substantial, nor an important, difference. Compensation of the individual, whether by salary or commission, can have but little, if anything, to do in determining whether the party so served was an agent of the defendant in this state, or not. It is sometimes difficult to determine what acts constitute "carrying on business," within the meaning of the authorities. The defendant was a foreign corporation, having no officers in this state. The per-

son served was its representative in securing business—advertisements—for its newspaper, and there can be no doubt but that the defendant held Brooke out to the world, in this capacity and to this extent, as its agent in the city of New York. In *Palmer v. Pennsylvania Co.*, 35 Hun, 369, the court at general term say:

"The Code does not specify the extent of the agency required to bind defendant by service of process. \* \* \* Every object of the service is obtained when the agent served is of sufficient character and rank to make it reasonably certain that the defendant will be apprised of the service made. The statute is satisfied if he be managing agent to any extent."

And in *Tuchband v. Railroad Co.*, 115 N. Y. 437, 22 N. E. 360, the court say:

"Where a corporation created by the laws of another state does business in this state, the person who, as its agent, does that business, should be considered its managing agent; and more especially should that be so where the foreign corporation has an office or place of business in this state, and when that office is in charge of that person, and he there acts for the corporation. He is there doing business for it, and so manages its business. Such person is, in every sense of the word used in the statute, 'a managing agent.'"

Moreover, it seems to me that the cases at bar fall directly within the purview of the cases of *U. S. v. American Bell Telephone Co.*, 29 Fed. 17, and *Palmer v. Evening Post Co.*, 70 Fed. 886. In both these cases the court say:

"When, however, such foreign corporation carries on some substantial part of its business in the state by means of an agent or representative appointed to act there, it impliedly assents to be found and sued there."

Brooke was employed by the defendant to obtain advertisements in New York for defendant's newspaper published in St. Louis, Mo. He was in charge of an office here, which carried on its door or window the name of defendant's newspaper. He did the business of the defendant in this line in this state, and was so far its agent and representative duly appointed and authorized by the defendant to act here. The statute does not require that the service shall be made upon the managing agent, but only upon a managing agent, of the defendant. *Code Civ. Proc. N. Y.* § 432, subd. 3, and *Brayton v. Railroad Co.*, 72 Hun, 602, 25 N. Y. Supp. 264. He had authority to make conclusive contracts in regard to advertisements, and receive pay therefor. There can be no question that the soliciting of advertisements, and the making of conclusive contracts therefor, are substantial parts of the corporate business of the defendant; and it may therefore be fairly held that the defendant did business in this state, and had a representative here, and did thereby impliedly assent to be found and sued here in the person of such agent. The motion must, therefore, in both cases, be denied.

#### SOWLES v. NATIONAL UNION BANK OF SWANTON, VT.

(Circuit Court, D. Vermont. October 9, 1897.)

##### 1. ATTACHMENT OF NATIONAL BANK STOCK—STATE LAWS.

The levy of an attachment on the shares of a national bank under the Vermont statutes (*R. L.* §§ 3261, 3262), which do not include national bank stock in their provisions, is of no effect against the defendant in attachment.

## 2. SAME.

It seems doubtful whether any attachment under state laws can operate as a transfer of shares of national bank stock, since such stock exists solely under the laws of the United States, which provide for transfers, and declare the effect thereof.

This was a suit in equity by Merritt Sowles against the National Union Bank of Swanton, Vt. The cause was heard upon an intervening petition filed by Margaret B. Sowles and Edward A. Sowles.

Edward A. Sowles, for petitioners.

WHEELER, District Judge. Fifty-two and two-thirds shares of the capital stock of the bank stood on the books in the name of Edward A. Sowles, and were long ago attached, so far as they could be under the state statutes, as his, in suits in a state court, the proceedings in which have been long stayed, and lain for want of prosecution. Dividends amounting to \$1,040, and five shares of National Car Company stock, belonging with this stock, have been withheld by the receiver, in winding up the affairs of the bank, because of this attachment, and the funds and car stock are now in court. Margaret B. Sowles, who has some color of title to these shares, has joined with Edward A. Sowles in an intervening petition for the payment of the dividends and delivery of the car stock to her, and they have tendered a bond of indemnity to the plaintiff in the attachments. When this attachment was attempted the laws of the state provided, in terms, for the attachment of shares of stock in corporations organized under the laws of the state only. R. L. Vt. §§ 3261, 3262. Shares in a national bank existing wholly under the laws of the United States were not included, if they could be. The laws of the United States provide for the transfer of shares in national banks, and what the effect of the transfer shall be, and this might exclude any effect of transfer proceedings by attachment under state laws. Rev. St. U. S. § 5139. This attachment does not of itself, therefore, seem to be of any force against the defendant in the attachment. His acts, however, in joining in this petition for payment and delivery to Margaret B. Sowles, may be, and for safety they should be, made upon an acquittance from both, and for still greater safety, upon acceptance of the bond. Bond accepted and petition granted.

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BONNER et al. v. MEIKLE et al.

(Circuit Court, D. Nevada. September 20, 1897.)

No. 633.

## 1. MINING CLAIMS—APPLICATION FOR PATENT—RIGHT TO CONTEST.

Occupants of lots in a town located on public lands of the United States, who have built on and improved the same, have a possessory right, which entitles them to contest the issuance of a patent to the claimant of a mining location covering such lots, though neither they nor the authorities of the town have taken any steps to secure title to themselves.

## 2. SAME—CONTEST BETWEEN TOWN-SITE AND MINERAL CLAIMANTS.

To entitle an applicant to a patent for a mining claim, as against occupants who have improved lots situated within its limits, claiming under

the town-site act, it must be shown that at the time the town-site claimants acquired or purchased the lots the land was known to contain mineral of such extent and value as to justify expenditures for the purpose of extracting it. This rule applies though the town-site claimants have taken no steps to obtain title.

B. Sanders and O. W. Powers, for complainants.  
Henry Rives and Robt. M. Clarke, for defendants.

HAWLEY, District Judge (orally). This suit was brought in the state court by complainant Bonner on behalf of himself and for the benefit of numerous other persons upon a protest made by complainants to an application made by defendants for a patent to the Naid Queen mining location at De Lamar, Lincoln county, Nev., and upon the petition of one of the defendants was removed to this court upon the ground of prejudice and local influence. *Bonner v. Meikle*, 77 Fed. 485. Some question was made in the oral argument of counsel as to the character of this suit. It was instituted under and by virtue of and in compliance with the provisions of section 2326, Rev. St., which provide as follows:

"Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim."

In such suits, as is said in *Perego v. Dodge*, 163 U. S. 160, 165, 16 Sup. Ct. 971, 973:

"The determination of the right of possession as between the parties is referred to a court of competent jurisdiction in aid of the land office, but the form of action is not provided for by the statute; and apparently an action at law or a suit in equity would lie, as either might be appropriate under the particular circumstances,—an action to recover possession when plaintiff is out of possession, and a suit to quiet title when he is in possession."

This suit comes within the latter class. The cause was tried before the court, a stipulation having been filed waiving a jury. The ground in controversy is situate upon the unsurveyed public lands of the United States. The complainants are the owners of, and in possession of, certain town lots, and the buildings erected thereon, in the town of De Lamar, situate within the surface limits of the location of the Naid Queen claim. They have expended over \$30,000 in the construction of buildings and making improvements on their land. The notice of the mining location was posted on the ground prior to the entry of complainants upon the land. At the time the notice was posted, no discovery had been made of any mineral-bearing lode or vein within the limits of the location. Section 2320, Rev. St., provides that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." The contention of complainants is that no such discovery has ever been made, but, in any event, that no such discovery was made until

long after the rights of complainants had been acquired. In *Enterprise Min. Co. v. Rico-Aspen Min. Co.*, 167 U. S. 108, 112, 17 Sup. Ct. 762, 763, the court said:

"In order to make a location, there must be a discovery; at least that is the general rule laid down in the statute. \* \* \* The discovery in the tunnel is like a discovery on the surface. Until one is made, there is no right to locate a claim in respect to the vein, and the time to determine where and how it shall be located arises only upon the discovery, whether such discovery be made on the surface or in the tunnel."

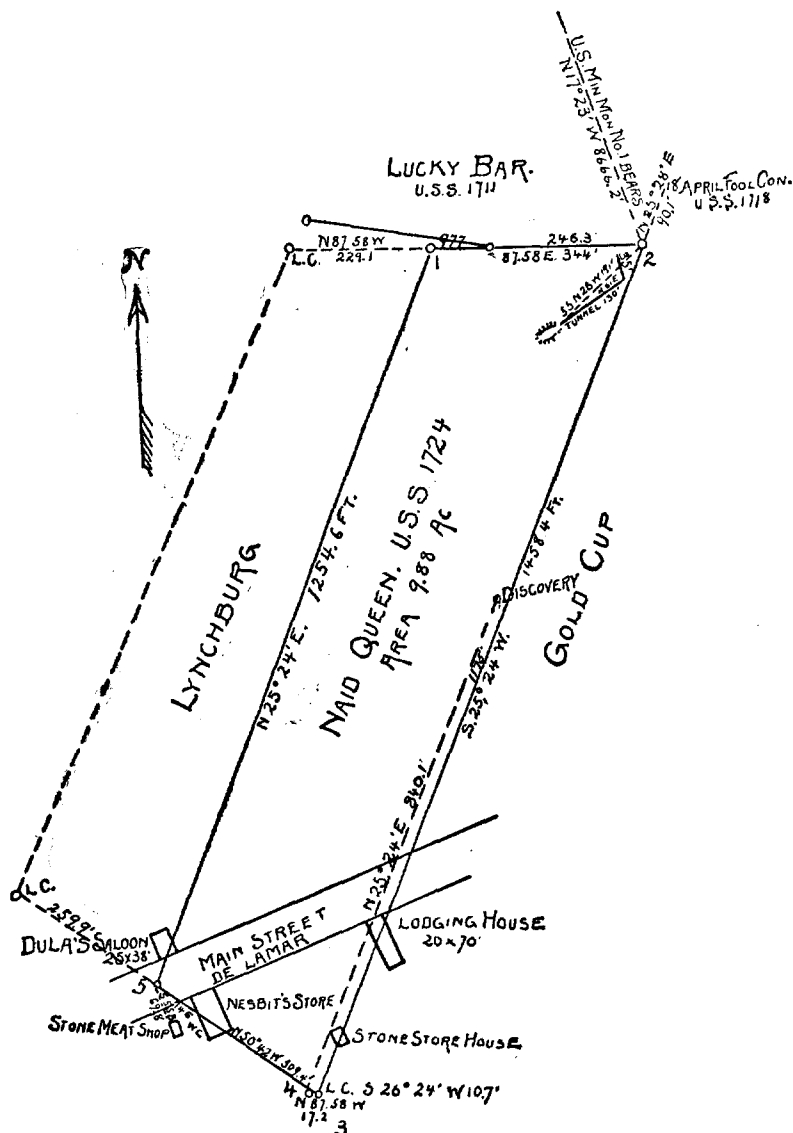
This suit involves a question of fact. If a mineral lode or vein was discovered within the limits of the Naid Queen surface location, running in a parallel direction with the side lines of the location, prior to the entry of complainants upon the town lots, the defendants are entitled to a patent. Was such a discovery made prior to that time? A preliminary objection was urged by defendants' counsel to any consideration of the merits of this case upon the ground that complainants have no standing in court; that they have not established any right to the premises in controversy; and are not, therefore, entitled to protest against the application of defendants for a patent to the Naid Queen mining location, because there had been no action taken by the citizens of the town of De Lamar to obtain title from the United States to the town site. To quote from the argument of counsel: The testimony "does not show that the public authorities have ever made application for it. It does not show that any steps have been taken to comply with the laws of the United States on the part of the complainants, or to acquire by purchase or otherwise from the United States the title which is alleged to be outstanding in the government; nor is there anything in the case that shows that this complainant, or those whom he represents, have now or expect to obtain this title, or that they have taken any steps to connect themselves with the government of the United States." It is true that such steps might have been taken by the town authorities, if it has any town organization, or by complainants, to secure title from the government to the land occupied by them; but the fact that no such steps have been taken does not deprive the property owners of the town, or any or either of them, from protesting against the application of the defendants for a patent to the Naid Queen location, which includes the property which they claim to own. The citizens of a town have as much right to build houses upon the public domain in which to live as others have to locate mining claims upon which to work. One purpose is as necessary as the other. Both are entitled to the equal protection of the law. Although complainants have not connected themselves with any government title, nor sought in any manner to secure such title, yet they have such a possessory right to the land upon which their buildings have been erected as will prevent others, not having any title from the government, from entering thereon, and taking their property from them, without first establishing a superior right thereto.

There are many cases where the owners of mining ground valued at millions of dollars have preferred to hold the same under "a mere possessory right" rather than to take any steps to secure a patent

from the government. *Forbes v. Gracey*, 94 U. S. 762, 767. Would it not be absurd to claim that in such cases the owners of the possessory title, under valid mining locations, were not entitled to any protection, and could not even protest against the application of some subsequent locator for a patent covering a portion or all of their ground because they had never taken any steps to secure title to their property from the United States? The argument of counsel would have merit if the complainants were seeking to set aside a patent that had been issued by the United States to the owners of the Naid Queen location. Being simply occupants of and in possession of town lots on the public lands without title, they have no vested rights to this land as against the United States nor any purchaser from them. *Sparks v. Pierce*, 115 U. S. 408, 6 Sup. Ct. 102. But that is not this case. The defendants have no title from the United States. They are not in any better position in this respect than the complainants. It is true that they are seeking to procure the government title; but, in order to obtain a patent, they must first prove that they have a better right to the land than the complainants. The case must be considered upon its merits.

A mass of testimony has been introduced tending to show that the entire country in and around the town of De Lamar is one mineralized zone or belt about 5 miles long and  $1\frac{1}{2}$  miles wide, in which over 200 mining locations have been made; that the Naid Queen is within this mineralized zone; that it is entirely surrounded by other mining locations, in each of which more or less mineral has been found; that the general course of the fractures found in this belt, upon the sides of which the paying rock is usually found, is northeast and southwest. The formation of this zone or mineral belt of country is quartzite, and the pay ore or mineral rock is largely composed of, or is found in, this quartzite. It is difficult to tell by merely looking at the quartzite whether it contains mineral or not. There are specimens occasionally found where more or less quartz is plainly to be seen, clearly indicating that it contains gold in paying quantities; other specimens have copper stains and other marks peculiar to mineral-bearing rock; but the greater portion of the rock that is milled is of such a character that it is exceedingly difficult, if not impossible, even for experienced miners, thoroughly acquainted with this district, to tell the mineral-paying quartzite from the quartzite which does not contain sufficient mineral to pay for extracting and milling. It is necessary to have assays made in every section of the timbered ground in order to ascertain whether or not the quartzite therein contains mineral in sufficient quantities to justify its being sent to the mill for reduction. Owing to these peculiar characteristics, as well as of the exciting conditions found in all new mining camps upon the discovery of rich ore, it can readily be understood why all the ground in the mineral belt or region of country where the quartzite was found was located upon a claimed lode, whether any valuable mineral was found therein or not. The notice of location of the Naid Queen was posted on the ground April 14, 1892. At that time there were no houses or buildings of any kind upon the surface ground included within the limits of the Naid Queen location. The first cabin built within the town

site of De Lamar was constructed in the fall or winter of 1893. The first buildings erected upon the ground in controversy were put up in the spring of 1894. Quite a number of buildings were constructed that year; others in 1895. The town is built in a gulch. The following diagram shows the location of the ground as shown by the survey made by the United States mineral surveyor in the application made by the owners of the Naid Queen for a patent.





There was some work on the extreme northerly end of the Naid Queen location done in the fall of 1893,—a little cut 5 or 6 feet long and 2 feet deep on the croppings, and another small cut or prospect hole about the north end of the tunnel, found on the diagram. The cut at the croppings was enlarged in 1894. It was made a little deeper, and extended in length to about 16 or 18 feet, and in the deepest place was about 6 feet. The tunnel was started in April, 1895. The following assays of samples of rock found in the tunnel were made by the assayer of the De Lamar Company:

“Naid Queen Samples.

“No. 1. From door of tunnel E. 12 feet, sides and top; value, trace. No. 2. 2nd 12 feet E. of No. 1, sides and top; value, trace. No. 3. 1st 6 feet of 3rd 12 feet E. of No. 1, sides and top; value, trace. No. 4. 4th 12 feet east, sides and top; value, trace. No. 5. 5th 12 feet east, sides and top; value, trace. No. 6. 6th 12 feet east, sides and top; value, trace. No. 7. 7th 12 feet E., sides and top; value, trace. No. 8. 8th 12 feet E., sides and top; value, trace. No. 9. 9th 12 feet E., sides only; value, trace. No. 10. Distance from crosscut to face of tunnel (10'), sides, top, and face; value, trace. No. 11. About 40 feet east of door of tunnel on south side of tunnel; value, \$.46. No. 12. About 70 feet east of No. 11 in a winze in south crosscut; value, \$.82. No. 13. South side of winze in south crosscut; value, \$.68. No. 14. Face of north crosscut, about 50 feet north of No. 13; value, trace. No. 15. 13 feet south of No. 14, on west side north crosscut; value, \$1.14. No. 16. 6 feet south of No. 15, west side of north crosscut; value, \$.70. No. 17. Intersection of west side of north crosscut and north side of main tunnel; value, trace. No. 18. Roof of tunnel at its intersection with crosscut; value, \$.22. Above samples were taken on or about March 7, 1897, and were made in duplicate, and checked.

Oscar Lachmund,

“Assayer for De Lamar Nevada G. Mg. Co., De Lamar, Nevada.”

From the testimony it appears that assays No. 12 and No. 18 were in fact taken over the easterly side line of the Naid Queen. It is admitted by the defendants that no ore or rock containing mineral was ever found at or near the point of “discovery” marked on the diagram. The testimony shows that nothing more than a trace was found in the tunnel for a distance of 108 feet from the mouth. The length of the tunnel is 130 feet. All the samples were taken at the northeast corner of the Naid Queen location. There is no testimony tending to show the discovery of any mineralized rock of any value in any other portion of the Naid Queen location. The points where the assays were taken showing a trace are over 1,000 feet distant from the buildings claimed by the complainants. The opinions and beliefs of witnesses that, as depth is attained, quartzite containing valuable mineral would or might be found extending through the location of the Naid Queen from the north to the south end, is entirely theoretical and problematical. At present, none has been found except at the places above stated. The fact that pay ore has been found in the middle or northern portion of the Lucky Bar, immediately adjoining the Naid Queen on the north, and in the southerly end of the Richmond location, adjoining the Naid Queen on the south, is too remote to establish the fact that there is a continuity of ore extending from the one point to the other through the Naid Queen location. So, with reference to the quartzite in the Gold Cup on the easterly side of the Naid Queen, while some valuable specimens of rock are found,

and some ore has been milled, still it is not shown that ore or rock of any value extends over and into the Naid Queen. At the northerly end of Jim Crow, which is situated adjoining and northwesterly from the Lynchburg, valuable rock containing mineral is found. To the west of Lucky Bar, in Jim Crow No. 1 and No. 2, paying ore is found; and to the north and northeast of the Lucky Bar, in Monitor No. 2 and April Fool, the quartzite is rich in mineral; and to the north of these last-named claims are the Millionaire, Monitor, Cliff, Swifter, and other valuable locations. From the testimony it appears that the richest locations are found in the hills surrounding the town; that, as you approach the base toward the gulch, the values cease; and in the gulch, where the town of De Lamar is shown on the diagram, no mineral has been found.

Taking into consideration all the facts and circumstances testified to by the respective witnesses, and carefully weighing the same, it seems clear to my mind that, whatever the probabilities or improbabilities of the continuance of mineral-bearing quartzite and rock in place through the Naid Queen lengthwise at the present time may be, there was not, at the time the complainants took up, purchased, or secured the town lots upon which their respective buildings are erected, any such discovery of mineral-bearing earth, rock, or ore within the limits of the Naid Queen location as would give to the owners of such location a prior right to the ground and premises occupied by the complainants herein. It must be borne in mind that this is not a contest between two mining companies, both claiming the ground as mineral land, and each claiming to be the first locator, or the first to discover rock in place bearing mineral. In all such cases the question as to what constitutes a discovery of a vein or lode under the provisions of section 2320, Rev. St., is governed by the rule announced in *Book v. Mining Co.*, 58 Fed. 106, 121, that, when a locator of a mining claim finds rock in place containing mineral in sufficient quantity to justify him in expending his time and money in prospecting and developing the claim, he has made a discovery, within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low, with this qualification: that the definition of a lode must always have special reference to the formation and peculiar characteristics of the particular district in which the lode or vein is found. This rule has always prevailed in the courts, as is clearly shown in the numerous authorities there cited. See, also, *McShane v. Kenkle* (Mont.) 44 Pac. 979, 981. Why? Because it was never intended that the courts should weigh scales to determine the value of the mineral found as between a prior and subsequent locator of a mining claim on the same lode. But where the rights of claimants to a town site, or to agricultural land, or as between the locators of a placer claim and others claiming a vein or lode to the same ground, are involved, other questions must be considered. In all such cases there are different statutes to be construed, and a somewhat different rule prevails. This is clearly stated by the court of appeals of this circuit in *Migeon v. Railway Co.*, 23 C. C. A. 156, 77 Fed. 249, 256. In a case of contest between mineral claimants on one side and parties holding town-site patents on the other the supreme court has repeatedly declared that under the acts of congress

which govern such cases, in order to except mines or mineral lands from the operation of a town-site patent, it is not sufficient that the lands do in fact contain minerals, or even valuable minerals, when the town-site patent takes effect, but they must at that time be known to contain mineral of such extent and value as to justify expenditures for the purpose of extracting them; and, if the lands are not known at that time to be so valuable for mining purposes, the fact that they have once been valuable, or are afterwards discovered to be still valuable, for such purposes, does not defeat or impair the title of persons claiming under the town-site patent. *Deffeback v. Hawke*, 115 U. S. 393, 404, 6 Sup. Ct. 95; *Davis v. Webbald*, 139 U. S. 507, 525, 11 Sup. Ct. 628; *Dower v. Richards*, 151 U. S. 658, 663, 14 Sup. Ct. 452. In *Davis v. Webbald*, the court, after announcing the rule as above stated, said:

"In connection with these views it is to be borne in mind, also, that the object of the town-site act was to afford relief to the inhabitants of cities and towns upon the public lands by giving title to the lands occupied by them, and thus induce them to erect suitable buildings for residence and business. Under such protection many towns have grown up on lands which, previously to the patent, were part of the public domain of the United States, with buildings of great value for residence, trade, and manufactures. It would, in many instances, be a great impediment to the progress of such towns if the titles to the lots occupied by their inhabitants were subject to be overthrown by a subsequent discovery of mineral deposits under their surface. If their title would not protect them against a discovery of mines in them, neither would it protect them against the invasion of their property for the purpose of exploring for mines. The temptation to such exploration would be according to the suspected extent of the minerals, and, being thus subject to indiscriminate invasion, the land would be, to one having the title, poor and valueless, just in proportion to the supposed richness and abundance of its products. We do not think that any such results were contemplated by the act of congress, or that any construction should be given to the provision in question which would lead to such results."

I am of opinion that those cases, and the principles therein announced, are applicable to this case. It is true that no steps have even been taken by the town-site claimants of De Lamar to obtain a town-site patent in order to procure a title from the government. They might have done so; and, if they had, then the mineral claimants to the Naid Queen mining location could have protested, and the identical question here raised would then have been presented. The fact as to which party first applies for a patent certainly cannot make any difference in the principle which is involved.

It was argued by counsel for complainants that, if any discovery of a lode or vein was made in the Naid Queen location, it was a vein that ran in an easterly and westerly direction at the northerly end of the location. It was also claimed that the application for a patent by the defendants was not made in good faith for the purpose of procuring a patent to mining ground for mining purposes, but was an attempt to obtain a patent for the sole purpose of getting title to the town lots and buildings in possession of the complainants. It is undoubtedly true that in a case like the present, where complainants acted in the utmost good faith in locating upon or purchasing the town lots upon which their improvements are made, under the belief that the land was not mineral, their rights ought not to be disturbed without clear and satisfactory proof that within the limits of the mining location there

had been found a lode or vein which, in its natural course and direction, would give the owners thereof a right to all the surface ground within the limits of the location. In other words, if the proofs were undisputed that a discovery of a lode or vein had been found at the northerly end of the Naid Queen location; that from such discovery it clearly appeared that the course of the lode lengthwise was easterly and westerly, and at right angles within the side lines of the Naid Queen,—then, in the eye of the law, the side lines of the location as made upon the ground would become the end lines of the location (King v. Mining Co., 152 U. S. 222, 228, 14 Sup. Ct. 510; Last Chance Min. Co. v. Tyler Min. Co., 157 U. S. 683, 687, 15 Sup. Ct. 733), and the owners of the claim would only be entitled to a patent for 300 feet of surface ground on each side of the middle of the lode; and hence it would not interfere with complainants' rights. There is more or less testimony that tends to support that theory, but the views already expressed are decisive of the case, and render it unnecessary to decide other questions raised by counsel. The defendants are not entitled to a patent for any part or portion of the land claimed and occupied by the complainants. The complainants are entitled to judgment for their costs. Let a decree be entered accordingly.

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MUTUAL LIFE INS. CO. OF NEW YORK v. BOYLE, Atty. Gen., et al.

(Circuit Court, D. Kansas, First Division. September 27, 1897.)

1. JURISDICTION OF FEDERAL COURTS—SUITS AGAINST STATE OFFICERS.

The eleventh amendment to the federal constitution does not prevent a federal court from entertaining a suit by an individual or corporation against an executive officer of a state to compel him to perform a plain ministerial duty, as to which the law allows him no discretion, or to enjoin him from performing some official act whereby complainant's rights will be injured.

2. STATE SUPERINTENDENTS OF INSURANCE—EXCLUSION OF INSURANCE COMPANIES OF OTHER STATES.

The Kansas law of 1889 providing, among other things, that the superintendent of insurance shall have no power to refuse an insurance company a certificate of authority to do business in the state if such company is solvent and has fully complied with the state laws, applies to life as well as fire insurance companies, and to both home and foreign corporations. The act is mandatory, and allows no exercise of discretion.

3. SAME—EQUITY JURISDICTION—INJUNCTION.

Where an insurance company has built up a large and successful business in the state, and has valuable property and numerous policies therein, the act of the state superintendent of insurance, who is personally insolvent, in illegally refusing it a license to continue in business, and threatening to institute criminal proceedings against it, warrants a court of equity in interfering to enjoin the threatened injury, but the state officers will not be enjoined from bringing a suit in quo warranto to test the right of the company to do business in the state.

This was a suit in equity brought by the Mutual Life Insurance Company of New York against Louis C. Boyle, as attorney general of the state of Kansas, and Webb McNall, as superintendent of insurance of the same state, to enjoin them from interfering with the transaction of its business in that state, and to procure an adjudication that it was entitled to a certificate authorizing it to carry on business therein.

A. H. Horton, Geo. J. Barker, J. W. Green, and E. F. Ware, for complainant.

L. C. Boyle, David Overmeyer, David Martin, and J. C. Clemens, for defendants.

WILLIAMS, District Judge. The material averments in the bill of complaint filed herein are that the complainant, the Mutual Life Insurance Company of New York, is a corporation duly organized and incorporated under the laws of the state of New York, having been organized and doing business since the year 1842; that its business, as its corporate name suggests, is that of life insurance upon the mutual plan; that it has been doing business in the state of Kansas as a life insurance company since the year 1866; that there are within the state of Kansas 3,300 citizens and residents who have taken out life insurance policies from said company, and that the aggregate of life insurance by said policies exceeds the sum of \$7,000,000; that its assets on the 1st day of March, 1897, amounted to over \$234,000,000, and its surplus over and above all of its liabilities amounted to over \$29,000,000; that it carries on the life insurance business generally in all the states of the United States, and in many foreign countries, and that it has in all the states and countries, including the state of Kansas, fully complied, on its part, with all the requirements of law of said states and countries for the regulation of the business of life insurance as transacted by corporations incorporated under the laws of the state of New York, and has also strictly complied with every act and requirement of the state of Kansas concerning life insurance companies incorporated under the laws of states other than Kansas, and with all the legal rules and regulations prescribed by the insurance department of the state of Kansas; that the business of life insurance depends for its ultimate success upon securing the annual contributions of a large number of patrons, and upon the continued satisfaction of such patrons with the manner in which the corporation transacts said business, and performs its obligations to its policy holders and to the public generally, and that the business of life insurance is peculiarly sensitive to the attacks of persons who appear to be in a position to have peculiar information concerning its proper transaction, and that in order for a successful life insurance corporation to give its members a proper distribution of dividends, thereby decreasing to them individually the cost of their business, it is necessary that the establishment of its business should be permanent, and that there should be situated within reasonable territorial limits general agencies or branches for the proper conduct of the business, and that it has been the successful experience of this company that by reason of its large expenditure of money, time, and skill in the creation of its agency plant, business connections, and good will of the state of Kansas, it has been able to maintain its high standing as a reliable and honorable life insurance company among the citizens of said state, and that the property of the company within the state of Kansas, consisting of its established agency plant, together with its business connections, patronage, and good will, was on the 1st day of March, 1897, of the actual value of more than \$50,000; further, that on February 26, 1897, as has been its in-

variable practice and custom for more than 30 years prior thereto, it presented to Webb McNall, one of the defendants herein, a statement signed by its vice president and secretary, and verified by their oaths, giving in detail, and in strict compliance with the laws of the state of Kansas in relation thereto, the condition of the company on the 1st day of January next preceding, and on the same day presented to Webb McNall, defendant herein, as superintendent of insurance, at his office in the city of Topeka, Kan., a report made under oath by the vice president of the company, a copy of the report required by the laws of the state of New York to be annually made by the company to the superintendent of insurance of the said state, and therewith presented a certificate of authority licensing said company to transact its business of life insurance in the state of New York, issued by the superintendent of insurance of said state on or about the said day, and prior to the 1st day of March, 1897, complainant tendered to said Webb McNall, as superintendent of insurance of the state of Kansas, all of the money and fees required to be paid to the said Webb McNall, as superintendent of insurance, by the provisions of paragraph 3336 of the General Statutes of 1889, and all other statutes and regulations enacted and imposed by the state of Kansas, being conditions prerequisite to the granting of permission by the said state to the complainant to carry on and transact its business of life insurance within the state of Kansas for and during the year 1897, and until the 28th day of February, 1898; that at the time above mentioned the said Webb McNall was the duly appointed, qualified, and acting superintendent of insurance of the state of Kansas, and, under the provisions of the laws of said state in relation to his office, was the duly authorized and constituted officer, and by said statutes and laws was required to issue to life insurance companies incorporated under the laws of other states certificates of authority, evidencing the permission of the state of Kansas that such life insurance companies were and should be entitled to transact their said business within said state for said period of time; and, further, that the said Webb McNall, defendant herein, pretending to act as such superintendent of insurance of the state of Kansas, and as the agent of said state in that behalf, disregarding his plain ministerial duty in the premises, refused and declined, and still refuses and declines to issue and deliver to the said company a certificate of authority, under the seal of the insurance department, evidencing the compliance of said company with all the laws of said state applicable to the defendant as a life insurance corporation incorporated under the laws of the state of New York, and refused and still refuses to accept the tender so made by the company of the money and fees required to be paid and accepted under the laws of the state of Kansas. Charges that said Webb McNall, in his actions in so refusing to issue said permit, was instigated by malicious, wicked, arbitrary, and capricious design on his part to oppress this company and deprive it of its property without due process of law; that the said Webb McNall well knew, and had frequently publicly admitted, that said company was solvent, and had been solvent for a long time prior to said application, and that the said company had complied with all the laws, rules, and regulations enacted and imposed by the state of Kansas concerning said com-

panty, and that the sole cause of said arbitrary, wicked, and malicious assertion of authority on the part of the said Webb McNall was the purpose of compelling said company to pay to one Sallie E. Hillman a claim she pretended to have against said company for a large sum of money, to wit, more than \$20,000, without her first obtaining any judgment of any court for the same. Makes a letter written by the said Webb McNall to the agent of the company a part of said bill, which letter is as follows:

"Topeka, Kansas, March 3, 1897.

"John E. Lord, General Agent Mutual Life Insurance Company of New York, Topeka, Kansas—Dear Sir: Replying to your request for license to do business in this state for the ensuing year after you had filed your annual statement, and after your check in the sum of \$100 in payment of fees had been tendered to this department, I will say that, on evidence satisfactory to this department, I am satisfied that your company has not dealt fairly with the plaintiff, Mrs. Sallie E. Hillman, in refusing to pay the death loss, and in the litigation of the same, pertaining to her deceased husband. Hence this department refuses to issue to the Mutual Life Insurance Company of New York a license to do business in this state for the ensuing year. Your check in the sum of \$100 is herewith returned.

"Very respectfully,

Webb McNall, Superintendent."

Complainant further states, in relation to said claim of said Sallie E. Hillman, that there was presented to the complainant a claim by the said Sallie E. Hillman demanding payment by said company to her of the sum of more than \$10,000, which it was claimed by said Sallie E. Hillman this company owed her on account of the issuance by the company to one John W. Hillman of a certain policy of life insurance. It alleges that the claim of the said Sallie E. Hillman, being false and fraudulent, was denied and refused, and thereafter, and during the year 1879, the said Sallie E. Hillman commenced an action at law in the circuit court of the United States for the district of Kansas against said company, to recover a judgment for said sum of more than \$10,000; and it alleges that ever since said action at law was commenced the company has been in the orderly and peaceful litigation in said court of said claim, and that the said Sallie E. Hillman has never recovered a final judgment against this company for any part of said sum, and that her claim is at this time, and has been for more than 15 years, a disputed claim in the course of an orderly and proper litigation in said court, which said litigation is still pending and undetermined. It charges further that the damage and injury to the company will be irreparable, and that for such damage the company has no adequate remedy at law; it alleging, upon information and belief, that the said Webb McNall is wholly insolvent. It further states that by the laws of the state of Kansas the said insurance commissioner, whenever, in his judgment, it is necessary, may call upon the attorney general of the state to bring actions or to prosecute criminally any insurance company doing business in said state without a license, and that this may be done in any county in the state where the said insurance company has an agency or an agent; and as against the said Louis C. Boyle, the attorney general of said state, it charges him with upholding and encouraging the defendant Webb McNall in the assertion by the said Webb McNall of the right to deny to the plaintiff the equal protection of the laws within the state of Kansas, and of the right to deprive it

of its property without due process of law, and that, acting in concert with the defendant Webb McNall, and for the purpose of harassing and intimidating the agents and employes of the complainant, he has threatened to, and will, unless restrained by the court, commence proceedings against complainant, its agents and employes, and compel it to defend a multiplicity of suits in actions instigated by said McNall and said Louis C. Boyle for the purpose of preventing complainant from peaceably transacting its business of life insurance within the state of Kansas, and designed by the defendants, McNall and Boyle, to deny to complainant the equal protection of the laws, and deprive it of its property within the state of Kansas without due process of law. The prayer of the bill is for a decree adjudging that it is the duty of said Webb McNall, as superintendent of insurance, to forthwith issue and deliver to the complainant a certificate of authority to do business within the state of Kansas, and also that the court grant a temporary injunction against the said Webb McNall, as superintendent of insurance of the state of Kansas, his agents and employes, and against the said Louis C. Boyle, as attorney general of the state of Kansas, enjoining and restraining each of said defendants, and all persons acting under them, from in any manner whatever interfering with the transactions by the complainant in the state of Kansas of its said business of life insurance, and for all other relief.

This petition and application for restraining order were presented to one of the United States district judges who was assigned to hold court in the district of Kansas, who thereupon granted a restraining order, restraining the defendants, McNall and Boyle, from interfering with said insurance company, in accordance substantially with the prayer of the petition; said restraining order to remain in force only until the next term of court to be holden where the said action was commenced. At the hearing the defendants interposed a demurrer to said complaint, and all questions involved and raised by the demurrer are submitted to the court for final determination.

There are two questions of law involved in this case. The first is as to the power of the court to grant the relief prayed for, taking into consideration the provisions of the eleventh amendment to the constitution of the United States, which, it is urged by the defendants, prohibit the court from proceeding in any manner against the defendants, because they are officers of the sovereign state of Kansas, and they are within the prohibition, and are protected by the provisions of said amendment from being required to answer, or restrained from acting, in any manner, as officers of said state. That the question involved is one of importance need not be asserted, and this court desires to express at the very threshold of the investigation a lifelong conviction and adherence to the doctrine that the rights of the states under our form of government should at all times receive proper protection, especially at the hands of the judicial department of the general government; and while it will, in the discharge of its duty, endeavor to enforce all laws of the United States, it will also, under all circumstances, "render unto Cæsar the things that are Cæsar's," and abstain from encroaching in any manner upon the rights of any sovereign state or the officers thereof.



The question of the force and effect of the eleventh amendment to the constitution of the United States, and to what extent the officers of the several states are exempt, under it, from any process of control by the courts of the United States, has been a subject of adjudication upon many occasions, and has been many times decided, by the supreme court of the United States. I deem it unnecessary to refer to all the decisions, but begin with the decision in the case of *Board v. McComb*, 92 U. S. 531. In that case the court used the following language:

"Although a state, without its consent, cannot be sued by an individual, nor can a court substitute its own discretion for that of the executive officers in matters belonging to their proper jurisdiction, yet when a plain official duty, requiring no exercise of discretion, is to be performed, and performance refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and, when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases the writs of mandamus and injunction are somewhat correlative to each other."

In the case of *Cunningham v. Railroad Co.*, reported in 109 U. S. 446, 3 Sup. Ct. 292, 609, the court, referring to the case of *Board v. McComb*, supra, uses the following language, "In the opinion in that case the language used by Mr. Justice Bradley well and tersely expresses the rule and its limitations," and then quotes approvingly the language used by Justice Bradley in that opinion. In the case of *Allen v. Railroad Co.*, 114 U. S. 311, 5 Sup. Ct. 925, 962,—it being one of the celebrated Virginia Coupon Cases,—the court again quotes the language of the decision in *Board v. McComb* approvingly, as well as the other cases of like character that had been theretofore decided by the supreme court. The case of *Hagood v. Southern*, reported in 117 U. S. 52, 6 Sup. Ct. 608, is a case that seems to be relied upon by the defendants to show that suits of the character now under consideration are prohibited by the eleventh amendment to the constitution of the United States. The supreme court in that case, on page 69, 117 U. S., and page 616, 6 Sup. Ct., uses the following language:

"The principle which governs in the cases that are cited must be carefully distinguished from that which ruled in *Osborn v. Bank*, 9 Wheat. 738, *Davis v. Grey*, 16 Wall. 203, *Board v. McComb*, 92 U. S. 531, and *Allen v. Railroad Co.*, 114 U. S. 311, 5 Sup. Ct. 925, 962,—a distinction which was pointed out in *Louisiana v. Jumel* [2 Sup. Ct. 128], and in *Cunningham v. Railroad Co.*, 109 U. S. 446, 3 Sup. Ct. 292, 609. The rule for such cases is well stated by Mr. Justice Bradley in *Board v. McComb*, and is as follows:" (Then quoting the language used by Justice Bradley in that case, with approbation.)

In *Re Ayers*, reported in 123 U. S. 443, 8 Sup. Ct. 164, and which is the case relied upon with seeming entire confidence by the counsel for the defendants in this case, the court uses the following language:

"But this is not intended in any way to impinge upon the principle which justifies suits against individual defendants, under color of the authority of unconstitutional legislation by the state, who are guilty of personal trespasses and wrongs, nor to forbid suits against officers in their official capacity, either to arrest or direct their official action by injunction or mandamus, where such suits are authorized by law, and the act to be done or omitted is purely ministerial, in the performance or omission of which the plaintiff has a legal interest. In respect to the latter class of cases, we repeat what was said by this court in *Board v. McComb*, 92 U. S. 531:" (Then quoting the language of Justice Bradley in that case.)

In the case of *Scott v. Donald*, reported in 165 U. S. 58, 17 Sup. Ct. 265, the court uses the following language:

"Where a suit is brought against defendants who claim to act as officers of a state, and, under color of an unconstitutional statute, commit acts of wrong and injury to the property of the plaintiff, to recover money or property in their hands unlawfully taken by them in behalf of the state, or for compensation for damages, or, in a proper case, for an injunction to prevent such wrong and injury, or for a mandamus in a like case to enforce the performance of a plain legal duty, purely ministerial, such case is not, within the meaning of the eleventh amendment to the constitution, an action against the state."

One of the most authoritative cases upon this subject is *Reagan v. Trust Co.*, 154 U. S. 362, 390, 14 Sup. Ct. 1051, in which that eminent jurist, Justice Brewer, used the following language:

"Neither will the constitutionality of the statute, if that be conceded, avail to oust the federal court of jurisdiction. A valid law may be wrongfully administered by officers of the state, and so as to make such administration an illegal burden and exaction upon the individual. A tax law, as it leaves the legislative hands, may not be obnoxious to any challenge, and yet the officers charged with the administration of that valid tax law may so act under it in the matter of assessment or collection as to work an illegal trespass upon the property rights of the individual. They may go beyond the powers thereby conferred, and when they do so the fact that they are assuming to act under a valid law will not oust the courts of jurisdiction to restrain their excessive and illegal acts. \* \* \* Nor can it be said in such a case that relief is obtainable only in the courts of the state. For it may be laid down as a general proposition that, whenever a citizen of a state can go into the courts of a state to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the federal courts to maintain a like defense. A state cannot tie up a citizen of another state, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. Given a case where a suit can be maintained in the courts of the state to protect property rights, a citizen of another state may invoke the jurisdiction of the federal courts."

It seems clear, then, that it is the well-settled doctrine that where an officer of a state, in the language as used by Judge Bradley in the case of *Board v. McComb*, is in the discharge of a plain official duty, requiring no exercise of discretion in the act to be performed, and performance is refused, any person who sustains personal injury for such refusal may have a mandamus to compel its performance; and, when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. The federal courts may entertain jurisdiction in suits by persons against such officer, and may afford adequate remedy by a mandatory injunction in order to protect the rights of parties injured by the action of said state officer. It only remains, then, to inquire, what are the duties of the defendant McNall, as superintendent of insurance of the state of Kansas, as declared by the statutes of said state? The law of Kansas prior to the year 1889, in relation to the duties and powers of the state superintendent of insurance, as defined and declared by the supreme court of Kansas, seem to be as follows: Referring to the different sections and provisions of the insurance laws, the court declares:

"These and other provisions of the statute relating to insurance and to the superintendent of insurance clearly show that many of the duties of that officer are discretionary; and this is especially true regarding the granting, withholding, or revoking of authority to insurers to transact business within the state." *Insurance Co. v. Wilder*, 40 Kan. 568, 20 Pac. 268.

And it was held by the supreme court of the state of Kansas in the case of *Insurance Co. v. Wilder*, above referred to, that the state superintendent of insurance had the absolute right to refuse to any company a license to transact business in this state, regardless of their solvency or their having complied with the requirements of the law. After this decision, referred to in 40 Kan. 561, 20 Pac. 265, the legislature that met soon after, or perhaps that were then in session, passed the law that is now in force in relation to the duties of state insurance commissioner; but the contention of the defendant is that that amendment only relates to home mutual fire insurance companies, and that, by the wording of the title of the act, no provision relating to any other kind of insurance companies could be properly enacted under said title. The act in controversy is known as "Chapter 159, Session Laws of 1889," and went into effect in March of that year. It is entitled "An act relating to insurance and amendatory of section 24 of chapter 132 of the Laws of 1885, being an act entitled 'An act to provide for the organization and control of mutual fire insurance companies,' and contains the following language:

"Provided, however, that the superintendent of insurance shall have no power or authority to refuse an insurance company a certificate of authority to do business in the state, if such company is solvent and has fully complied with the laws of the state. And provided, further, that such superintendent of insurance shall have no power to revoke or suspend the certificate of authority of any association or corporation transacting the insurance business, if such association or corporation is solvent and complies with all the laws of this state. Also, it is further provided that in all actions brought against the superintendent of insurance to compel him by mandamus, or otherwise, to issue certificates of authority to any association or corporation desiring to transact insurance business in this state, and in all cases brought against the superintendent of insurance to restrain or enjoin him from revoking or suspending the certificate of authority of any association or corporation transacting insurance business in this state, such action or actions must be commenced and maintained in the county where the office of superintendent of insurance is located and carried on."

It would seem that the language of the act embraces all insurance associations or corporations desiring to transact business in Kansas. The language of the title being "An act relating to insurance and amendatory of section 24, c. 132," etc., the title of the act seems certainly broad enough to cover any legislation in relation to insurance or insurance companies. Referring to the contention of counsel for the defendant that the act was not intended and designed to affect the duties of the state superintendent of insurance in relation to any but home mutual fire insurance companies, it may be proper to state that up to the year 1871 there was no law of the state of Kansas requiring insurance companies of any kind, incorporated by the laws of the state of Kansas, to have any certificate or license in order to transact business. By the act of 1871, creating the insurance department in the state of Kansas, under the head, "Insurance Other than Life," sections 29 and 30 of

said act will be referred to, as important in this connection and upon this point. Section 29 is as follows:

"It shall be lawful for any insurance company incorporated under the laws of this state for any purpose other than life insurance, to invest its capital and the funds accumulated in the course of its business, or any part thereof, in bonds and mortgages on real estate," etc. (the balance of the section directing in what manner its funds shall be invested).

Section 30, at length, is as follows:

"Upon the complying with the foregoing provisions by any such insurance company, the superintendent of insurance shall cause an examination to be made, either by himself or some disinterested person, specially appointed by him for that purpose, who shall certify under oath that the capital herein required of the company named, according to the nature of the business proposed to be transacted by said company, has been paid in, and is possessed by it in money, or in such stocks and bonds or mortgages as are required by the 29th section of this statute, in an amount not less than one hundred thousand dollars. Such certificate shall be filed in the office of such superintendent, who shall thereupon deliver to such company a certified copy of such certificate, which, upon being recorded in the office of the register of deeds of the county where the company is located, in a book provided for that purpose, shall be their authority to commence business and issue policies."

This is the law of Kansas to-day in relation to fire insurance companies incorporated under the laws of Kansas, and it was in full force and effect at the time of the decision in 40 Kan. of Insurance Co. v. Wilder (40 Kan. 561, 20 Pac. 265). The decision in that case was in relation to the rights of fire insurance companies which were not organized or incorporated under the laws of the state of Kansas, but were foreign corporations; and by the reading of the section referred to, and its careful consideration, the court is at a loss to know what additional legislation in the way of relief from any oppression by the state superintendent of insurance the mutual home fire insurance companies of the state of Kansas needed or required. That the decision of the supreme court of the state, deciding, as it did, that the state superintendent of insurance, in relation to foreign insurance companies, had discretionary power to refuse or grant a license or certificate to do business, delivered, as it was, in January, 1889, was the prime factor moving the legislature to pass the amendment to the insurance laws, as heretofore stated, seems to me a clear proposition, requiring no argument to support it. That some such legislation was imperatively needed, the action of the state superintendent of insurance in the case at bar would clearly show. The action of the superintendent, in this case, refusing to grant a license to transact business in the state to a company that he himself admits to be solvent and to have complied with the laws of the state, for the reason contained in his letter to the agent of the insurance company, to state it very mildly, is arbitrary, and is an assumption of authority by a ministerial officer that is startling. The reason for the refusal, as announced in his letter, is because they have not treated Mrs. Sallie E. Hillman, whose husband held a policy in this company, fairly, and the refusal to pay said policy to her is the sole basis of his refusal to grant a license to the company to do business in the state of Kansas. In this connection it is proper that the court should state the condition of said claim, as it was well known to the insurance commissioner at the time of said

refusal. An action to recover upon said policy has been pending in the courts of the United States in the district of Kansas for more than 18 years. The action has been tried five times in said courts, and the trials presided over by five different judges, beginning with the fair-minded, learned, and able jurist who has presided over the courts in said district for nearly a quarter of a century, and the next in the order of trials presided over by that eminent jurist, Associate Justice Brewer, who was at that time United States circuit judge for the eighth judicial circuit, and the next time in the order of trials presided over by a judge of large experience and eminent learning, Justice Shiras, of Iowa, followed next in order by the late lamented Judge Thomas, of North Dakota, and lastly by the district judge delivering this opinion; and the only success in determining this issue that has been properly raised in the courts of the United States between the insurance company and Mrs. Hillman has been four mistrials, and a verdict and judgment at one trial which were reversed by the supreme court of the United States. And at this time, after these repeated trials, and the case still pending in the United States court, for an officer clothed with any power or authority to refuse to grant any insurance company whatever a license or a certificate to transact business in the state, because of their refusal to pay a claim thus contested and thus tried, is virtually a denial to such parties of their right to submit any case to a final determination by a jury of their country. This action by the state superintendent of insurance, refusing to grant a license to another life insurance company for the same reason that it is denied in this case, upon being called to the attention of the district judge of this district, was deemed by him such an interference with the administration of the law and with the rights of litigants in his court that he called the attention of the United States grand jury to said action, and it appears by the records of said court that the grand jury have found an indictment against him for such interference. Looking to the existing evil sought to be corrected by the legislature, it would seem, then, that it is small wonder that the legislature of 1889, perhaps foreseeing that such arbitrary power vested in any one individual would lead to just such results as it has in this case and in the other case referred to, intended, by their amendment of the insurance laws, to deprive him of such discretionary power, for it ought not to and cannot exist in a state or country where the right of a trial by jury is ever held to be the palladium of the liberties and the rights of the people. It would seem, from the history of the state of Kansas, that it certainly could not long exist here. The pioneers of the state of Kansas were eminent and distinguished in their assertion of equal rights to all persons under the law; and her statehood, under its constitution, which breathes in all its provisions the principles of freedom, and the right of every one to seek redress for all grievances and the enforcement of all rights by recourse to the laws, and to be protected by the laws, was the result of the actions of the Kansas pioneers of 1855, 1856, 1857, and of all the stormy years that have passed, and are a part of the history of the territory, up to its admission as one of the great states of this Union. It may well be admitted and considered that the law-makers of 1889 were of the pioneers of 1856 and 1857 and 1860, or

their immediate descendants; and the intention of those lawmakers, it may well be concluded, was to enact a law asserting that no officer should have the arbitrary right to deprive any person, natural or artificial of the enjoyment of the right of trial by jury in any case whatsoever. If such was not their intention and desire, it must be admitted that the ardent desire for freedom and liberty which animated their breasts in the early years had departed, and that the soul of that great leader of the pioneers of Kansas, the man of Osawatomie, had at that early period in the history of the state ceased "to go marching on." That in the enactment of this law they may have builded better than they knew, may be admitted; but this is true of the framers of not only the constitution of the United States, but of many of the beneficent laws that have been enacted, and that are now upon the statute books of the United States and of the various states of this Union. That it is the law of this state regulating the duties and powers of the state superintendent of insurance, after a careful consideration of it, I have not the slightest doubt. That being the case, it follows that in relation to the duty of the state superintendent of insurance to grant a license to transact business in this state to any insurance company that is solvent and has complied with the laws of this state, he has no discretion whatever, and the law is mandatory upon him to grant such license whenever the conditions stated in the law are complied with. This brings his action within the exceptions and rules laid down concerning actions that may be brought against a state officer under the eleventh amendment to the constitution of the United States, as held by the numerous decisions of the supreme court of the United States, and determines that the federal court of this district has jurisdiction to hear and determine this issue.

As to the right of the complainant company to have a mandatory injunction against him, there seems to be no question, because the complaint states unequivocally that it has property in this state, in a large amount, that is affected by the action of the state superintendent of insurance, and this is not denied by either respondent. In fact, a denial of it would be futile. It is admitted that this complainant has effected insurance upon the lives of more than 3,000 persons in the state of Kansas, and the amount of the policies exceeds the sum of \$7,000,000. It is manifest that, if it is prohibited from keeping up its business in the state, its property rights would be, if not destroyed, materially injured, and the injury is apparently irreparable,—the state superintendent of insurance being declared by the complainant to be insolvent, and that insolvency not denied; thus affording to the complainant a right, in a court of chancery, to have its interests in this large property protected by the courts of the United States.

I might well have been content to have allowed this case to be decided by a simple reference to the decision of the learned district judge who presides over this district in the case of *Insurance Co. v. McNall*, 81 Fed. 888, in which opinion I fully concur; but I have deemed it best to submit my conclusions in the matter in this opinion, craving the indulgence of all parties, and the bar generally, for the very crude manner in which it has been prepared in the very short time that I have been able to give to its consideration.

The relief prayed for in the bill is granted, and a perpetual injunction shall issue against the defendant Webb McNall, as state superintendent of insurance of the state of Kansas, restraining him from in any manner interfering with the company or its agents in the transaction of insurance business in the state of Kansas, and commanding him to issue a license to said company as required by the laws of the state of Kansas, and restraining all others that may act, or be called upon to act by him, from interfering with said company in the transaction of business in the state as above stated. But the respondent the attorney general of the state of Kansas is not included within this injunction, to the extent of prohibiting him from bringing any suit of quo warranto against said company in any of the courts of this state to test its right to transact business in the state; but he is restrained from acting as contemplated by the statute of the state of Kansas, upon the request of the insurance commissioner, in bringing suits other than quo warranto against the company or its agents for transacting its business in the state.

I may add, in conclusion, that the company having, in the judgment of the court, complied with all the requirements of the law of the state (having demonstrated to the entire satisfaction of the insurance commissioner that it is solvent, and tendered him the amount of fees required to be paid before a license could be obtained), it has done all that it could do, or the law required of it to do; and the arbitrary refusal of the superintendent of insurance to grant it a license does not, in my judgment, prevent its transacting business in the state, and consequently it should not be interfered with or prevented from transacting such business; for, if the superintendent of insurance is without discretion to refuse a license to the company upon its compliance with the requirements of the laws of the state, it follows that, if it has so complied with the laws in all respects, such compliance has the full force and effect of a license to transact business, for it has done all it was required to do, and all that it could do.

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#### HEED v. COMMISSIONERS OF COWLEY COUNTY, KAN.

(Circuit Court, D. Kansas, Second Division. September 13, 1897.)

1. MUNICIPAL CORPORATIONS—BOND ISSUES—RECITALS—INNOCENT PURCHASERS.

"Where a municipal body has lawful authority to issue bonds, dependent only upon the adoption of certain preliminary proceedings, and the adoption of those preliminary proceedings is certified on the face of the bonds by the body to which the law intrusts the power, and upon which it imposes the duty, to ascertain, determine, and certify this fact before or at the time of issuing the bonds, such a certificate will estop the municipality, as against a bona fide purchaser of the bonds, from proving its falsity to defeat them." *Commissioners v. Aspinwall*, 21 How. 539.

2. SAME.

This principle covers a case of county bonds issued for 30 years straight, and certified to have been issued "in pursuance of, and in accordance with, the vote of a majority of the qualified electors of the county," though an examination of the county records would have shown that the vote of the people only authorized, in fact, an issue of bonds due in 30 years, but subject to payment in 10 years.

**8. SAME—ESTOPPEL.**

If there is authority to issue the bonds of a county, and the bonds recite that authority, and that the conditions required by the act under which they are issued have been complied with, and this recital is made, and the bonds issued, by persons who were not officers, and not authorized to so certify or issue them, but there was authority for the proper officers to issue the bonds, then payment of part of the bonds and the interest, on all for a long time will be a full ratification of the acts of the officers who issued the bonds, and estops the county from questioning the acts of the officers who issued them, after the bonds have passed into the hands of innocent purchasers.

This was an action at law by George Heed against the county commissioners of Cowley county, Kan., to recover on interest coupons cut from county bonds. The case was heard on a demurrer by defendants to plaintiff's reply to the answer.

Gleed, Ware & Gleed, for plaintiff.

Pollock & Lafferty, for defendants.

**WILLIAMS**, District Judge. This is an action to recover on 118 coupons clipped from 59 bonds of the defendant county. The declaration alleges that plaintiff, although not the owner of the bonds, is the owner for value and bona fide holder of these coupons, 59 of which matured January 1, 1894, and the other 59 on July 1, 1894. The bonds were issued on January 1, 1880, and, the declaration alleges, were issued under an act of the legislature of the state of Kansas, as shown by the recital of the bonds. A copy of the bonds is set out, with the declaration. The bonds contain the following recitals, after the acknowledgment of the indebtedness and the promise to pay 30 years after the date thereof:

"This bond is one of a series of one hundred and thirty-six bonds of a like tenor, effect, and amount, executed and issued by the county commissioners of said Cowley county, by virtue and in pursuance, of an act of the legislature of the state of Kansas entitled, 'An act to enable counties, townships, and cities to aid in the construction of railroads, and to repeal section 8 of chapter 39 of the Laws of 1874,' approved February 25, 1876, and the acts of the legislature of said state amendatory thereof, and supplemental thereto, and in pursuance of, and in accordance with, the vote of a majority of the qualified electors of said Cowley county at a special election regularly called and held therein on the 29th day of April, 1879, and are issued in payment of a subscription by said county to the capital stock of the Southern Kansas & Western Railroad Company to the amount of sixty-eight thousand dollars."

The bonds were signed by the chairman of the board of county commissioners, and attested by the county clerk and county seal, and were registered in the office of the auditor of state, on March 30, 1880.

The answer denies that plaintiff is a bona fide owner or holder of the coupons, and, second, asserts a want of power in the county officers to issue the bonds and coupons. The latter ground is stated as follows:

"First. Because the chairman of the board of county commissioners and the county clerk of defendant county were wholly without power to issue the binding obligations of the county, unless theretofore expressly authorized by a vote of a majority of the qualified electors of the county, voting at an election held



for such purpose, to order the same issued, and that at no time was there ever an election held or authority conferred by the voters to issue said bonds. Second. That the persons pretending to issue said bonds were not officers or agents of the county at the time."

To this answer plaintiff filed a reply, setting up:

"The defendant county has adopted, ratified, and confirmed all the said acts complained of by the defendant, and have recognized the official character of the persons who acted as officers, by paying off 77 of the said bonds and also by paying off the coupons for 13 years upon the balance of the said outstanding bonds, being those mentioned in plaintiff's petition, and by reason of which recognition, and upon the faith thereof, plaintiff bought the coupons sued on in open market, in good faith and for value."

To this plea in the reply defendant demurred, and both parties want all questions, as they appear of record in this cause, disposed of on this demurrer. From the exhibits filed with the answer, it appears that the proposition to issue the bonds, as submitted to the electors, provided for bonds payable in 30 years, but with the right of the county to redeem and pay them off at any time after 10 years. The demurrer was submitted on printed briefs by E. F. Ware, for the plaintiff, and J. C. Pollock, for the defendant; WILLIAMS, District Judge.

The real question involved in this action on the demurrer to the reply only is whether, by reason of the payment by the county of 77 of the 136 bonds, and the payment of the interest coupons on all the bonds for 13 years, the county is estopped from showing now, in an action on the coupons by one who purchased them in good faith on the strength of these facts, that the persons who issued these bonds as officers of the county were really not the officers, and had no right to act for or bind the county. The demurrer admits the truth of every allegation in the reply. But, as a demurrer reaches back to the former pleadings, and counsel have ably presented every issue of law involved in the cause, it is proper that the entire case, so far as it appears from the pleadings and exhibits, shall be determined now; reserving, of course, the questions of fact put in issue by the answer, as to whether plaintiff is a bona fide holder and owner of the coupons, to a trial before a jury, if desired by the parties, in the event the demurrer is overruled. That there was legislative authority for counties in Kansas at that time to issue its negotiable bonds in payment of stock subscriptions to railroads is admitted by defendant. That being so, it is too late at this day to go behind the recitals in the bonds, if made by the officers who, by the laws of the state, were authorized to pass upon those facts. Ever since the decision of the United States supreme court in *Commissioners v. Aspinwall*, 21 How. 539, it has been the settled rule of law in the courts of the United States that:

"Where the municipal body has lawful authority to issue bonds, dependent only upon the adoption of certain preliminary proceedings, and the adoption of those preliminary proceedings is certified on the face of the bonds by the body to which the law intrusts the power and upon which it imposes the duty, to ascertain, determine, and certify this fact before or at the time of issuing the bonds, such a certificate will estop the municipality, as against a bona fide purchaser of the bonds, from proving its falsity to defeat them."

Counsel for plaintiff cite a large number of cases in their brief in which this rule has since then been followed, but it is unnecessary to refer to them in this opinion, as that rule has never been questioned by any decision of the supreme court of the United States, or of the circuit court of appeals for this circuit, and those are the courts whose decisions are conclusive and binding upon this court. The latest reported case of the supreme court recognizing this rule is *Graves v. Saline Co.*, 161 U. S. 359, 16 Sup. Ct. 526.

But learned counsel for defendant seek to distinguish this case from those above referred to by reason of the fact that the bonds in controversy were issued for 30 years straight, while the vote of the people only authorized a bond known as the "10/30,"—i. e. bonds due in 30 years, but subject to payment after 10 years. While it is true that an examination of the county records would have shown to plaintiff that such was the vote, the recitals in the bonds that they were issued "in pursuance of, and in accordance with, the vote of a majority of the qualified electors of the county," relieves a purchaser of the necessity to examine the county records for the purpose of ascertaining whether those recitals were in fact true. *Evansville v. Dennett*, 161 U. S. 434, 16 Sup. Ct. 613.

Counsel for defendant refers to a large number of cases in his brief to show that this rule does not apply to this case; but, unfortunately, none of these cases are at all like the case at bar. In *Brenham v. Bank*, 144 U. S. 173, 12 Sup. Ct. 559, the only recitals in the bonds are that they were issued under a city ordinance, and an examination of the ordinance showed that the bonds were not in compliance therewith. In *Barnum v. Okolona*, 148 U. S. 393, 13 Sup. Ct. 638, the statute under which the bonds were issued absolutely prohibited the issue of a bond to run for over 10 years. *Norton v. Dyersburg*, 127 U. S. 160, 8 Sup. Ct. 1111, was exactly like *Barnum v. Okolona*. *Lewis v. Commissioners*, 12 Kan. 186, is in point, and, if the law as there stated were not in direct conflict with the principles established by the supreme court of the United States, it would be decisive of this case in favor of the defendant. But, with due deference to the learned judge who delivered the opinion in that case, the United States supreme court has never recognized that doctrine, but, on the contrary, has absolutely refused to follow it. In *Block v. Commissioners*, 99 U. S. 686, in which case the same bonds as those determined in the *Lewis Case* were in issue, the court says:

"We have not overlooked the opinion delivered by the supreme court of the state in *Lewis v. Commissioners*, 12 Kan. 186. The judgment in the case was not given until after the bonds were issued, and after the rights of the holders thereof had become fixed. We are therefore at liberty to follow our own convictions of the law. To those expressed by the state court, we cannot assent. They are not in harmony with many rulings of this court, made and repeated through a long series of years, and they are not such as, in our opinion, would administer substantial justice if applied to this case."

The same rule prevails in the United States circuit court of appeals for this circuit. *National Life Ins. Co. of Montpelier v. Board of Education of City of Huron*, 27 U. S. App. 244, 10 C. C. A. 637, and 62 Fed. 778.

The only question left for determination is:

"Will the payment by a county of some of the bonds, and payment of interest for 13 years on all the bonds, estop the county from showing that the officers who issued the bonds were not in fact officers of the county, and not authorized to issue the bonds involved in this proceeding?"

The rule of law relating to this question may be briefly stated to be settled by the decision of the courts of the United States as follows:

"Where there is no authority to issue the bonds, or if the act authorizing it is unconstitutional or absolutely void, payment of interest will not estop the county; but, if there is authority to issue the bonds, and the bonds recite that authority, and that the conditions required by the act under which they are issued have been complied with, and this recital is made by the officers authorized by law to determine those questions, or where the bonds were issued by officers who were not such at the time, but there was authority for the proper officers to issue the bonds, payment of part of the bonds and the interest on all for a long time will be a full ratification of the acts of the officers who issued the bonds, and estops the county from questioning the acts of the officers who issued them, after the bonds have passed into the hands of innocent purchasers."

*Supervisors v. Schenck*, 5 Wall. 772; *Clay Co. v. Society for Savings*, 104 U. S. 579; *Moulton v. City of Evansville*, 25 Fed. 382; *Commissioners v. Beal*, 113 U. S. 227, 5 Sup. Ct. 433; *Citizens Saving & Loan Ass'n v. Perry Co.*, 156 U. S. 692, 15 Sup. Ct. 547.

It therefore necessarily follows that the demurrer to the second paragraph of the reply must be overruled. As to whether this allegation in the reply is true, or whether plaintiff is a bona fide owner of the coupons, were questions of fact to be submitted to a jury, or the court, if a stipulation to waive a jury is filed.

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#### PITTSBURGH & W. RY. CO. v. THOMPSON.

(Circuit Court of Appeals, Sixth Circuit. October 5, 1897.)

No. 429.

##### 1. TRIAL—DIRECTING VERDICT.

Unless there is a lack of evidence on some vital question, sufficient to reasonably support a verdict for plaintiff, it is not error to refuse to direct a verdict for defendant.

##### 2. MASTER AND SERVANT—DEFECTIVE APPLIANCES—RAILROAD CARS—QUESTIONS FOR JURY.

A brakeman who was directed to ride two loose cars on a downgrade into position for coupling with a standing car was obliged to stand on a shelf, at the end of the moving cars to be coupled, which was three feet below the ratchet wheel of the brake. While turning the brake, he was caught between the ratchet wheel and the standing cars, and injured. There was evidence tending to show that the latter car was defective, so as to permit the two to come together, leaving only 11½ inches between them. A witness testified that 10 to 12 inches was the usual space between freight cars, and was enough to enable brakemen to handle them with safety. *Held*, that this evidence would not have justified an instruction that the brakeman assumed all the risks of handling cars having that much space, as this would have ignored the peculiar location and character of the brake wheel.

##### 3. COMPETENCY OF WITNESS—MENTAL UNSOUNDNESS.

Rev. St. Ohio, § 5240, excepting persons of "unsound mind" from those who are competent as witnesses, is merely declaratory of the common law, which requires that the unsoundness must be such that the witness is in-

capable of understanding the nature of an oath or giving a coherent statement touching the matter upon which he is examined.

4. SAME.

The fact that a person has been found insane by the proper tribunal, and is an inmate of an insane asylum, does not make him absolutely incompetent as a witness, but is prima facie evidence of such unsoundness of mind as will disqualify him, and throws the burden of proving competency upon the party offering him. In such case it is proper for the court to hear evidence, including that of the medical men in charge of the asylum of which he is an inmate, as to the character and extent of his mental unsoundness, and to cause him to be examined upon the questions at issue in the suit, in order to determine how far his mind and memory are unbalanced. If it then appears that, while he has a delusion upon one subject, his evidence is clear, coherent, and consistent, there is no error in admitting it, leaving the question of its weight to the jury.

5. APPEAL—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Where it was admitted that a witness offered was an inmate of an insane asylum, properly committed thereto, it was harmless error to exclude the record of the inquisition of lunacy, as affecting the question of his competency.

6. SAME—RULINGS ON EVIDENCE—GENERAL OBJECTIONS.

When a general objection is made to the reception of evidence, an appellate court will treat it as nugatory, unless the evidence admitted could under no circumstances have been competent.

7. SAME—PRAYERS FOR INSTRUCTIONS.

A mere general exception to the failure of the court to give nine separate propositions, requested before the argument and charge, and not afterwards called to the attention of the court, is too vague to require any action by an appellate court.

8. MASTER AND SERVANT—INJURY TO RAILWAY EMPLOYEES—DEFECTIVE CARS.

The Ohio statute of April 2, 1890 (87 Ohio Laws, p. 149), provides that, in actions by railroad employes for injuries occasioned by defective cars, the company shall be deemed to have had knowledge of such defect, and that this presumption shall stand as prima facie evidence of negligence. *Held*, that this presumption is not overcome by proof that the company employed competent car inspectors, where it is not proved that they actually made an inspection.

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio.

This is an action at law brought by Frank H. Wakelee to recover damages for personal injuries sustained by him while engaged in the service of the Pittsburgh & Western Railway Company as a brakeman. After suit was brought, the plaintiff, Wakelee, upon an inquest found, was declared to be an insane person, and letters of guardianship were duly issued to Samuel M. Thompson, who thereupon was suffered to prosecute the pending suit in behalf of his said ward. There was a verdict and judgment in favor of the plaintiff. This writ of error has been sued out to reverse that judgment by the Pittsburgh & Western Railway Company.

Jones & Anderson, for plaintiff in error.

Geo. F. Arrel, L. W. King, and Thomas McNamara, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and SAGE, District Judge.

After making the foregoing statement of facts, the opinion of the court was delivered by LURTON, Circuit Judge.

At the conclusion of all the evidence, the plaintiff in error moved for an instruction to find for the defendant, which was overruled. This

has been assigned as error, and has necessitated the examination of a very voluminous record, containing all the evidence submitted to the jury. In substance, it appears that the plaintiff, Wakelee, at the time he suffered the very serious injury of which he complains, was in the employment of the said railway company as a brakeman, and, as such, was a member of a switching crew in the yards of the company at Painesville, Ohio. On the 4th of October, 1892, six freight cars were received from the Nickel Plate Railroad Company, a road crossing the Pittsburgh & Western at Painesville. These cars had been placed on a transfer track by the Nickel Plate Company, and were removed to the yards of the Pittsburgh & Western Company by an engine and the switching gang of which Wakelee was a member. One of these cars was owned by a private company, and is known and designated in the record as "Car 96, G. H. H.," and this car is alleged to have had a defective drawbar, and to have been the direct occasion of the injury to Wakelee. In the course of the distribution of these cars in the yard of the Pittsburgh & Western Company, it came about that this car No. 96 was cut out from the rest, placed on one of the yard tracks, and blocked. It then became necessary to move two others of the same draft of cars down to this standing car, to be coupled to it. To this end, the two cars, after being cut out, were started on a downgrade in the direction of the alleged defective car, and Wakelee ordered by his conductor to ride them into position for coupling. The brake by which these moving cars were controlled was at the end of the car next the stationary car, and the brake wheel was at the upper end of an upright brake staff, and about 13 inches above the top of the car. To handle this brake, the brakeman was obliged to stand on a narrow step or shelf at the end of the car, about 23 inches below the top of the car. Thus, the proper position of the brakeman would place him on a shelf about 3 feet below the brake wheel, and between the two cars to be coupled. These two cars came together while Wakelee was setting the brake by swinging against the wheel with both hands. The two cars came so close together that the top of the stationary car struck Wakelee in the back, just at the base of the spinal column, and squeezed him between the outer rim of the brake ratchet wheel and the top of the defective car. From this he sustained permanent and serious injuries.

Two special inquiries were submitted to the jury upon which they were instructed to find, the first of which was: "Was the car No. 96, G. H. H., so defective when it passed into defendant's control and use as to make it dangerous for trainmen to handle it?" To this the jury answered, "Yes." The second interrogatory was in these words: "Was the car 96, G. H. H., inspected by defendant's inspectors when it was received into defendant's use?" The answer to this was, "No." In addition, the jury returned a general verdict in favor of the plaintiff. These two interrogatories presented the principal issues of fact involved in the case, and upon each the jury have definitely found in favor of the contention of Wakelee. The argument of the learned counsel in support of the proposition that the court erred in not instructing the jury to find for the defendant railway company is based chiefly upon the contention that there was no sufficient evidence in support of the claim that this car was so defective as to be danger-

ous to handle by trainmen. This is chiefly predicated upon the assumption that Wakelee's evidence, as a witness for himself, is so thoroughly contradicted by the testimony of other witnesses and by the circumstances of the case as not to be worthy of going to the jury. Counsel for plaintiff in error admit that this car 96 was in a defective condition, but say that the defects were not such as to enable the drawhead to slip back under the car, or to cause the cars to come closer together than if in a sound condition, and that the defects which in fact existed had nothing to do with the injury to Wakelee. This car was inspected by Murphy, an inspector for the Nickel Plate Company, on the day it was transferred to the Pittsburgh & Western Company, who made a record in these words: "G. H. H. bro. draw & Int-sill bro. end ceiling & C. plate bolts, transferred and ret: 10-4." Murphy testified that he had no recollection of this car or of its inspection, and could only speak from this entry made by him in a book kept by him for his own satisfaction. He explains his record by saying that it means that the center and intermediate sills were broken and the end ceiling,—that is, the upright planks at end of the car,—and that certain center bolts were broken, how many the entry does not show; that the extent of these breaks he never inserts, but would not have passed the car unless he had supposed it safe to handle; and that the defects he made a note of would not enable the drawhead to slide back or make the car dangerous to handle. He further says if he had found the draft timbers broken and the follower gone, he would have noted it, and marked the car defective and dangerous. The draft timbers, as shown by the evidence, are heavy timbers under the center sill and on either side of the drawhead, forming a slot to hold it up and in place. If these timbers were broken or loosened, so that they could be pushed aside, the flange on the drawhead might not hold it in place, and the drawhead might be pushed back under the car, so that they would come closer together. These draft timbers are bolted to the sill and to the floor of the car. Upon the other hand, Wakelee testified that, very shortly after he was hurt, he examined this car, and found that "the drawsill was all broken on one side, and the intermediate sill was broken, and the end sill where the flange on the drawhead comes against it was all chawed out in them. The draft sill was broken back where the followers are bolted in. The draft timber was broken out sideways. It was shivered and broken and pressed right out sideways." Witness, on cross-examination, explained what he meant by "draft timbers," saying:

"What I call the 'draft timber' is timbers that are alongside the drawhead, and hold the drawhead in place, where the followers and springs are bolted into. [Sic.] Q. Was the sill above that broken? A. Yes, sir; weakened. Q. Both draft sill and draft timber was broken? A. Yes, sir. Q. Were the bolts broken? A. I did not examine the bolts to see whether they were broken or not. Q. You noticed that the follower was broken? A. It was gone altogether."

This witness was examined and cross-examined at great length concerning the injuries to this car, and it is very clear, both from his evidence and that of experts, that, if the car was in the condition to which he testified, the drawhead might slide under the car, and thus

bring the cars much more closely together than otherwise. This presented a very sharp conflict of fact, and Murphy admitted that if he had found the draft timbers broken and pushed sidewise and the follower gone, as described by Wakelee, he would have regarded the car as dangerous, and would not have received it. Mulqueeny, inspector for the Pittsburgh & Western Company, at Painesville, had no record concerning this car, and no recollection of its inspection, and could only speak as to his habit and course of business, from which he believed he had passed this car as not dangerous to handle. In addition to this, there was some opinion evidence to the effect that defects such as those noticed in Murphy's record would make the car dangerous to handle, and the drawhead liable to give way. It is clear from this statement, without going more largely into the details of the evidence, that there was evidence that the draft timbers which hold the drawhead in place were defective, and defective to such an extent that, when these cars came together, they might give, and thus permit the drawhead to slide back in such way as to bring the car ends as close together as the deadwood on them would permit. There was therefore evidence of a defect in a vital particular, having a direct relation to the injury sustained by Wakelee.

The question of the credibility of Wakelee was one for the jury. If his evidence on this point was believed, he made out the most vital point in his case; and, unless there was some other vital question in the case upon which there was no such evidence as would reasonably support a verdict in his favor, it was not error to submit the issues to a jury. But it is next contended that there was no evidence tending to show that, even if this drawhead was defective, it brought the cars so close together as to subject Wakelee to any unusual risk, and that the court should, on this ground, have instructed for the defendant below. This contention rests upon the evidence of one Stevens that the usual space between box cars when brought together for coupling is from 10 to 12 inches, and that that space has, by experience, been shown to be enough to enable trainmen to handle such cars with safety to themselves. On this evidence, it is insisted that Wakelee, under his contract of service, assumed all risks incident and usual to his employment, and had no right to expect that more than 10 or 12 inches of space would exist between the cars he was handling, and should have protected himself accordingly. *Tuttle v. Railway Co.*, 122 U. S. 195, 7 Sup. Ct. 1166. To have instructed the jury to find for the defendant upon this ground would have been to assume that the evidence conclusively established that the protection afforded by the deadwood and drawhead on the Lehigh Valley car, on which Wakelee was standing, was in excess or equal to the usual space between two cars in perfect condition, and to have ignored the fact of the peculiar location of the brake wheel and brake step which Wakelee was compelled to use in handling these cars. The witness Anderson did say that the deadblock and deadwood plus the drawhead of the car on which Wakelee was braking would prevent that car from coming nearer to the defective car than 11½ inches. The same witness also said that, ignoring the defective drawbar, the deadwood on car 96 was 9½ inches thick, including, possibly, the block under the deadwood. The evi-

dence of Anderson therefore comes to this: That the deadwood on the two cars added to the extension of the drawbar beyond the deadwood of the Lehigh Valley car gave a space of 21 inches between the cars, even if the drawbar of car 96 was defective, as claimed. But to have taken this question of the space between these cars from the jury upon Anderson's evidence would have been to ignore the positive evidence of Wakelee that there was no deadwood on the defective car.

In the late case of *Railway Co. v. Lowery*, 20 C. C. A. 596, 598, 74 Fed. 463, 465, we had occasion to deal with the whole subject of the duty and power of a trial judge to instruct a jury to find for the one party or the other, and, in considering the power of this court to reverse a judgment for refusing a request to so instruct, we said:

"In the solution of this question, we are not to weigh the evidence, nor to determine the value of conflicting evidence. The question when a motion to direct a verdict is made is this: Is there any material and substantial evidence, which, if credited by the jury, would in law justify a verdict in favor of the other party? If there was, it cannot be held error that the trial judge declined to direct the verdict, and submitted the value of that evidence to the consideration of the jury."

In *Pleasants v. Fant*, 22 Wall. 116, Mr. Justice Miller said, touching the duty of the trial judge, that:

"In the discharge of this duty, it is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor; not whether, on all the evidence, the preponderating weight is in his favor,—that is the business of the jury; but conceding to all the evidence offered the greatest probative force which, according to the law of evidence, it is fairly entitled to, is it sufficient to justify a verdict?"

Applying these well-settled principles, it must be conceded that the court below could not ignore the evidence of Wakelee that there were no deadwoods on this defective car. If the jury should accept Wakelee's evidence rather than the vague and speculative evidence of Anderson to the contrary, and should also find that the drawbar of car 96 was defective, as testified to by Wakelee, it would follow that the two cars, when brought together for coupling, would have no space between them other than that afforded by the drawbar and deadwood of the Lehigh Valley car, a space of but  $11\frac{1}{2}$  inches. Assuming this space to have existed on the uncontradicted evidence in the case, would it have been proper for the court, on the evidence of Stevens that from 10 to 12 inches was safe, and was the usual space between cars so brought together, to have instructed the jury that Wakelee had assumed all the risks incident to handling cars where a space of that much existed when brought together? We think not. To have done so would have been to ignore the peculiar location and character of the brake wheel on this Lehigh Valley car, and the position in which Wakelee must have stood in order to apply the brake and control the movements of the cars he was directed to ride. A space of  $11\frac{1}{2}$  inches between cars might be sufficient for a man on the ground between the cars, but not sufficient to set a brake while standing on a 10-inch shelf between the ends of two cars. Stevens did not say that from 10 to 12 inches was the usual space between cars where the brake was so situated, nor that that space, under the circumstances of this case, was



usual or safe. The duty expected from Wakelee was that he would control the speed of these cars moving on a downgrade, and check them at the right moment. To do his duty required the full strength of the operator, and that it should be exerted by swinging against the ratchet wheel with both arms. The fact that this ratchet was but 3 feet above the step on which he was required to stand would seem to involve more or less bending of the body, and consequently more space than a mere coupling from the ground. The question was one for the jury, and was properly submitted to them. The question as to whether Wakelee assumed a careless and unnecessary posture, and thus brought his injury upon himself, was one of contributory negligence, and was properly submitted to the jury, under an instruction exceedingly favorable to the plaintiff in error.

We come now to the question of Wakelee's competency as a witness. When he was offered as a witness, counsel stated that he was a person of unsound mind, and at the time an inmate of an insane asylum, having been committed under an inquisition of lunacy. When objection was made to his competency, the court heard evidence, including that of the medical men in charge of the asylum of which he was an inmate, as to the character and extent of his mental unsoundness, and also caused him to be elaborately examined upon the questions at issue in the suit, that it might be determined to what extent he was unsound and how far his mind and memory were out of balance. After a full consideration of all this evidence, the court ruled that he might be heard, and that the jury should determine, under proper instructions, how far his mental state affected his memory and credibility. This is now assigned as error. The practice followed by the court in this matter was that approved by the supreme court in *District of Columbia v. Armes*, 107 U. S. 519, 2 Sup. Ct. 840. The general statement that at the common law a person non compos mentis is incompetent to testify is doubtless true. *Hartford v. Palmer*, 16 Johns. 143; *Cannady v. Lynch*, 27 Minn. 435, 8 N. W. 164.

In the case of *Reg. v. Hill*, 5 Cox, Cr. Cas. 259, the proper meaning of this general statement of the rule was under consideration, and the chief justice said:

"Various authorities have been referred to which lay down the law that a person non compos mentis is not an admissible witness. But in what sense is the expression 'non compos mentis' employed? If a person be so to such an extent as not to understand the nature of an oath, he is not admissible. But a person subject to a considerable amount of insane delusion may yet be under the sanction of an oath, and capable of giving very material evidence upon the subject-matter under consideration. The proper test must always be, does the lunatic understand what he is saying, and does he understand the obligation of an oath? The lunatic may be examined himself, that his state of mind may be discovered, and witnesses may be adduced to show in what state of sanity or insanity he actually is. Still, if he can stand the test proposed, the jury must determine all the rest."

In the case of *District of Columbia v. Armes*, cited above, the supreme court, referring to *Reg. v. Hill*, said: "The doctrine of this decision has never been overruled, that we are aware of;" and added: "The general rule, therefore, is that a lunatic or a person affected with insanity is admissible as a witness if he have sufficient understanding

to apprehend the obligation of an oath, and to be capable of giving a correct account of the matters he has seen or heard in reference to the questions at issue; and whether he have that understanding is a question to be determined by the court, upon examination of the party himself and any competent witnesses who can speak to the nature and extent of his insanity."

But it is said that the Ohio statute makes a person of unsound mind absolutely incompetent. Section 5240, Ohio Rev. St., is in these words:

"All persons are competent witnesses, except those of unsound mind, and children under ten years of age who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly."

But the question remains, who is a person of unsound mind? That the person has been found insane, and is an inmate of an insane asylum, affords prima facie evidence that he is of unsound mind, within the meaning of the provision, and operates to throw the burden of proving competency upon the party offering him. This was the ruling of Judge Ricks, who tried this case, and, in our judgment, was a correct exposition of the law. Whether he was so unsound in mind and memory as to be totally incapable of testifying is as open a question under this statute as at the common law. The statute is but a declaration of the common law. To suppose that it was meant to disqualify every person who is of any degree of unsoundness would bring about an intolerable condition of things, and, under such circumstances, it is not to be presumed that the common law was intended to be altered or modified to any greater extent than indicated by a reasonable construction of the words of the statute. To say that a person of unsound mind is incapable of testifying is but to state the general rule of the common law. But at the common law the unsoundness must be such as that he is incapable of understanding the nature of an oath or giving a coherent statement touching the matter upon which he is examined. In *Cannady v. Lynch*, 27 Minn. 435, 8 N. W. 164, a similar statute was held not to extend the exclusiveness of the common law. The preliminary examination developed that Wakelee had a delusion touching his physical condition, but that on all other matters he was sound. His evidence was clear, coherent, and consistent, as shown by this record, and there exists no reason to doubt his capability of testifying fully and truthfully. We think the court did not err in permitting him to be heard as a witness.

Upon the preliminary examination the defendant below offered as evidence of his unsoundness the record of the state court adjudging him insane, and committing him to an asylum. Upon a general objection this was excluded. The record is silent as to the ground for this ruling. The record in the lunacy case, as contained in the transcript before us, is not a properly certified record, and it may be that this was the ground of exclusion. We ought not to reverse if the ruling was correct for any reason. But, whether properly or improperly excluded, the ruling was wholly immaterial. The fact of commitment to an asylum for the insane was admitted by Wakelee's counsel, as well as proven by Wakelee's medical attendants. He was produced in

court by the authorities having him in custody, and the fact of present mental unsoundness was not a disputed issue. No harm could possibly result from the exclusion of this record of commitment.

Another error relating to evidence remains to be considered. Wakelee was recalled and examined as to statements made to him by one Roe, contrary to his evidence in court, Roe having been theretofore examined as a witness for the railroad company. It is said that this evidence as to Roe's statement out of court was incompetent, no sufficient ground having been laid for thus contradicting him. The objection was not specific. If the ground now stated had then been made the basis for the objection, the evidence might have been excluded, or Roe might have been recalled on a proper showing, and ground laid for this evidence. When a general objection is made to the reception of evidence, without stating the ground of the objection, this court will treat the objection as vague and nugatory, unless the evidence admitted could under no circumstances have been competent. *Noonan v. Mining Co.*, 121 U. S. 393, 7 Sup. Ct. 911; *Toplitz v. Hedden*, 146 U. S. 252, 13 Sup. Ct. 70.

The bill of exceptions shows that defendants below, before the argument of the cause, handed to the court a series of nine propositions of law, with the request that they should be each charged, "separately, as the law applicable to this case." After the delivery of the court's instructions to the jury, the defendant reserved an exception in these words: "Defendants except to the refusal of the court to give to the jury separately all of the requests asked by the defendant." It is now insisted that if any one of this long series of propositions should have been given, and was not included or covered by the charge as delivered, the judgment must be reversed. Several of the propositions contained in this series of requests were substantially given. Others were not included because not sound law. Possibly one or two of the series were applicable, and would doubtless have been given if the attention of the court had been specifically called to the omission. It is well settled that an exception to a charge, in order to be available upon a writ of error, should be specific, and point out distinctly the matter deemed erroneous. *Carver v. Jackson*, 4 Pet. 1; *Unitarian Church v. Faulkner*, 91 U. S. 415; *Burton v. Ferry Co.*, 114 U. S. 474, 5 Sup. Ct. 960. So it is equally well settled that a general exception to the refusal of the court to grant a series of instructions presented as one request will be of no avail for the purpose of reversing the judgment, although it may happen that some of the series ought to have been given. *Harvey v. Tyler*, 2 Wall. 328; *Worthington v. Mason*, 101 U. S. 149; *Bogk v. Gassert*, 149 U. S. 17, 13 Sup. Ct. 738; *Moulor v. Insurance Co.*, 111 U. S. 335, 4 Sup. Ct. 466. An exception in the general terms of the one under consideration, by which it is sought to put the court in error for failing to give a series of propositions requested before the argument and charge, and not repeated afterwards, is too vague. The object of an exception is to definitely call the attention of the court to either an omission in the charge, or to some affirmative misstatement. The exception must be taken while the jury is at the bar. *Johnson v. Garber*, 19 C. C. A. 556, 73 Fed. 523. The reason for requiring that exceptions shall be definite, and made while the

jury are at the bar, is that the court may correct the error or omission pointed out. The exception for failing to give this entire series of requests could not serve this purpose, as it did not advise the court of any particular omission.

Propositions Nos. 2, 5, 6, 7, and 8 presented different phases of the question of the presumption as to the proper inspection of cars and machinery coming upon one road from another, and of the discharge of duty by inspectors. Each of these requests was faulty in totally ignoring the Ohio statute of April 2, 1890, the second section of which provides that it shall be unlawful for any railroad company to knowingly or negligently use or operate any defective car, and that, in actions by an employé for an injury by reason of such defect, the company shall be deemed to have had knowledge of such defect, and that this presumption shall stand as *prima facie* evidence of negligence on the part of the company. 87 Ohio Laws, p. 149. This act was construed by the supreme court of Ohio in *Railway Co. v. Erick*, 51 Ohio St. 146, 37 N. E. 128, the court saying:

"The presumption of knowledge of the defect before and at the time of the injury is, by this statute, chargeable to the company; and this statutory presumption cannot be overcome by proof of facts which only raise a presumption that the company did not have such knowledge. Competent and careful inspectors are presumed to properly inspect the cars and their attachments, but such presumption would not overcome the statutory presumption of knowledge of defects before and at the time of the injury. It would take an actual and proper inspection, or its equivalent, to overcome the statutory presumption of knowledge of such defects. It will be noticed that this section of the statute also provides that, in the trial of a personal injury case against a railroad company, the fact of such defect in its cars or their attachments shall be *prima facie* evidence of negligence on the part of such corporation. It will be noticed that it is not the servants or such as are fellow servants that are deemed guilty of negligence, but the corporation itself. In such case, when the plaintiff has shown that he was injured, and that such injury was caused by a defect in the cars or their appliances, the statute raises the presumption of negligence on part of the company, and the burden of proof is thrown upon the company to overcome the *prima facie* case of negligence thus made by the statute."

There was no direct evidence that this car was ever inspected by this company, and the question as to whether such an inspection was ever in fact made by the plaintiff in error was submitted to the jury, who found that no inspection was made when received by the defendant company. The statutory presumption of negligence was therefore not overcome, and the requests we have referred to were properly refused, as altogether ignoring this presumption. The judgment must be affirmed.

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In re WEEKS.

(District Court, D. Vermont. October 6, 1897.)

**1. INTERNAL REVENUE—COLLECTORS AS WITNESSES IN PROSECUTIONS UNDER STATE LIQUOR LAWS.**

An instruction issued by the commissioner of internal revenue, directing collectors and their deputies to refuse to produce, in criminal prosecutions of liquor dealers in the state courts, the returns made to the collectors, or the lists showing payments of federal liquor taxes, or to give information derived from official sources as to the fact of such payments, is valid,

and in accordance with the federal laws. Rev. St. U. S. §§ 251, 321, 3238-3240, 3244.

2. SAME.

A state has no right to federal instruments of purely federal character for proof, unless they are left within its reach.

This was a proceeding in habeas corpus in behalf of Arthur L. Weeks, who was imprisoned under a commitment for contempt by a state court of Vermont for refusal to produce evidence in relation to the payment of United States liquor taxes.

John H. Senter, for relator.

Fred A. Howland, for the State of Vermont.

**WHEELER**, District Judge. The laws of the United States provide that the secretary of the treasury shall prescribe "rules and regulations not inconsistent with law, to be used under and in the execution and enforcement of the various provisions of the internal revenue laws," and "give such directions to collectors, and prescribe such rules and forms to be observed by them, as may be necessary for the proper execution of the law" (Rev. St. § 251); that "the commissioner of internal revenue, under the direction of the secretary of the treasury, shall have general superintendence of the assessment and collection of all duties and taxes, now or hereafter imposed by any law providing internal revenue, and shall prepare and distribute all the instructions, regulations, directions, forms, blanks, stamps, and other matters pertaining to the assessment and collection of internal revenue" (section 321); for a special tax on, among others, retail dealers in liquors (section 3244); to be paid by stamps (section 3238); that collectors shall place and keep in their offices, for public inspection, an alphabetical list of the names of all persons who have paid such special taxes within their districts, with the time, business, and place of business for which such taxes have been paid (section 3240); that every person engaged in such business shall place and keep conspicuously in his establishment or place of business all stamps denoting the payment of such tax (section 3239). The laws of the state provide for punishing common liquor sellers, and for abating and enjoining places of sale as common nuisances, and that "the payment of the United States special tax as a liquor seller shall be held to be prima facie evidence that the person paying the same is a common seller, and the premises so kept by him are a common nuisance." V. S. § 4476. The collector's office for this district is kept at Portsmouth, N. H. The commissioner of internal revenue, presumably with approval of the secretary of the treasury, issued on March 31, 1888, instructions to this collector, containing, among others, these, which have not been modified, but rather extended:

"A special taxpayer is required, under severe pains and penalties, to make his return under oath. The information is extorted from him. It is largely in the nature of a privileged communication, which he is required to make to the revenue officer, for revenue purposes, and for those alone. It is not believed the courts will require a disclosure of evidence thus obtained for use in a criminal prosecution of him who furnished it. It is respectfully insisted that neither the return itself, nor information derived from it, should be admitted on trial, especially if objected to by the accused."

In the case of *Gardner v. Anderson* (U. S. Cir. Ct. D. Md., before Judges Bond and Giles) 22 Int. Rev. Rec. 41, Fed. Cas. No. 5,220, although the point involved was as to official communications between officers of the government, the court made a remark which is applicable to the question now under consideration, viz.:

"That the communication was in its nature an official communication, relating to public business, which it was sought to prove by means of a witness whose only knowledge of it was derived from his official employment, which was contrary to public policy, and not to be permitted.' You and your deputies should, of course, respond to the subpoenas of the court, but you should respectfully decline to produce either the alphabetical list or the returns on Form 11." 34 Int. Rev. Rec. 261.

The relator is deputy collector in Vermont, and was summoned to attend as a witness at the trials of several persons in a court of this state for selling liquor, and to produce and exhibit all books and papers in his possession showing, or tending to show, that the respondents had paid any special tax for the sale of liquors in 1896 or 1897 at Montpelier. These instructions had been furnished to him by his superior for his guidance. In the trial of one respondent he was asked whether the respondent had ever paid him any money for the purpose of obtaining a retail liquor dealer's special tax stamp, and answered that he could not remember, but supposed he had means of ascertaining; whereupon he was asked to ascertain and state the fact, which he declined to do, because his means of knowledge of it had come to him solely in his official capacity, and of the instructions from the treasury and internal revenue department, and for this refusal he was adjudged guilty of contempt. This writ is brought for relief from commitment on this judgment. That the national and state governments have each a separate jurisdiction for their operations, although within the same territory, seems to be well and clearly shown in many cases in the supreme court of the United States whose authority must be paramount; and especially by *In re Neagle*, 135 U. S. 1, 10 Sup. Ct. 658, where the relator was released from a charge of murder in a state court for a killing done in protecting a United States judge traveling on his official business. This killing was held to be as much without the jurisdiction, although within the limits, of the state, as if it had been done without its limits. The federal government could doubtless lay these internal taxes upon liquor dealers, and provide for their collection by collectors and deputies, or otherwise, and by methods, open or secret, accessible or inaccessible, or accessible only in prescribed ways, for evidence in its own or the state courts. It did provide that the fact of the payment of the tax should be open to all, and that proof of it should be accessible to all by examination of the authentic alphabetical list of the taxpayers and their places of business, for public inspection, in collectors' offices, and by the stamps conspicuously to be kept by sellers in the places of business. The provision of these open and convenient methods of proof of this fact somewhat excludes the use of any government agencies otherwise for that purpose. The federal law is to be resorted to for ascertaining whether the instructions or directions are contrary to law; and they do not appear to be in any respect opposed to it, but rather to be in accord-

ance with it. The relator, as federal officer, was in duty bound to obey them. This fact of payment of the special tax, of which the federal law provides such convenient proof, is exactly what the state statute makes evidence of being a common seller, and of keeping a nuisance. When the state lays hold of a federal officer, and his doings as such, for proof contrary to his duty in respect to the tax, instead of resorting to the evidence provided by that government, it interferes with the lawful operations of the federal government in laying and collecting its taxes. The federal government cannot dictate as to evidence in state courts, but it cannot be required to provide evidence for them; and the state has no right to federal instruments of purely federal character for proof, unless they are left within its reach, and these are not, but are put without that reach. This is somewhat as if a federal district attorney or grand juror should be imprisoned to compel disclosure of proceedings before the grand jury, which might be very material in a trial elsewhere. This disclosure would be contrary to legal duty, as that would be, and such imprisonment would seem to be quite clearly contrary to the laws of the United States.

This case differs from *In re Hirsch*, 74 Fed. 928, in respect to the proof required, and the regulations, instructions, and directions shown, where the relator was remanded, and is similar to *In re Huttman*, 70 Fed. 699, where the relator was discharged.

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AMERICAN STREET CAR ADVERTISING CO. v. NEWTON ST. RY. CO.  
et al.

(Circuit Court, D. Massachusetts. August 6, 1897.)

No. 770.

1. PATENTS—COMBINATION CLAIMS—AGGREGATIONS.

The unnecessary enumeration, as elements of a combination, of parts which are necessary to the operation of a device, but which may be understood and can be supplied by those ordinarily skilled in the art, does not, under the circumstances of this case, make the claim one for an unpatentable aggregation.

2. SAME.

The Randall patent, No. 380,696, for an advertising rack to be used in street cars, *held*, on the proofs submitted to the court, to cover a novel, useful, and patentable invention, and also *held* infringed.

This was a suit in equity by the American Street Car Advertising Company against the Newton Street-Railway Company and others, for alleged infringement of letters patent No. 380,696, issued April 10, 1888, to Isaac H. Randall, for an advertising rack.

William Quinby and Edward S. Beach, for complainant.  
Chas. G. Coe, for defendants.

PUTNAM, Circuit Judge. As the record is brought to us, it presents a close case. What the respondents have done was merely as follows: They constructed street-railway cars, built where the sides

join the roof with the usual concave cornice or cove. In this construction, they made use of the usual moldings for a proper finish at the lower and upper edges of the casing of this cornice or cove. At the inner edges of these moldings they cut grooves in the plane of the exterior surface of the casing; so that by holding up advertising cards whose width was somewhat more than the right line distance between the two moldings, and by inserting their edges in the grooves, and then pressing back the cards against the concave casing, the edges of the cards slide down into the grooves, and the cards take the concave form of the casing, and rest smoothly and securely against it. The use of the concave casing, with or without the moldings, for thus finishing the cars in the way described, is, of course, common in the art of construction. It is a matter of common knowledge that the respondents were entitled to use the same. If the respondents desired also, for any purpose whatever, to cut grooves in the moldings, the court can well conceive that it would follow as a matter of course, in the greater number of instances, that they would be cut in the plane of the convex casing. Therefore the court might well look through the record with the expectancy of finding that all done by the respondents was matter common to the art of construction. Yet the respondents have not shown us the state of the art in this respect beyond what is quite frequent in causes of this nature; that is, beyond the introduction of extracts from the records of the patent office, which often show an eccentric portion of the state of the art rather than the whole of it.

The complainant's patent was issued April 10, 1888, and purports to cover "a new and useful advertising rack for street cars." The claim in controversy is as follows:

"An advertising rack adapted for use in a street car, consisting of the body, A, having a continuous concave face, and longitudinal moldings along the edges thereof, having grooves, c, adjacent to and in substantially the same plane as the concave face of the body, in combination with screws or equivalent devices for connecting the rack to the car, engaging with the moldings outside the grooves therein, substantially as and for the purpose set forth."

The first ground of defense relates to the contents of the file wrapper. The claim as originally put into the patent office was as follows:

"An advertising rack consisting of the curved body, A, and longitudinal strips or moldings, D, D, and provided with longitudinal grooves, c, c, substantially as shown and described, and for the purposes set forth."

This claim being rejected, the applicant proceeded to amend by inserting after the words "the curved body, A," the words "presenting a concave surface to the front." As amended, the claim still met with objection at the patent office; and finally the applicant canceled the entire claim, and offered the one now in suit, which was allowed. The law applicable to proceedings of this nature has been fully explained by the court of appeals for this circuit in *Reece Buttonhole Mach. Co. v. Globe Buttonhole Mach. Co.*, 10 C. C. A. 194, 61 Fed. 958; but the subject-matter is not in any event of importance in the case at bar, because there is no attempt to broaden out the claim in issue beyond what it expressly calls for, and the claim



as finally allowed by the patent office is clearly coincident with the complainant's invention.

Another ground of defense relates to the fact that the claim in issue enumerates the screws or equivalent devices for connecting the complainant's rack to the car, and states, in substance, that these screws or equivalent devices engage with the moldings outside the grooves therein. Beyond the fact that the respondents claim that this constitutes an aggregation, it is not entirely clear what their ground of defense is in this connection. It needs no discussion to show that this does not make what is understood by the term "aggregation,"—a term, moreover, dangerous and misleading, unless used and applied with very great consideration and care. The screws or equivalent devices, and the method of their use, described in the claim, are essential to the combination to enable it to perform its function, and, combined with it, operate to produce a single result only. It is not necessary to enlarge into extended explanations to show that this does not constitute an aggregation. Probably the best practical definition of an aggregation is found in *Hailes v. Van Wormer*, 20 Wall. 353, 368, where the court said as follows:

"It must be conceded that a new combination, if it produces new and useful results, is patentable, though all the constituents of the combination were well known and in common use before the combination was made. But the results must be a product of the combination, and not a mere aggregate of several results, each the complete product of one of the combined elements."

It is clear that what is covered by the claim at issue does not produce several results within this language. The most that can be said with reference to it is that inasmuch as it is plainly obvious to any mechanic that screws or equivalent devices are essential for attaching a rack to the car, and that as also, almost as a matter of course, the screws would be made use of by any ordinary mechanic in the place pointed out in the claim, it was unnecessary for the complainant to make references to these details as though they were elements of his combination; and therefore the most that can be deduced therefrom is that, perhaps, by thus enumerating them as elements, the patentee limited his claim accordingly. We perceive no principle whatever by virtue of which it can be said that the claim is invalid for this reason. The law, which deals mainly with essentials, is not inclined to permit rights to be destroyed by nonessentials, although it is true that persons interested may so insist on nonessentials as to unavoidably limit and qualify their rights. The authorities ordinarily cited to establish a different proposition do not, on examination, seem to us to support it. They consist mainly of references to patent-office decisions relating to the practice of that office, and, so far as that is concerned, based on good sense, and also tending to promote the interests of applicants for patents; but, like some other rules of the patent office, they do not invalidate a patent after it is issued. The respondents have furnished us with no case in point; and the only one which we have been able to find is *Machine Co. v. Woodward*, 53 Fed. 481, 483, where it is said that certain claims were invalidated by the fact that a foot treadle was enumerated as an element, the court observing that the treadle played

no part in the function of the combination. So, perhaps, it may be said that the screws or equivalent devices in the case at bar play no part in the function of the combination. But the proposition laid down by the court in the case referred to does not appear to have received particular consideration, and, as we have already shown, it is based on neither principle nor authority. It has been commonly said by the courts, as was said by Mr. Justice Curtis in *Forbush v. Cook*, 2 Fish. Pat. Cas. 668, Fed. Cas. No. 4,931, that it is not requisite to include in a claim, as elements thereof, all parts of the machine which are necessary to its action, so far as they may be understood and can be supplied by those who are ordinarily skilled in the art; and a careful examination of the cases ordinarily cited to the proposition that an enumeration of elements of that character invalidates a claim will be found to establish no proposition beyond that thus laid down. We must therefore hold that this unnecessary designation of the elements to which we refer does not invalidate the claim.

Another ground of defense is the common one of anticipation, and we have been referred to numerous patents with reference thereto. These are pressed on us, both with regard to the question of anticipation strictly, and also as showing such a state of the art as defeats any claim of patentable invention in the device at issue. We do not find it necessary to discuss individually the patents thus cited, nor to explain precisely how they bear on each of the topics referred to. It is sufficient to say that none of them anticipate all the elements found in the claim in issue, and none of them are capable of being operated or used in the manner in which complainant's device was intended to be operated and used, as clearly shown by the specification. This was in all respects the same as the method of use and operation of the moldings in connection with the concave casing built into their cars by the respondents, which we have already described. The result was a facility of inserting cards in such a way that, after being pressed back, they would rest smoothly and securely against the concave surface of the casing. These particular features appear in none of the alleged anticipatory matters, and are sufficient to distinguish the complainant's device from all of them. By combining what preceded the complainant, the result which he secured very likely could have been obtained; but this is not the test, as has been repeated over and over again by the courts. *Packard v. Lacing-Stud Co.*, 16 C. C. A. 639, 70 Fed. 66, 68; *Boston & R. Electric St. Ry. Co. v. Bemis Car-Box Co.*, 25 C. C. A. 420, 80 Fed. 287, 289. The same proposition was also well stated by Judge Lowell in *Stewart v. Mahoney*, 5 Fed. 302, 305, who at the same time added some observations which perhaps will illustrate the character of the invention in the case at bar. He said:

"I have examined the evidence and the arguments with care, and I am of opinion that there was both novelty and utility in the subject of the first claim, and that it has been infringed. Many chairs had been made that resembled the plaintiff's in many particulars, and which might easily have been so modified as to embody his invention; but they do not appear to have been so modified before his time. The question of novelty, including in that word the discovery or invention which will be sufficient to support a patent, is often a very

difficult one to decide. Invention often involves a new result, first thought of by the patentee; and in such cases the fact that the mechanical changes he has made are not difficult is often unimportant."

The question of utility must clearly be resolved in favor of the complainant. If there were any doubt about this, it would be entirely obviated by the fact that the respondents, in their carefully drawn specifications for the construction of the cars which are alleged to infringe complainant's patent, required in precise terms that they should be constructed "with Randall's patent advertising racks, built in." Novelty and utility appearing, we are compelled, on the evidence which we have with reference to the state of the art, to yield to the presumption in favor of patentable invention arising from the issue of the patent, or assume to have more practical knowledge of this limited and special subject-matter than we ought to assume. *Packard v. Lacing-Stud Co.*, 16 C. C. A. 640, 70 Fed., at page 67; *Boston & R. Electric St. Ry. Co. v. Bemis Car-Box Co.*, 25 C. C. A. 423, 80 Fed., at page 290.

The question of infringement presents no difficulties. The only possible ground of defense with reference to this branch of the case is the proposition that the patent covers only a portable rack, complete in itself, while the alleged infringing device is a part of the structure of the car. That this proposition does not address itself to the intelligent, practical mind, acquainted with the art, is plain from the reference we have already made to the specifications for building the cars. They describe the device as the Randall patent rack, although to be built in. Construing strictly, as we must under the circumstances, the complainant's claim in issue, yet every element of it is found in the cars of the respondent corporation. If, in drawing its specifications, it had intended to accomplish what would not infringe the patent, by requiring that the rack should be built into the car, this would have been clearly only an attempted evasion; but the case does not show that it had any such intention. The manner in which it framed its specifications indicates that it intended and understood that it was to obtain the complainant's device, whatever may have been the intention or understanding of the parties who built the cars which the respondent corporation operates.

Some other matters were called to the attention of the court, but they are clearly so unimportant that they do not require any expression of opinion from us.

The bill is filed, not only against the Newton Street-Railway Company, which controls the cars alleged to infringe, but also against the president and treasurer of the company. We do not perceive any such case made against these individuals as justifies us in holding them responsible in this suit. Therefore, unless the complainant discontinues as to them, with costs, the final decree will provide that the bill shall be dismissed so far as they are concerned. Let the complainant file a draft decree against the Newton Street-Railway Company for an injunction and an account, with the direction that, by the final decree, the bill shall be dismissed as against Coffin and Smith, with costs; such draft decree to be filed on or before the 4th day of September next, and corrections thereof to be filed on or before the 11th day of September next.

GRAHAM v. EARL.<sup>1</sup>

(Circuit Court of Appeals, Ninth Circuit. October 18, 1897.)

No. 315.

## 1. PATENTS—ACTION FOR INFRINGEMENT—PLEADING.

Where the complaint describes the invention of the patent sued on by the name given it in the patent, and then specifically refers to the letters patent "for further and fuller description of the invention therein patented," such reference imports into the complaint the description contained in the patent, and is controlling as to the nature of the invention.

## 2. SAME—NOVELTY AND INFRINGEMENT—CONCLUSIVENESS OF VERDICT—APPEAL.

The questions of novelty and infringement are mixed questions of law and fact, so that, if the court correctly instructs the jury on the applicable questions of law, the verdict is conclusive on appeal, unless there is an entire want of evidence on which to base it.

## 3. SAME—CONSTRUCTION OF DISCLAIMERS.

In determining the meaning of a disclaimer, the same rules are to be observed as in construing any other written instrument; the purpose being to carry out the intention of the person executing it, as indicated by its language, when construed with reference to the proceedings of which it forms a part. It must therefore be read in connection with the original specifications, of which it becomes a part when recorded.

## 4. SAME—DISCLAIMER OF BROAD CLAIMS IN COMBINATION.

A disclaimer of broad claims in a combination does not operate as a disclaimer of other and narrower claims, covering specific means, which are included in the language of such broad claims.

## 5. SAME—PARTIES LIABLE TO INFRINGEMENT—AGENTS AND MANAGERS.

An agent or manager for a given state, who is engaged in leasing infringing fruit cars to shippers for his principals, who are the owners thereof, is himself liable as an infringer, though he receives a regular salary, and has no interest in the profits of the business.

## 6. SAME.

The Graham reissue, No. 11,324, for a ventilator and combined ventilator and refrigerator car, is not invalid because of any expansion of the invention described in the original patent; and the claims thereof are infringed by a refrigerator car having ventilators made according to the Kerby patent, No. 537,293.

In Error to the Circuit Court of the United States for the Northern District of California.

This was an action at law by Robert Graham against Edwin T. Earl to recover damages for infringement of a patent relating to ventilators for refrigerator cars. In the circuit court there was a verdict and judgment for plaintiff for nominal damages, in the sum of one dollar, and the defendant brings error.

Wheaton, Kalloch & Kierce, E. S. Pillsbury, and Lewis L. Coburn, for plaintiff in error.

John H. Miller, John L. Boone, and Guy C. Earl, for defendant in error.

Before GILBERT, Circuit Judge, and HAWLEY and DE HAVEN, District Judges.

DE HAVEN, District Judge. This action was brought to recover damages for the infringement of reissued letters patent numbered 11,324, granted to the plaintiff on the 18th day of April, 1893, and

entitled, "Ventilator and Combined Ventilator and Refrigerator Car." The complaint alleges that the invention patented was "a ventilator and combined ventilator and refrigerator car," but makes special reference to such letters "for further and fuller description of the invention therein patented"; and this reference imports into the complaint the description contained in the patent, and is controlling as to the nature of the invention patented.

The action was tried by a jury, and a verdict rendered in favor of the plaintiff for damages in the sum of one dollar. The case is brought here by the defendant on a writ of error to reverse the judgment rendered on such verdict in favor of the plaintiff. The specific claims of invention made by the plaintiff in the application upon which such reissued letters patent are based, so far as necessary to be here set out, are as follows:

"(1) In combination with a car having separate and independent openings, a lid or cover for each opening, adapted to close the latter, and means for holding the lids open in oppositely inclined positions, whereby said lids are adapted, not only to form closures for the openings, but also to act as funnels to insure a circulation of the air within the car. (2) In combination with a car having separate and independent openings, a lid or cover for each opening, adapted to close the latter, and means carried by the respective lids for holding them open in oppositely inclined positions. (3) In combination with a car having separate and independent openings, a lid or cover for each opening, adapted to close the latter, and foldable devices, substantially such as shown and described, for holding the lids open in oppositely inclined directions. (4) In combination with a car having separate and independent openings, movable covers or lids adapted to close such openings, and side wings hinged to such lids or covers, and adapted to sustain them in oppositely inclined positions, and to form, in connection with the lids, a funnel."

On April 11, 1895, the plaintiff filed with the commissioner of patents a disclaimer in full of the foregoing claims 1 and 2. On April 9, 1895, there was granted to one Thomas B. Kerby patent numbered 537,293, for a ventilator for refrigerator cars. This ventilator was afterwards, and before the commencement of this action, attached to and used upon refrigerator cars employed in transporting fruit from California to the East, and such use of the Kerby ventilator constitutes the alleged infringement of plaintiff's patent. A sufficiently accurate description of the Kerby ventilator, and by means of which it can be easily compared with the ventilator covered by plaintiff's revised letters patent, is contained in one of the briefs filed for the plaintiff in error, and is as follows:

"This Kerby ventilator is applied to the ordinary four openings of refrigerator cars, using the lids of the openings for the upper part of the ventilator. The lids are made of double thicknesses of boards, placed in parallel planes with each other, and far enough apart to leave a pocket between them, into which the screen and side wings of the ventilator are shoved and closed when the ventilator is put out of use. When the ventilator is in use the said lid is held up by the frame of the Kerby screen, and the side wings do not hold or assist in holding the lids in any position, or in any way. The wide ends of the side wings are hinged to the screen frame, and they swing around horizontally when they are being put into or taken out of use."

In addition to the foregoing, other facts will be hereinafter stated in the discussion of the several points to which they more particularly relate.

1. It is earnestly insisted by the plaintiff in error that the court admitted irrelevant testimony tending to show that plaintiff's patent covered a combined ventilator and refrigerator car as well as ventilator. We are satisfied from a careful examination of the record that this contention cannot be sustained. It is possible that some of the questions asked in behalf of the plaintiff, and allowed by the court, were not so specific and accurate in their reference to the particular device covered by the plaintiff's patent as to be entirely free from criticism, but it is clear to us that the jury could not possibly have been misled thereby. And in submitting the case to the jury the judge took occasion to particularly instruct them as follows:

"A patent for invention only covers and protects what is particularly pointed out and claimed as the patentee's invention in the claims of the patent. It is usually expedient for the specifications of a patent to describe things already in use, and which constitute no part of the invention claimed, in order to better explain what the invention is. The present patent mentions 'refrigerator cars,' yet those refrigerator cars were admittedly older than the plaintiff's alleged invention, and are not claimed as any part of his invention in the patent. You will therefore consider that nothing is protected by the patent that is described in its specifications, excepting only what is specified in the claim of the patent as the invention which the patentee claims as belonging to him."

It would not seem possible that, after so explicit an instruction, the jury failed to understand that plaintiff's patent did not cover either a refrigerator or ventilator car, or anything other than the ventilating device claimed by the plaintiff as his invention.

2. It is urged by plaintiff in error that the patent issued to the plaintiff in the action is void for want of novelty in the invention claimed, and also that the device covered by the Kerby patent is not an infringement of the plaintiff's patent. This contention, in each of its branches, presents a mixed question of law and of fact. 1 Rob. Pat. § 272; *Paving Co. v. Molitor*, 113 U. S. 609, 5 Sup. Ct. 618. The circuit court correctly instructed the jury in relation to the law applicable to each of these questions, and, unless there was an entire want of evidence upon which to base the verdict returned by the jury, such verdict is conclusive here as to every fact embraced within the issues submitted to the jury for decision. This results from the well-settled rule that on a writ of error the appellate court can only consider errors of law, and that the review under such writ does not extend to matters of fact. *Zeller's Lessee v. Eckert*, 4 How. 289. Without undertaking to give even a synopsis of the evidence bearing upon the question of the novelty of the invention covered by plaintiff's patent, it is sufficient for us to say that, in our judgment, there was ample evidence to sustain the verdict of the jury upon this point. Nor are we able to agree with the further contention of plaintiff in error that this court should declare, as a matter of law, that the Kerby device is not an infringement upon the invention covered by the plaintiff's patent. Of course, there may be cases in which there is such a marked dissimilarity in the structure and functions of devices covered by different patents that a court may declare, as a matter of law, that the one does not infringe upon the other, but such is not the case before us.

Claims 3 and 4 of plaintiff's patent cover a foldable ventilator in combination with a refrigerator car, while the Kerby device is also a foldable ventilator in combination with such a car. There is a slight difference between the two, in reference to the mode by which the side wings are hinged to the cover of the ventilator. In the plaintiff's invention, such wings are hinged directly to the cover, while in the Kerby device the side wings are hinged to the frame of a screen, such screen being placed in front of the ventilator, and hinged to its cover; but, notwithstanding this difference in the mode of holding the side wings of the ventilator in place, we do not think it can be said that the two devices do not perform the same function, and in the same way. It is clear both are foldable devices, and both accomplish the same general purpose of deflecting and directing the air down into a moving car at one end, and permitting it to pass out at the other; and both, when not in use, are folded in such a manner as not to be in the way of those operating the train. In view of these facts, we are not prepared to say, as matter of law, that the one ventilating device is not the equivalent of the other.

3. The plaintiff in error further insists that under the evidence and the instructions of the court the jury could not possibly have found that the Kerby device was an infringement of any other than claims 3 and 4 of the plaintiff's reissued letters patent. And from this it is argued that the judgment should be reversed on the ground that the plaintiff's disclaimer of claims 1 and 2 of his reissued letters patent necessarily operated as a disclaimer of the specific combination or invention described in claims 3 and 4 of the same patent. Claims 1 and 2 of the patent just referred to are exceedingly broad, and cover all possible means for holding the lids of the ventilators open in oppositely inclined positions, while its claims 3 and 4 are more narrow, and cover only the specific means therein particularly described for holding such lids open. The whole argument of the plaintiff in error upon this point seems to rest upon the proposition that, as claims 1 and 2 are broad enough in their descriptive language to include the specific combinations covered by claims 3 and 4, plaintiff's disclaimer of claims 1 and 2 was, in legal effect, a disclaimer of the particular device described in claims 3 and 4; in other words, that the particular means for holding the lids of the ventilators open as described in claims 3 and 4 were thus disclaimed, because such means are covered by the broad language of claims 1 and 2. In support of this position it is argued that the disclaimer filed by the plaintiff is not to be treated as a simple withdrawal or expunging of claims 1 and 2 from the specifications of which they originally formed a part, and thus leaving the remaining claims to be construed as if such claims 1 and 2 had never been made, but that the instrument of disclaimer is to be construed by itself as an independent and affirmative declaration by the plaintiff that he was not the first or original inventor of any device covered by claims 1 and 2; and the case of *United States Cartridge Co. v. Union Metallic Cartridge Co.*, 112 U. S. 644, 645, 5 Sup. Ct. 486, is cited to sustain this proposition. In that case it was said:

"The disclaimer was one of the fact of invention. It could not lawfully be anything but a disclaimer of the fact either of original invention or of first invention. It was not merely the expunging of a descriptive part of the specification, \* \* \* but it was a disclaimer of all claims based on such descriptive part," etc.

But in that case the court was discussing the effect of a disclaimer of the fact of invention of a specific and particular mechanical device, the language of the disclaimer thus construed by the court being:

"Your petitioner disclaims the said movable die, D, called a 'bunter,' as being the invention of said Ethan Allen; thus leaving the description of said die, D, the same as shown in the original patent and the drawings thereof."

Of course, in such a case the court properly held that the disclaimer was specific, and must be construed as an affirmative declaration that the patentee was not the inventor of the particular thing disclaimed. In considering the scope and effect to be given a disclaimer, the same rules are to be observed as in construing any other written instrument, and so as to carry out the intention of the person executing it, as indicated by its language when construed with reference to the proceedings of which it forms a part. It cannot be read independently of its relation to the original specifications, of which it becomes a part when recorded. Applying this rule of interpretation to the disclaimer filed by the plaintiff in this action, it would seem too clear to admit of any doubt that such disclaimer cannot be given the broad and sweeping effect claimed for it by the plaintiff in error. On the contrary, the only reasonable construction which can be given the disclaimer of claims 1 and 2 is that the plaintiff intended to thereby limit his patent to the specific invention described in the remaining claims of his specifications, and not to abandon such remaining claims.

4. We do not think the claims of the plaintiff's reissued letters patent are any expansion of the invention referred to in the specifications of his original patent, and such reissued letters are therefore valid, under the rule declared in *Topliff v. Topliff*, 145 U. S. 156, 12 Sup. Ct. 825; *Odell v. Stout*, 22 Fed. 159; and *Gaskill v. Myers*, 81 Fed. 857.

5. Another ground upon which the reversal of the judgment under review is asked is that the evidence fails to show that the plaintiff in error was guilty of the act of infringement complained of, even if it should be conceded that the Kerby device is an infringement upon the invention protected by the reissued letters patent granted to the defendant in error. In order to fully understand the point thus made, it is necessary to briefly refer to the facts upon which it is based. The cars on which the Kerby device was used, and which use the plaintiff claims to have been an infringement upon his patent rights, were owned by Armour & Co., of the city of Chicago; and the plaintiff in error was their general manager in this state, and as such conducted for them here the business of leasing such cars, furnished with the Kerby device, to shippers of fruit who desired to engage the use of cars thus equipped. The plaintiff in



error had no interest in those cars, nor in the profits of the business thus conducted by him for Armour & Co. When leased, the cars were delivered by the plaintiff in error, or by his direction, to the shipper, who loaded them himself, and paid the railroad company for hauling them to their place of destination; and, while thus in possession of the shipper, neither the plaintiff in error nor his principals exercised any control over the use of such cars, or the Kerby device used in connection therewith. Upon this state of facts, it is claimed that the plaintiff in error did not, within the meaning of the law, either manufacture, use, or vend the Kerby device, and therefore was not guilty of any infringement upon plaintiff's invention; that he was only a mere agent and solicitor for Armour & Co. in the business carried on by them, and in which business the Kerby device was, in connection with these cars, let for hire; and that as such agent he is not responsible for any wrong suffered by the plaintiff by reason of such use of the Kerby device. This contention presents the most serious question in the case, and it is not to be denied that there are decided cases which support the proposition contended for by the plaintiff in error. The case of *Nickel Co. v. Worthington*, 13 Fed. 392, is one. That was, like this, an action at law to recover damages for the infringement of certain patents, and a corporation and some of its officers were made defendants. The court held that only the corporation was liable, although it was found that one of the other defendants solicited the business for which judgment was rendered against the corporation.

- In delivering the opinion in that case it was said by Lowell, Circuit Judge:

"I am of opinion that the only persons who can be held for damages are those who should have taken a license, and that they are those who own, or have some interest in, the business of making, using, or selling the thing which is an infringement, and that an action at law cannot be maintained against the directors, shareholders, or workmen of a corporation which infringes a patented improvement."

We are unable to agree with the opinion thus expressed, that only those persons can be held for damages "who own, or have some interest in, the business of making, using, or selling the thing which is an infringement." It is well settled that a mere workman or servant who makes, uses, or vends for another, and under his immediate supervision, a patented article, is not liable in an action at law for damages which may have been sustained by the patentee by reason thereof. This rule is an apparent exception to the general principle of law which makes all who participate in a tort of misfeasance principals, and liable for damages therefor; and we do not think it should be so extended as to exempt from liability the general manager of a business which infringes upon the exclusive right of a patentee to make, use, and vend the invention protected by his patent. Such an agent, to use a word sometimes employed in the discussion of the law relating to fellow servants, may be regarded as a vice principal, and he should be held responsible in damages for any action of his in the transaction of the business thus placed under his management which is in violation of the rights of another.

In this case the plaintiff in error, as the general manager in this state of this particular branch of the business of Armour & Co., voluntarily entered into contracts which contemplated the use of the Kerby device; and we do not think it is at all material that he engaged in this work for a stated salary, rather than reserving to himself a share of whatever profits his principals might make by reason of such unauthorized invasion of rights secured to defendant in error by his letters patent. Upon the facts appearing here, we are clearly of the opinion that the plaintiff in error may be said to have authorized the use of the Kerby device when he entered into the contracts before referred to, and is equally answerable with his principals for damage on account of the wrong thus done to the defendant in error. This conclusion seems to be in harmony with the views of Mr. Robinson, as stated in section 912 of volume 3 of his valuable work on Patents, in which, after referring to the rule adopted by some courts, that all directors, agents, or other servants of a private corporation, who actually employ or authorize the employment of a patented invention, are guilty of an infringement, and personally answerable to the patentee, the author declares that this principle "is in harmony with other doctrines of the law, sufficiently protects the patentee, and justly punishes those whose willful acts place them on the same footing with individual infringers. Under this opinion, all agents who perform acts of infringement, and all stockholders, directors, and other officers who, in the prosecution of the business of the corporation, authorize them, participate in the infringement, and are personally responsible to the patentee." And in the case of *Cramer v. Fry*, 68 Fed. 201, the court gave a strong intimation of its approval of this statement of the law, although in that opinion stress seems to have been placed upon the fact that the agent making the sales of the alleged infringing machine received, in addition to his salary, a commission on sales made by him,—a fact which we would not regard as material if such commission was paid to the agent on account of his services as such. The case of *Lightner v. Brooks*, 2 Cliff. 287, Fed. Cas. No. 8,344, was an action on the case for the alleged infringement of a patent. The defendant therein, as chairman of the board of directors of a railroad corporation, had entered into a contract in behalf of the corporation for the construction and delivery to such corporation of cars furnished with boxes similar to those patented by the plaintiff in that action. In that case judgment was entered for the defendant upon the ground that the contract did not necessarily contemplate that the contractor should use the patented article without license from the patentee; but the court, in the opinion, which was delivered by Mr. Justice Clifford, of the supreme court of the United States, conceded that the defendant would have been liable if the contract could have been construed as one having in view an infringement of the plaintiff's patent. This is the language of Mr. Justice Clifford upon the point we are now considering:

"The argument for the plaintiff is that the defendant is liable because it is insisted that, whenever an agent of a corporation assumes to authorize or directs the commission of a trespass, the agent assuming to confer the authority,

or who gives the direction, is himself personally liable to the injured party, although he did not directly participate in the commission of the wrongful act. Undoubtedly, all persons commanding, procuring, aiding, or assisting in the commission of a trespass are principals in the transaction, and stand responsible to answer in damages to the injured party. Both the master who commands the doing and the servant who does the act of trespass may be made responsible as principals, and may be sued jointly or severally for damages, as the injured party may elect."

While what was thus said cannot be regarded as an authoritative decision upon the point we are now considering, still, as the expression of the opinion of a very learned judge upon a question naturally suggested by the argument of that case, it is entitled to very great respect, and in our opinion it is a correct statement of the law applicable to this case. Without extending this opinion by a discussion of other points urged in behalf of the plaintiff in error, it will be sufficient for us to add that we find no error in the record; and therefore the judgment sought to be reversed should be, and accordingly is, affirmed.

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TUTTLE v. CLAFLIN et al.

(Circuit Court of Appeals, Second Circuit, February 23, 1897.)

**PATENTS—INFRINGEMENT—DAMAGES—DECISION ON APPEAL—REHEARING.**

Decree on appeal in case for infringement of plating machine, reversing decree for nominal damages, and allowing substantial damages, will not be modified by directing return of the case to the master for further evidence in regard to the cost of hand-made plaits, on the single affidavit of defendant's representative, made as the result of a short test by persons employed by him, that such plaits could be made at a certain low cost; the same person having represented defendant before the master, when cost was an important feature of the case, and then been silent on the subject, and the manufacture of plaits having practically ceased, so that evidence on the subject of cost would necessarily be based on estimates.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was a suit in equity by Theodore A. Tuttle, trustee, etc., against John Clafin, as executor of Horace B. Clafin, and others, formerly partners, under the name of H. B. Clafin & Co., for alleged infringement of a patent for a machine for crimping textile materials. The patent was sustained, and held to be infringed, by the court below, and an accounting was ordered. 19 Fed. 599. The cause was afterwards heard on exceptions to the master's report, and a decree entered for complainant for nominal damages. 62 Fed. 453. Both parties appealed to this court, which, on July 29, 1896, filed an opinion, finding that large profits had been made by H. B. Clafin & Co., and reversing the decree below, with directions to enter a decree for complainant in the sum of \$40,000 and costs. See 22 C. C. A. 138, 76 Fed. 227. Defendants have now applied for a modification of the decree by directing the return of the cause to the master for further proofs.

Benj. F. Lee, for plaintiff.

Edmund Wetmore, for defendants.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The defendants have moved that the decision upon this appeal be modified by directing that the case should be returned to the master for further evidence in regard to the cost of hand-made plaits, upon the ground that it has been ascertained by experiments that the cost of linen plaits, made and ironed by hand, of as marketable a quality as those made upon a machine, would not have exceeded one cent per yard. The counsel for the defendants states that this class of testimony was not deemed by him of importance upon the hearing before the master, because the complainant's testimony was to the effect that hand-made plaits could not in any event compete with machine-made plaitings, on account of the inferiority of hand-made work. We think that the counsel construed the testimony too literally. The witnesses were introduced for the purpose of proving the cost of hand-made linen and woolen plaitings, and their testimony related to the salable or merchantable character of the goods as they ordinarily could be presented by hand, and that linen and percale goods could not commercially compete with machine-made goods without an excessive expense. They went further than this, and said that hand-made goods of linen could not be manufactured at any cost to compete in quality with the same kind of plaitings made by machinery; while one of these witnesses also said that he could not make narrow plaits in woolen goods so as to give satisfaction. This latter class of testimony was not true, as was shown by the defendants' witness Mrs. Smith; and, indeed, it must have been well known that silk and woolen goods were, as a rule, hand plaited, in preference to running them through a machine.

The defendants were represented, upon the hearing before the master, by Mr. Asabel K. Smith, the superintendent of their manufacturing department, who asked his wife, under whose supervision the defendants' plaiting was made from the latter part of 1876 to the first part of 1880, to make experiments upon the subject of the cost of hand-made goods. Her experience made her an intelligent witness in regard to plaitings, and she made an experiment, but of so brief a character as to be of very little moment. The attempt of Mr. Smith to present information to the master upon the subject of profits stopped with this testimony. Mrs. Smith, however, also testified that the goods that were plaited upon the machines could be plaited by hand; that she did not know the actual expense of plaiting fine goods by hand, because no separate account was made of it; that silk and dress goods and woolen goods were generally hand plaited at the complainant's factory during 1876 and subsequently, because the work upon fine goods was done better by hand than through a machine; that the character of the material made the difference between the results of hand plaiting and of machine plaiting; and that hand-made plaiting was sufficiently uniform for the ornamental uses to which the articles were put.

The questions of expense and of the proper standard of comparison for the purpose of an estimate of profits went to the master upon the testimony which the parties thus chose to give. The actual history of the manufacture fully justified the finding that, in esti-

mating the profits gained by the use of the patented machines, the proper and the only proper standard of comparison was the expense of making the like articles by hand. In determining the amount of profits, his estimates were based upon the only figures which the parties chose to give him. The defendants now say, by Mr. A. K. Smith, the same person who was silent before the master, that:

"With the apparatus that we had in our employ during the time covered by the accounting, it would have been entirely possible to have made by hand all of the plaitings which we made by machine, and to supply our trade without any delay. At the rate of wages we then paid, and carefully following the work step by step, I am able to say positively that the cost of the hand plaiting, and ironing each plait out so as to produce the result shown by the specimens above referred to, would not have exceeded one cent a yard. A more accurate estimate would show about three-quarters of a cent, but it is certain that it would not have exceeded one cent a yard; and at that cost we could have furnished plaitings upon all the goods which we made and sold during the said period."

We do not doubt that the exhibits were made in the presence of Mr. Wetmore, in the time that he states, and as they are now presented; but the question is that of the cost of manufacture upon a commercial scale. The new information which Mr. Smith has obtained is not in harmony with his silence when he was also the representative of his employers, and when cost was an important feature of the case. His single affidavit, made as the result of a short test by the work people whom he employed, that linen plaitings can be made at one cent per yard, is not adequate to satisfy a court that justice towards a losing party requires a rehearing.

Turning to the question whether, under any state of facts, it would be the more proper course to send back the case to the master, in the hope that another investigation might turn estimates into mathematical accuracy, it is to be recollected that this case is, by reason of its history, both remarkable and unique. The interlocutory decree was dated in March, 1884, and the master's report was dated August 24, 1893, and related to an industry which, as an active industry, died in 1879 or 1880. As the case presented itself before the master, large profits had been undeniably made. This court thought that too little account had been taken of two subjects which would reduce the sums found by the master, but that, if the case should be sent back, the result would be another prolonged hearing, necessarily based upon estimates by the experts on both sides; for the time when facts could be ascertained which were based upon the experience of actual manufacturers had been suffered to pass by. No new rule of law was announced in regard to the burden of proof, or in regard to the necessity that the complainant should, in the cases which ordinarily come before the master, satisfy him by affirmative evidence of the amount of profits. The court was of opinion that justice to the defendants required a reduction of the amount which had been apparently made out by the testimony, and that for the purpose of bringing to a close a litigation which, by its delays, had become discreditable, it was desirable that the court should take the responsibility of making a decision, modifying the amount found by the master to such an extent that the defendants should have no cause of complaint. The motion is denied.

WELSBACH LIGHT CO. v. BENEDICT & BURNHAM MANUF'G CO.

(Circuit Court, D. Connecticut. October 9, 1897.)

1. PATENTS—PRELIMINARY INJUNCTION—ACQUIESCENCE.

General acquiescence in the validity of a patent is not of so much weight on the question of a preliminary injunction, when the patent is of a subordinate character, so that there has been little temptation to infringe until after it is supposed that the principal patent is no longer in force.

2. SAME—DOUBTFUL PATENTS—CLEAR INFRINGEMENT.

The rule that, when infringement is clear, and the injury to complainant by refusing the injunction will be greater than the injury to defendant by granting it, some doubts as to the validity of the patent should be resolved in its favor, is not of great force when the alleged invention is of a subordinate or comparatively unimportant character, and the court has very serious doubts on the question of invention.

3. SAME—INCANDESCENT GAS LAMPS.

The Welsbach patent, No. 409,530, for an improved incandescent gas lamp, designed to be used with the Welsbach incandescent hood, *held* invalid, on motion for preliminary injunction, as to claim 3, which is for a combination with a Bunsen burner of a shield suspended around the air inlets thereof, and as to claim 5, which is for a gas burner and a chimney support or gallery with a vertically adjustable rod supported by the gallery, and an incandescent hood suspended from the rod.

This was a suit in equity by the Welsbach Light Company against the Benedict & Burnham Manufacturing Company for alleged infringement of the Welsbach patent for an improved incandescent gas lamp. The cause was heard on a motion for a preliminary injunction.

John K. Beach and John R. Bennett, for complainant.

A. M. Wooster and M. B. Philipp, for defendant.

SHIPMAN, Circuit Judge. This is a motion for a preliminary injunction against the further infringement by the defendant of claims 3, 5, and 6 of letters patent No. 409,530, dated August 20, 1889, issued to Carl Auer Von Welsbach, assignor to the complainant, for an improved incandescent gas lamp. In 1885, the patentee had patented in England the well-known Welsbach hood or mantle, which was also subsequently patented in this country, and which was styled in his English patent "an illuminant appliance in the form of a cap or hood, to be rendered incandescent by gas and other burners, so as to enhance their illuminating powers." This invention underwent a most thorough investigation in the English courts, the patent was sustained, and the invention was declared by Mr. Justice Wills to have accomplished "what has long been a desideratum, what has been attempted before, but always with an utter want of success, and it was for the first time brought within the range of practical manufacture the production of a brilliant light by incandescence within an ordinary gas flame." The lamp which is the subject of the patent in suit was designed to hold and to heat this hood, and is, in its details, exceedingly well adapted to bring the Welsbach illuminant into successful use in houses, and also in places of business; but the patent was not limited to the use of any particular hood or mantle. Its claims to patentability are therefore liable to be disputed by pre-existing lamps which were made for the purpose of raising to incandescence some

other refractory material by means of a gas flame; and it appears from the "file wrapper and its contents" that this was fully understood by the inventor when the application was making its way through the patent office. The patent has never before been the subject of litigation. The Welsbach system of lighting has had great success in this country. Over two millions of lamps made under this patent have been sold, and neither patent was seriously infringed until the spring of 1897. About that time it was rumored that the hood or mantle patent had expired by reason of the expiration of a Spanish patent for the same invention, and forthwith infringement of each patent commenced. Suits for infringement of the hood patent are now pending in the Southern district of New York.

It is strongly urged that the public has admitted the validity of the patent in suit, and that the complainant's rightful possession of an exclusive right to make the brass part of the Welsbach lamp has been clearly acknowledged. It must be recollected that the Welsbach system consists of the brass lamp and the hood; that the latter is the important member of the system, and gives to it its success; that the brass part of the lamp is for the purpose of making the hood operative; and that, so long as the validity of the hood patent was admitted, there was little or no reason for an attempt to infringe the patent in suit. Acquiescence in the validity of this patent has not, therefore, the importance that it generally has, and which it had in the early and well-known case of *Sargent v. Seagrave*, 2 Curt. 553, Fed. Cas. No. 12,365. I am therefore compelled to examine the patent by the light which has been thrown upon it by the affidavits and the other papers which were presented upon the hearing of the motion. The patent contains six claims, which are as follows:

"(1) The combination of a burner tube, provided with a cap having a vertically projecting cone, 13, surrounded by an inner annular series of perforations, 14, and an outer annular series of radiating slots, 15, a hood of refractory incandescent material suspended above said burner cap, and a chimney surrounding said hood, substantially as described.

"(2) The combination, with a burner tube, 5, and gallery, 8, having lugs, 23, and set screws, 24, located on a laterally extended portion of the gallery body, of the chimney, 19, the hood, 20, and the vertically adjustable rods, 21 and 22, substantially as described.

"(3) The combination of a vertically perforated thimble having a gas inlet, a perforated disk supported by said thimble, a Bunsen burner having lateral air inlets, and a shield located around the burner air inlets, substantially as described.

"(4) The combination of a Bunsen burner having lateral air inlets, a ring shrunk onto the burner tube above the air inlets, and a shield suspended from said ring and surrounding the air inlets of the burner, substantially as described.

"(5) The combination, with a gas burner and a chimney gallery, of a vertically adjustable rod supported by the gallery, and an incandescent hood suspended from said rod above the burner, substantially as described.

"(6) The combination, with a gas burner, a chimney, and an incandescent hood suspended in said chimney, of a gallery having converging ribs, 8a, arranged at intervals, substantially as described."

The defendant's burner does not have the vertically projecting cone, 13, of claim 1, nor the vertically adjustable rods, 21 and 23, of claim 2, and its shield is not suspended as required in claim 4. It does plainly infringe claims 3, 5, and 6, and the question upon this motion

is whether the validity of those claims can be so clearly ascertained that an injunction ought to issue. Claim 3 is the one of importance. It relates to the parts of the gas burner which produce the necessary smokeless and almost nonluminous hot flame. The patentee used, as is stated in the claims, the Bunsen burner, which had been for many years before the date of his invention a well-known form of gas burner for heating purposes, and which is said to have been invented by the chemist Bunsen. In this burner, gas and air are permitted to enter through different orifices or openings into the same tube or mixing chamber, where the mingling takes place; and when the gas is ignited it has become thoroughly mixed with the air, so that "all parts of the flame are supplied with sufficient oxygen to insure the immediate combustion of the carbon." The same general system of independent orifices for the admission of air and gas into a mixing chamber is used in most of the lamps for heating refractory material to incandescence. Claim 3 names four elements, as follows: (1) A vertically perforated thimble, having a gas inlet. This thimble is threaded for attachment to the gas fixture. (2) A perforated disk, secured to the upper end of the thimble, "to divide the gas supply into jets, and facilitate the mixture with the supply of air." (3) A Bunsen tube, having lateral air inlets. (4) A shield located around the air inlets, which the specification says may be used "if desired." This shield also has air inlets in a casing around the inlets of the burner tube, so that the supply of air can be regulated and modified. Divers earlier patents were introduced by the defendant to show either that these various elements were well known, and had been in some way combined before, or else were in such common use that their combination was not a patentable one, but I have directed my attention to what is disclosed in the proceedings in the patent office, in the specification, and in the patent to Charles Clamond, No. 282,053, dated July 31, 1883, to which reference was made by the patent office. The patentee, on October 15, 1888, asked for the allowance of the following, as claim 3:

"The combination, with a Bunsen burner having lateral air inlets, of the shield, 6a, suspended around said burner air inlets, substantially as described."

The existing claims 3 and 4 were claims 4 and 5 in this application. The office rejected claim 3, as applied for, by reason of the Clamond patent, and rejected claims 4 and 5 because they were modifications of the same general construction of burner. The applicant canceled claim 3, "though it is not believed to be met by the patent to Clamond cited, but to facilitate allowance of the remaining claims"; and said of claims 4 and 5 that the former covers "a combination including a shield located around the burner air inlets, while the latter is for a combination embracing a ring shrunk into the burner tube above the air inlets, and a shield suspended from said ring, and surrounding the air inlets of the burner." The claims as they now stand were then allowed. Thus the rejection of a claim for a Bunsen burner and a shield around the air inlets was acquiesced in, and the present claim 3 was allowed, because it included the combination of a Bunsen burner, shield, thimble, and perforated disk. The question is whether the claim describes anything more than a Bunsen burner plus a shield;



or, in other words, whether the combination as claimed contained anything which is not a part of a Bunsen burner when in actual use. The apparent contention of the complainant is that the perforated disk, which is a very thin plate, and contains three minute holes, is an addition to, or is such a modification of, the ordinary Bunsen burner that it can be considered a distinct member of the combination, and that this improvement is valuable. The specification says "that the number and size of the perforations in the disk \* \* \* can be varied as required according to the quality of the gas." It says also that "it is advantageous to cause the combustible gas used for the burner to issue through a hole or holes in a very thin sheet-metal plate, such as the perforated disk, 2, and not through a plate of from one to one and one-half millimeter in thickness, as in the ordinary Bunsen burner." It thus appears that neither the size nor the number of the perforations was regarded as of patentable importance. It furthermore appears that a perforated plate, or some other contracted orifice for the transmission of gas, was a part of an ordinary Bunsen burner, and that a thin plate was regarded as preferable to the one in general use, but that a thin plate was not designated, either in the specification or in the claims, as a part of the patented invention. After reading the specification, and the history of the patent upon its journey through the patent office, claim 3 seems to me to have been an attempt to magnify the combination of one of the common forms of an old burner and a shield into a novel combination of several elements, and thus to be patentable.

Claim 5 is for a combination of a gas burner, not necessarily a Bunsen burner, and a chimney support or gallery with a vertically adjustable rod supported by the gallery, and an incandescing hood suspended from the rod. When this very simple means of suspending the hood is looked at in the complainant's lamp, there seems to be nothing of an inventive character in the combination.

Claim 6 is for a chimney gallery or support having converging ribs, in combination with a gas burner, chimney, and incandescing hood suspended in the chimney. The important part of this combination, as appears from the specification, is the converging ribs of the chimney gallery. This is a matter of mechanical detail, which is not material, and which can, apparently, be changed without difficulty; and I should not think it worth while to issue an injunction in the present stage of this case merely for an infringement of this claim.

The complainant pressed its equities for an injunction by reason of the deliberate conduct of the defendant in entering into a contract to make the brass portion of the Welsbach lamp with notice of the complainant's possession of a patent, and after it had made these lamps for the complainant for eight or nine years; and presented the proposition that, when infringement is clear, some doubts should be resolved in favor of the patent, especially when injury to the complainant by a refusal will be greater than the injury to the defendant will be by granting the injunction. The force of these propositions in a case proper for their application is acknowledged, but their applicability depends upon the strength of the doubts. For example, the hood patent, which is the most important part of the Welsbach sys-

tem, has been respected in this country for many years, and the unique character of the invention, and its importance as a great aid to domestic comfort, have been universally recognized. Upon a motion for a preliminary injunction against the infringement of the patent in this country, even if there had been no adjudication in England, a court would naturally think that doubts in regard to validity were overborne by the weight of the considerations which have been mentioned. But this patent has not that distinctive kind of character, and, while I know that the issuance of an injunction would be a serious advantage to the complainant in its efforts to protect its business and prevent an onslaught upon it, yet, when I have so serious doubts as I have in regard to the validity of the contested claims of the patent, I do not think that I ought to enjoin against their infringement. Such an interference with the business of one manufacturer, in order to strengthen the position of another, pending an attack upon the validity of its patent, though it is being attacked by its old friends, seems to me an undue stretch of the power of a court of equity. The motion is denied.

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THE R. R. RHODES.

THE R. R. RHODES v. FAY.

(Circuit Court of Appeals, Sixth Circuit. October 5, 1897.)

No. 453.

1. SALVAGE—AMOUNT OF COMPENSATION—REVIEW ON APPEAL.

The allowance of salvage is an act involving judicial discretion, and the award will not be set aside as too large unless so excessive as to shock the conscience of the appellate court.

2. SAME.

An award of \$3,500 to a Lake steamer, worth, with her cargo, \$40,000, for drawing off with some danger to herself another steamer, worth about \$70,000, from rocks upon which she had gone fast, and was in a very dangerous position, *held* not excessive; the salving steamer having been detained about 16 hours on her voyage.

3. SAME—ELEMENTS DETERMINING COMPENSATION—SUBSEQUENT STORM.

In a suit for salvage for rescuing a stranded vessel from a reef where she would have been in great danger in a storm, evidence that a severe storm did in fact occur within a short time after the rescue is not entirely irrelevant, as it illustrates the imperative necessity the stranded vessel was in of losing no time in getting off.

4. SAME—CONTRACT FOR SERVICE.

A mere request for aid made by the master of a vessel in distress to the master of another vessel does not prevent the service rendered from being a salvage service, or reduce the claim merely to one for services rendered under a contract.

Appeal from the District Court of the United States for the Western District of Michigan.

On the night of Saturday, the 11th of August, 1894, about 11 o'clock, the steamer R. R. Rhodes, laden with a cargo of 1,827 tons of iron ore, while going at her full speed of  $9\frac{1}{2}$  miles an hour, ran upon a rocky reef off the north end of the South Fox Island, in Lake Michigan. She remained fast, and at her bow drew 15 inches of water less than before she was stranded. Her keel

and planking were so injured that, after she was towed into Chicago, it cost over \$4,000 to repair them. The reef was from three-quarters of a mile to two miles from shore, and the navigation in its vicinity was dangerous, because, while the water was deep enough in places, there were many bowlders on the bottom, ranging from those of a small size to others of many feet in circumference. As soon as the master ascertained her condition, he got an anchor out lakeward to prevent the steamer from drifting further on to the rocks and the shore, and the crew was immediately set to work jettisoning the cargo. On Sunday morning, the 12th of August, the mate was sent in a small boat to the nearest point of land, whence, by a sailing vessel, chartered for the purpose, he proceeded to Northport, 28 miles distant, where he telegraphed for the assistance of a wrecking steamer at Mackinac, 100 miles distant. About 3 o'clock on Sunday afternoon, the steamer Westcott, bound from Escanaba to Elk Rapids, sighted the Rhodes 8 miles away, changed her course, and, running towards her, discovered her condition. The master of the Rhodes, who had signaled the Westcott as she came nearer, requested her to render assistance. The Rhodes had no towlines, and the Westcott used a comparatively new one of her own, 9 inches in thickness and 700 feet in length. The Westcott stopped about 1,000 feet distant from the Rhodes. The Rhodes' master then came out in a small boat, and persuaded the master of the Westcott that she might safely approach the Rhodes, and that there was water enough on the starboard side of the Rhodes to permit her to go alongside. For two hours the Westcott attempted to swing the Rhodes off the rocks by the use of the towline, but did not succeed. She then went alongside the Rhodes, and sent aboard the Rhodes half her crew to assist in lightering. This was necessary, because the crew of the Rhodes were very tired from the hard labor of the previous night and day. After about 100 tons had been lightered, the Westcott again gave the Rhodes the towline, and, after two hours of hard work, succeeded in pulling or swinging her off the reef. The Rhodes kept her machinery moving. When the Rhodes had been pulled from the reef, it was discovered that she had broken off the buckets or blades of her screw, leaving nothing but a round hub, with which she was able to make no progress through the water. In her helpless condition, it became necessary for the Westcott to tow her from the reef to Northport, 28 miles away. The work of pulling the Rhodes off the reef and towing her to Northport delayed the Westcott in reaching her destination at Elk Rapids about 16 hours. The Westcott was a vessel 187 feet long, 32 feet beam, and having a cargo at the time of this occurrence of about 750 tons of iron ore, and worth, hull and cargo, \$40,000. She drew a little more than 14 feet. The draft of the Rhodes was 15 feet 2 inches forward, and 15 feet 5 inches aft. She was 50 or 60 feet on the reef, about amidships. The lake was calm at the time of the stranding, but the air was filled with smoke from forest fires; and though it cleared sufficiently to enable the Westcott to see the Rhodes on the afternoon of Sunday, the 12th, the air continued smoky until Northport was reached, on Monday morning, about 8 o'clock. The place where the Rhodes ran aground was off the usual course of steamers some 3 or 4 miles. It was near the middle passage frequented only by steamers going across Lake Michigan from Escanaba to Elk Rapids, and was out of view of the passage through which the great majority of the Lake steamers passed. The men upon the Rhodes had descried a steamer of the Anchor Line a little earlier in the afternoon, some three or four miles away, which failed to hear, or, at all events, failed to respond to, the Rhodes' signals of distress. On Tuesday morning, a northwest wind, reaching the proportions of a gale, came up, which probably would have rendered the Rhodes a total loss had she still been upon the reef. It was contended by the counsel for the Rhodes that the reason why more vessels were not seen from Saturday night, after she stranded, until Sunday afternoon, was because the smoke prevented, and not because the vessels were not frequently passing within a reasonable distance of the reef. After the Rhodes reached Northport, she was towed by the Marquette from Northport to Chicago, the Marquette delaying the trip until after the gale of Tuesday abated. The towline of the Westcott was very much weakened and its value much lessened by the strain to which it was necessary to subject it in jerking the Rhodes off the reef. There was no written opinion delivered by Judge Severens, who heard the case in the district court, but he entered a decree in favor

of J. J. Fay, Jr., for salvage of \$3,500. The estimates of the value of the Rhodes varied from \$60,000 to \$85,000 and upward. It is suggested by counsel that the court below fixed the value at \$70,000, and the salvage at 5 per cent. thereof.

Harvey D. Goulder (S. H. Holding, of counsel), for appellant.  
C. E. Kremer, for appellee.

Before TAFT and LURTON, Circuit Judges, and SAGE, District Judge.

TAFT, Circuit Judge (after stating the facts). We do not think that we ought to disturb the decree of the district court in this case. The action of the court in allowing salvage is one involving judicial discretion, and an appellate court will not set aside the result of the exercise of that discretion by the trial court unless it has been manifestly abused,—unless, as Chief Justice Marshall expresses it, in *The Sybil*, 4 Wheat. 98, the award of the district court is so grossly excessive as to shock the conscience of the appellate court. *The Comanche*, 8 Wall. 448; *Hobart v. Drogan*, 10 Pet. 108; *The Phoenix*, 8 U. S. App. 626, 10 C. C. A. 506, and 62 Fed. 487; *The Connemara*, 108 U. S. 359, 2 Sup. Ct. 754; *The Florence*, 38 U. S. App. 32, 18 C. C. A. 240, and 71 Fed. 527. The only point for discussion in the case, therefore, is whether the allowance by the court below was grossly excessive, and not whether, if we had been sitting in the trial court, we would have fixed a somewhat less amount.

There was ample evidence to justify the court in finding that the situation of the Rhodes was perilous. The record does not disclose the exact length of the Rhodes, but it is apparent that considerably less than one-third of the vessel was grounded upon the reef, and that this was about amidships. The witnesses for the libellant testify that she was hogged or bent so that her bow and stern sagged below her middle. Whether this be true or not, it is certain that, as she lay there, a heavy wind from the northwest would have destroyed her. It is also apparent that, in the thick and smoky condition of the atmosphere, the prospect of being relieved by other vessels was by no means bright. It is true that a telegram had been sent to a point 100 miles away for the wrecking steamer, but this could not have been done until the afternoon of Sunday, and it does not appear whether such a steamer was to be had. With all the effort which was made by the crews of both vessels to lighten the Rhodes, they succeeded in throwing overboard but 100 tons of the ore in something less than 24 hours. It is not at all clear that, if they had been dependent upon getting the steamer off by lightening her, they would have succeeded in doing so before Tuesday's storm was upon them. It is true that it was in a season of the year in which storms were not usual; but it is also true that storms sometimes occurred at that season, as the storm of Tuesday abundantly proved, and that they are not so exceptional at that time as to justify excluding them from a mariner's calculation when their occurrence would have been so disastrous as in this case. It is to be noted that it did not need a dangerous storm to imperil the hull and cargo of the Rhodes in her then condition. It needed only a heavy wind, as the captain of the

Rhodes, in his evidence, fully admits. So much for the peril which the Rhodes was in.

The Rhodes was upon a dangerous reef. Navigation in that vicinity by the Westcott, loaded with iron ore, drawing 14 feet, backing, maneuvering, and running ahead at full speed, as she was obliged to in order to accomplish the release of the Rhodes, was not by any means free from danger to herself. We think it very probable that nothing but the prospect of a substantial reward would have induced the captain of the Westcott to run the risks which he certainly did run in going to the relief of the Rhodes. The Westcott and her cargo were worth about \$40,000. The presence of the bowlders upon the bottom of the lake and on and about the reef is abundantly established by the evidence. It also appears that in her maneuvers the Westcott actually did touch bottom several times, if the testimony of two or three of her witnesses is to be credited. In this state of the record, while we might, perhaps, have fixed a lower amount were this the original hearing, we are clearly of opinion that in the hearing upon appeal we should not do so. It is suggested that the amount allowed as salvage to the Westcott is nearly or quite as much as the profits she would have earned in an entire season. This may be true, but we do not see why this circumstance should change the allowance if, as the court must have found, in order to earn this salvage, she put herself and her cargo in jeopardy.

An exception was taken to the libel in its mention of the storm which took place on Tuesday. We think this exception was not well taken. It was conceded that the condition of the Rhodes would have been practically hopeless had the storm found her on the reef, and the reference to it in the libel and the consideration of it by the court were justified as illustrating the very imperative necessity she was under of losing no time in getting out of her predicament. Such a storm was considered in *The Neto and Cargo*, 15 Fed. 819, and was thought not to be of particular weight in the case of *The Emulous*, 1 Sumn. 207, Fed. Cas. No. 4,480; but we do not understand that the court held in the latter case that the evidence was entirely irrelevant. The storm certainly showed that such a change in the weather was not impossible at that season.

The main ingredients to assist the court in determining the amount of salvage are stated by the supreme court of the United States, speaking by Justice Clifford, in the case of *The Blackwall*, 10 Wall. 1, 14, as follows:

(1) The labor expended by the salvors in rendering the salvage service. (2) The promptitude, skill, and energy displayed in rendering the service and saving the property. (3) The value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed. (4) The risk incurred by the salvors in securing the property from the impending peril. (5) The value of the property saved. (6) The degree of danger from which the property was rescued.

Having due regard to such of these factors as were present in this case, we cannot find the allowance excessive.

Something has been said by counsel in argument and in the brief indicating a desire to have this court establish a rule for fixing sal-

vage upon the Lakes different from that which obtains upon the high seas; and reference was made to a decision by Judge Baxter, in *Mattingly v. Cotton*, 2 Flip. 288, Fed. Cas. No. 9,294, in which he points out the great differences between cases of salvage upon the Western rivers and those upon the high seas. The difference recognized is a mere absence from cases of salvage on the rivers of some of the factors which increase the amount of the salvage on the high seas. It is quite certain that the dangers of salvors upon the Lakes are more like the dangers upon the high seas than those upon the Western rivers; but we do not think it profitable to attempt to lay down any general rule distinguishing salvage upon the Lakes from that on the high seas. Each case must be determined by its own circumstances. In the present case we hold that the court might reasonably have found impending peril for the steamer salvaged, and real danger to the steamer and cargo of the salvor, and that the amount allowed by the court below was not so manifestly excessive as to justify us in disturbing it.

Another point made by the counsel for the appellant is that there was a contract for services made between the captain of the *Rhodes* and the captain of the *Westcott*, and that this should not be treated as a salvage case, but only as a suit for services upon a contract. The evidence does not bear out this claim. The language upon which it is based was the mere request for aid by the captain of the stranded vessel to the captain of the vessel then about to aid her. A mere request for aid, without any discussion as to terms, certainly cannot exclude the right to salvage. If so, then all signals of distress must exclude it, for they are certainly requests for aid. The decree of the district court is affirmed.

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THE H. E. RUNNELS.

JENKS SHIP-BUILDING CO. v. WALLACE & CUNNINGHAM TRANSIT CO.

(Circuit Court of Appeals, Sixth Circuit. October 5, 1897.)

No. 450.

**SALVAGE—AMOUNT OF COMPENSATION.**

An award of \$2,450 to a steam barge, worth, with her cargo, about \$80,000, for going to the rescue of another barge loaded with coal, which was on fire in the Great Lakes, *held* not excessive, where the risk to the rescuing vessel was considerable, and the value of the vessel and cargo saved amounted to \$15,000.

Appeal from the District Court of the United States for the Eastern District of Michigan.

This was a libel in admiralty by the Wallace & Cunningham Transit Company against the steamer *H. E. Runnels*, whereof the Jenks Ship-Building Company was claimant, to recover compensation for salvage services. The circuit court rendered a decree for libellant in the sum of \$2,450, and the claimant has appealed.

Harvey D. Goulder (S. H. Holding, of counsel), for appellant.  
Moore & Goff, for appellee.

Before TAFT and LURTON, Circuit Judges, and SAGE, District Judge.

TAFT, Circuit Judge. This, like the last case considered (*The R. R. Rhodes v. Fay*, 82 Fed. 751), is an appeal from a decree of the district court for salvage. On May 29, 1895, the steam barge *New Orleans*, owned by the Wallace & Cunningham Transit Company, was bound on a voyage from Buffalo to Chicago, laden with a cargo of 1,976 tons of hard coal. About 6 o'clock in the morning, when 40 miles above Long Point, the steam barge *Runnels* was discovered on fire and flying a signal of distress, about 10 miles away and 3 or 4 miles off the course of the *New Orleans*. The *New Orleans* hastened to the assistance of the *Runnels* as fast as her engines could be made to drive her, and the hose was gotten ready to fight the fire. About 7 o'clock the *New Orleans* reached the *Runnels*. The fire, which had begun near the smokestack, had by this time swept away the after-house, the cabin, and the deck, and had burned through the hull about two feet above the water line. The vessel was a mass of flames aft the smokestack. One of her boats had been burned, and, when the *New Orleans* reached her, her crew had constructed a raft preparatory to leaving her. The *New Orleans* ran up on the port side of the *Runnels*, made fast to her with two lines,—one amidships, and one from the port quarter of the *New Orleans* to the port bow of the *Runnels*. Subsequently a third line was run from the port bow of the *New Orleans* to the port quarter of the *Runnels*. Two streams of water were put upon the *Runnels*, and in about a half hour the flames were under control. At that time the steam barge *Milwaukee* came to the starboard side of the *New Orleans*, and, running a line of hose across the deck of the *New Orleans*, assisted in throwing water upon the fire. The three vessels lashed together, with the *New Orleans* in the middle, then started for Ashtabula, 30 miles distant, the *Runnels* being towed stern foremost. About 12 o'clock, when off Ashtabula Harbor, the *Milwaukee* left, and continued on her voyage; and the *New Orleans* took the *Runnels* into the harbor, where she turned her over to some harbor tugs, who took her in, and ran her on the bottom, where she sank. The evidence is quite satisfactory that, had the fire been allowed to go on for half an hour longer, the *Runnels* would have sunk in midlake, in deep water, and have been a total loss. The value of the *Runnels* in Ashtabula Harbor, as fixed in the adjustment for insurance, was \$15,000, and the value of the *New Orleans* and her cargo was about \$80,000. Judge Swan, sitting in the court below, allowed \$2,450 as a reasonable and proper compensation, and allowed the mate \$50 for gallantry in carrying a line from the *New Orleans* to the *Runnels* at great personal risk. In the adjustment with the insurers, the owner of the *Runnels* asserted a claim against the insurance companies, which was allowed, of \$1,500 salvage for the *Milwaukee*, and \$1,500 for the *New Orleans*; thus admitting that the work done and

the risk involved merited an award of salvage of, at least, \$3,000. It is clear that the services of the Milwaukee were quite small as compared with those of the New Orleans, and that, if the amount of salvage to be allowed was \$3,000, the amount awarded to the New Orleans by the district court was by no means too great. The fact that the Milwaukee got more than she deserved by the concession of the owners of the Runnels cannot affect the amount which the New Orleans should receive. The New Orleans arrived upon the scene at the nick of time, and rendered very prompt service; and, while the risk of fire to her may not have been very great, yet the bringing of a vessel and cargo worth \$80,000 up to a burning steamer, and near enough to throw water onto the flames, must have in it some element of risk. Of course, the main reason for making the salvage substantial in this case was the certainty that there would have been a total destruction of all the property salvaged had it not been for the efficient aid rendered by the New Orleans. We have discussed somewhat more at length the elements which should enter into salvage in the case preceding this one, that of *The R. R. Rhodes v. Fay*, and it is not necessary to consider the matter further. The decree of the district court is affirmed.

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CANADA SUGAR-REFINING CO. v. INSURANCE CO. OF NORTH AMERICA.

(District Court, S. D. New York. June 3, 1897.)

**MARINE INSURANCE ON "PROFITS" — VALUED POLICY — CONSTRUCTIVE "TOTAL LOSS"—ABANDONMENT.**

The libellant was insured in the respondent's company for \$15,000, on "profits" on a cargo of sugar, against "total loss only," valued at amount of insurance. Before insuring, the respondent had notice of a previous insurance of the same cargo by the Atlantic Mutual for \$166,145. The policy on "profits" was designed to cover the additional value of the cargo above the prior insurance upon a rise in the market price. The vessel was afterwards stranded, and but \$9,000 net was eventually saved out of the cargo, the salvage work being superintended by the agent of the Atlantic Mutual to whom the cargo was virtually abandoned; that company settled with the libellant as for a total loss, returning to the libellant on account, the cargo saved to the net value of \$9,000. *Held*: (1) That there was a constructive total loss of the cargo; (2) and an actual total loss of the "profits," the subject of the insurance in the respondent's policy, that is to say, the value of the cargo over and above the amount insured by the Atlantic Mutual, which both parties understood to be the subject of the respondent's policy; (3) that no act of abandonment to the respondent was required, because there was no possibility that any part of the subject-matter of this policy could remain after the stranding, the right of the Atlantic Mutual to the possession of the whole cargo being superior, and incompatible with any possible abandonment of the sugar to the respondent; (4) that the subsequent receipt of a part of the sugar on account in settlement with the Atlantic Mutual, was merely by way of payment of its liability, and in no way inured to the defendant's benefit; and the libellant was therefore *held* entitled to recover the amount insured.

Butler, Notman, Joline & Mynderse, for libellants.  
Hand & Bonney, for respondents.



BROWN, District Judge. On April 29, 1893, the respondent company insured for the libellant's benefit:

"\$15,000 on profits on cargo sugar; against total loss only; valued at sum insured; shipped on board the British ship John E. Sayre at and from Iloilo to Montreal."

At that time the Sayre was at sea prosecuting the voyage. The libellant had 2,462 tons of sugars on board of her, amounting in value to \$181,000, and had just completed insurance of the sugars to the amount of \$166,145 in the Atlantic Mutual, of which insurance the respondent was informed before its insurance on profits was made. In July following, the Sayre stranded on the coast of Newfoundland, and all the cargo was lost excepting about 300 tons which was saved by the aid of salvors, of which one-half went to them as their agreed compensation. This agreement was originally made by the master soon after the stranding; but a few days afterwards the agent of the Atlantic Mutual appeared, to whom the master turned over the salvage operations. He confirmed the previous agreement with the salvors; reimbursed to the master the expenses already incurred by him, and thenceforward, with the libellant's consent and the defendant's knowledge and acquiescence, took the complete control and disposition of the cargo. The agent eventually bought from the salvors the moieties of the sugars allotted to them under the agreement, and then shipped all the sugar saved to the order of the insurers, to Montreal. The value of all the sugar that reached Montreal was about \$20,000, and the expenses and salvage charges paid by the Atlantic Mutual thereon and the additional freight to Montreal exceeded \$11,000, so that out of the whole cargo worth \$181,000 less than \$9,000 net was saved. The Atlantic Mutual settled with the libellant as for a constructive total loss, under its policy of \$166,145, and it turned over the sugars saved in part settlement of that sum, on about the basis of the average pro rata policy valuation. The respondent contests its liability upon the policy on profits on the ground chiefly that the receipt by the libellant of a portion of the sugars, viz. about \$20,000 in value, prevents the loss from being "total" within the terms of its policy.

The intention of both parties, I cannot doubt, was to insure under the designation of "profits" the interest of the libellant in this cargo over and above the sum of \$166,145, for which the sugars were already insured in the Atlantic Mutual. The excess of the market value over that sum was at that time equal to the insurance of profits. It was a valued policy; and the provision as to "total loss only" is the ordinary provision of those policies which admit abandonment when the loss exceeds one-half the value, and is not the special limitation to an "actual total loss," which requires the destruction of the entire property in order to entitle the assured to recover anything.

Upon the facts in proof, I cannot sustain the defense in any aspect of the case. The subject of this policy was "profits" alone. The facts show that by the stranding all "profits" were utterly destroyed, and very much more. There was clearly a total loss of the subject insured,

viz. profits. No notice of abandonment of profits was necessary as all possibility of "profits" was manifestly gone, and no remnant of profits remained which could be abandoned to the defendant.

As respects the sugars themselves moreover, there was a practical abandonment to the Atlantic Mutual, the insurers on cargo. On their policy there was a constructive total loss, since not one-tenth net value of their policy was saved. That company's rights as respects any abandonment, were superior; and the defendant company could not legally have any abandonment to itself as insurer on profits, except on payment to the insurer of cargo of the whole amount of the latter's liability—in this case an absurd alternative. A policy on profits in a case like this, precludes any possibility of an abandonment by the assured by his own act alone; and hence no attempt to abandon to the defendant was required. *Mumford v. Hallet*, 1 Johns. 433, 439; *Tom v. Smith*, 3 Caines, 245, 251.

The receipt of about one-eighth of this cargo by the libelant in the manner above described does not affect the libelant's right to recover as for a "total loss": (1) Because upon every pound of sugar rescued more than half its value had been paid in order to recover it, so that there was not only an actual total loss of "profits," but a constructive total loss of the sugar as well, and insurance on profits is subject to a constructive total loss. *Abbot v. Sebor*, 3 Johns. Cas. 39, 46. (2) Because none of the sugar ever came to the libelant in the ordinary course of the voyage, or through any delivery to the libelant as consignee by the carrier; but only through a delivery by the insurer of cargo, after a practical abandonment to the latter, and through a settlement by the insurer as upon a total loss, in which the sugar was received by the libelant upon an equitable basis in part payment, and as the equivalent of its value in cash, as any other property might have been received.

Decree for the libelant, with costs.

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#### THE T. F. OAKES.

ROBINSON et al. v. THE T. F. OAKES.

(District Court, S. D. New York. October 4, 1897.)

SEAMEN—SHORT ALLOWANCE—CHANGE OF ROUTE BY CAPE HORN—NEGLECT TO CALL—SCURVY—SHIP LIABLE—REV. ST. § 4568.

The ship *T. F. Oakes*, sailing from Hong Kong for New York by the way of Cape of Good Hope, was at first driven several hundred miles to the eastward by bad weather, whereupon the master changed his route by way of Cape Horn, from 5,000 to 7,000 miles further. The supplies were sufficient for the former route, but plainly insufficient for the latter. The master made no attempt to obtain additional supplies, as he might easily have done at Honolulu, Chili, or Rio Janeiro. Most of the crew suffered from scurvy through insufficient quantity and variety of food, and some died, apparently from that disorder. *Held*, seamen entitled to recover their damages arising from the master's neglect to procure additional supplies, and the consequent short allowance, including the compensation provided by section 4568 of the Revised Statutes.

In Admiralty.

Geo. C. Bodine and George Whitfield Betts, Jr., for libelants.  
Turner, McClure & Ralston, for defendant.

**BROWN, District Judge.** The above libels were filed by various seamen on the ship *T. F. Oakes*, to recover damages for their sufferings from scurvy, on a voyage from Hong Kong to New York in 1895 to 1896, through lack of a sufficient quantity and variety of food. Upon a criminal prosecution of the master for the same cause under section 5347 of the United States Revised Statutes, in May, 1897, in which it was necessary, in order to make out a criminal offense, to show that the negligence was willful and malicious, the master was acquitted. Upon the hearing of the above libels the same evidence has been introduced, with additional testimony. The issue here does not necessarily involve willful, or malicious negligence; but only the question whether there was an actual neglect to supply proper and sufficient food, and neglect to use reasonable endeavors to do so. Upon this issue, a careful consideration of all the testimony satisfies me that the libelants are entitled to recover.

The ship sailed from Hong Kong on July 4, 1895. She was reasonably provisioned for a voyage to New York by way of the Cape of Good Hope, which was the route expected to be taken, and for which the ship was fitted out. This voyage is usually made in from 130 to 180 days, but it is liable to be further prolonged. The *Oakes* had a supply of salt beef for 189 days; pork for 168 days; flour for 210 days; peas for 182 days; with ship bread, rice, tea, coffee and sugar for a longer period. This was sufficient for a voyage around the Cape of Good Hope. The general charge of bad quality I do not find sustained.

The proper course for the Cape of Good Hope was southerly through the China Sea, thence westerly through the Straits of Sunda into the Indian Ocean. Shortly after leaving Hong Kong, however, the ship was driven by storms several hundred miles to the eastward, across the China Sea, and a succession of calms and baffling winds still continuing, the master on July 19th, in longitude 123 E., determined to follow the easterly route by the way of Cape Horn. In the log of that date is the entry: "15 miles from Ballingtang Island, I take a new departure into the North Pacific Ocean." This route to New York was from five to seven thousand miles further than the route by the way of the Cape of Good Hope. The sailing qualities of the *Oakes* were of a very moderate order, and she was liable to make slow passages, as her master well knew. In the last passage around the Horn, the ship was 150 days in making New York from a point in about 7 degrees south latitude, off the coast of South America, the same time as on this voyage, and on this voyage she was 110 days in reaching that point. In all she was 260 days out, though she stopped at no intermediate port. In the principal articles of food she had plainly but a short supply of provisions for the route by way of Cape Horn, measured according to the captain's last trip with the *Oakes* by that route, and it was the obvious duty of the master therefore on changing to the longer route, after delays during two weeks, to obtain additional supplies at the first opportunity at some of the large and convenient

ports which lay along the route. There were several of these, such as Honolulu, Valparaiso and Rio Janeiro, where there would be no difficulty in obtaining the requisite additional food.

For this reason, although the circumstances in proof seem to me insufficient to show that the change to the longer route was likely to be a wise one, the log showing fair winds for a southerly course for several days from July 19th, I treat that question as being wholly within the master's judgment and discretion; but only because the needful additional supplies were easily obtainable. Had there been no such ports, or had the master intended to make no effort to get more supplies at any of them, I should have regarded the change of route as wholly unjustifiable, and in fact a blind disregard of duty, and a reckless exposure of the ship and crew. I cannot make out from the evidence just what the master really expected in this regard except to trust to luck and the chance of getting supplies from some vessels he might meet. He went near the Sandwich Islands; but he made no attempt to call there, or at any other port until near the Bahamas, which, he says, he was also unable to reach, again through baffling winds. This was many months after the crew had been put upon short allowance, and after some had died and most of the remainder were already suffering more or less from scurvy.

Upon a voyage from Hong Kong around the Horn, the master had no right to count on meeting vessels that could spare any such amount of additional supplies as he needed. He met in fact but one vessel that could give him any, viz. the Gov. Robie, on January 13th, and that a small amount only, until March 15, 1896, five days from New York, when the ship was taken in tow by the steamer Kasbeck, the crew being greatly reduced by sickness, exhaustion and distress. The voyage occupied, as I have said, 260 days; two of the crew, and perhaps a third, died from independent causes; three others died with symptoms indicating scurvy; and of the remaining sixteen men on board every one forward of the cabin had become ill; some incapable of any work, and others partially disabled. The general symptoms were sore and bleeding gums, teeth loosened and falling out, limbs swollen and discolored, with weakness and exhaustion. The physicians on shore, after the ship's arrival, had no hesitation in pronouncing the disorder to be scurvy; a disorder arising from one cause alone, viz. a lack of a sufficient quantity and variety of food. The log in noting the death of Thomas King, on December 26th, mentions his claim that the disease was scurvy. Others at that time made the same complaint. The provisions of the Revised Statutes are believed to be sufficient to make this disorder impossible, if they are observed; and scurvy, though formerly not uncommon on long voyages, is now rare in American vessels.

Complaints of a lack of sufficient food were made early on the voyage; three times before the end of September the crew went aft with their complaints. Upon their demand, the government allowance was for a time served out to them, or said to be served out; it is impossible upon the evidence to say whether it was fully served out or not. But the crew soon found themselves no better off than before;

and the majority after a few weeks voted to return to the master's "full and plenty," which they say was gradually diminished, resulting in renewed complaints. On October 24th, when 110 days out of Hong Kong and being then off the South American coast, in about 7 degrees south latitude, the master explained the short supply by saying, that from that point a previous voyage took 150 days, and that he must economize the food. The log makes no mention of this until December 11th, when it states that "the crew came aft complaining of the shortness of food" and were "half starved"; the log adds: "This is not so. \* \* \* The ship through adverse chances has been a long time at sea with no means of replenishing her, and hence what remains on board is served out in such a manner as to economize for future contingencies."

No explanation is offered by the master of his failure to put into the Sandwich Islands or Valparaiso for necessary supplies, which he must have known would be needed. The voyage had been very slow up to each of these points; and he knew that the supplies could not hold out, except by many months of short allowance; and to this he had no right to subject the crew, when ports of relief were accessible. No case of negligence in this regard it seems to me could be more plainly made out.

It is a pleasure to state that Mrs. Reed, the master's wife, did, indeed, do all in her power to restore those who were ill, and to ameliorate their sufferings. But while she thus softened their hardships, and to some extent shared in the general distress, this in no way excuses the antecedent wrong and the neglect to obtain proper supplies. The ship must therefore make good to the seamen their actual pecuniary damages, taking account of the statutory allowance.

Upon all the circumstances and the evidence, I do not think the amount of the deficiency is clearly shown to have been more than one-third; so that the amount recoverable under section 4568 of the Revised Statutes will be 50 cents per day for each seaman during the time of the short allowance, which I reckon from October 1st to March 16th, upon the reasonable inference to be drawn from the testimony of the master as well as of the seamen. This was 166 days, and amounts to \$83 to each seaman.

Four of the original libelants, namely, Sandstrom, Gustavsen, Fromhold, and Bemeison, have executed releases of all claims. No question on this point is made as respects the last two. As respects the two seamen first named, it is contended that the settlement made with them was unfair and should be disregarded. The testimony on that point is, however, extremely full and circumstantial, showing that they were fully acquainted with the facts, understood that a claim had been made in their behalf against the ship, that they desired to make a full settlement, and accepted the moneys offered to them, and that they executed releases fully understanding that they were in discharge of all claims against the ship. This was also done at the office of the shipping commissioner. A settlement so fully understood at the time should not, I think, be set aside.

The remaining eight seamen are entitled to some additional compensation for the sickness, suffering and disability reasonably attribut-

able to the lack of proper food. It is by no means easy, however, to form any certain judgment upon this point from the probable fact that other circumstances and causes contributed to the illness or disability of some of the men, and it is impossible to separate fully these contributing causes. From the presence, however, of certain common symptoms in all these men occurring only during the latter part of the voyage, between Christmas and the arrival of the ship in March, there seems to be no reasonable doubt that there was sickness arising from scurvy, caused by the lack of proper food. All had soreness of the gums and looseness of the teeth. Hautel lost four teeth, Fraser two teeth, Weber two teeth and Peterson five teeth. All had swelling of the limbs with discoloration, and all were laid up in their bunks for different periods from two to five weeks, and all went to the hospital and were treated on their arrival. Dr. Baker, who examined each of them, states that in June last the symptoms of scurvy were still apparent and that the disabilities suffered would be to some extent permanent.

Upon as careful consideration as I am able to give to the circumstances testified to in relation to each, I award, besides the sum above mentioned, to Hautel, Fraser, Peterson and Larsen \$300 each; to Weber and Arro \$275 each; to Robinson and Anderson \$250 each; in all \$2,914.

A decree may be entered accordingly, with costs.

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GILDERSLEEVE et al. v. NEW YORK, N. H. & H. R. CO. et al.

(District Court, S. D. New York. May 24, 1897.)

1. COLLISION WITH RIPRAP OF BRIDGE — ILLEGAL OBSTRUCTION — "DRAW 130 FEET IN THE CLEAR"—LOW-WATER MEASURE SUFFICIENT—APPROVAL BY SPECIAL TRIBUNAL.

In approaching the draw of the Connecticut river at Middletown, the libellant's barge ran upon the riprap foundation of the rest pier, which, below low-water mark, extended outward into the channel way. On the contention that the defendant was maintaining an illegal obstruction of navigation, it appeared that the bridge was built under the state act of June 17, 1868, confirmed by congress in 1869, which act required draws "not less than 130 feet in width in the clear," and that the bridge and draws be located and constructed in such manner and such places and upon such plans as should be approved by a competent board of engineers appointed by the superior court, etc. The bridge was built accordingly, under the supervision and approval of a board of three expert engineers thus appointed, two of whom were Gens. McClellan and Gilmore. The draw space was 130 feet wide in the clear between the abutments down to the level of low water. Below that, the riprap sloping outward diminished the clear space towards the bottom of the river. *Held*, that the contemporaneous construction of the act as requiring the full width down to the level of low water only, the projection of the riprap foundation below being approved by the board of engineers and confirmed by the court, was neither unreasonable nor so plainly contrary to the requirements of the act or the public needs as to render the bridge, approved as above, an unlawful structure; and that the determination of such questions was properly within the province of the special tribunal appointed to determine and to approve the plans.

**2. UNWIELDY BARGE—SHEERING IN SHALLOW WATER.**

The evidence showing that the barge was difficult to handle and liable to take unexpected sheers in shallow water: *Held* on the evidence that the collision should be ascribed to accident rather than to any negligence of the tug.

Sidney Chubb, for libelants.

Henry W. Taft, for New York, N. H. & H. R. Co.

Wilcox, Adams & Green, for the tug.

BROWN, District Judge. This libel was filed against the above railroad company by the owner of the barge *Volunteer* to recover damages for injuries received by the barge between 1 and 2 a. m. of September 5, 1895, in running upon the riprap foundation of the southerly rest pier of the railroad bridge over the Connecticut river at Middletown, Conn. The barge was going up the river with the flood tide, in tow of the tug *Luther C. Ward*, upon a hawser about 300 feet long, designing to pass through the east channel of the open draw. Astern of the *Volunteer*, and on a hawser of about 300 feet, was another barge; and astern of the latter, was a third barge upon a shorter hawser. The draw of the bridge, when open, afforded a clear space of 130 feet measured on a line perpendicular to the face of the piers, and at the level of low water. Each arm, when open, was supported by a smaller independent pier, the lower one being known as the south rest pier. The foundation of the rest piers, like that of the other piers, was sloping beneath the water, being constructed of successive steps outwards from the main pier, termed altars, which were further covered by riprap as a protection to the masonry. In approaching the draw, the *Volunteer*, in consequence of a previous sheer to the westward, from which she had not wholly recovered, ran up to within 5 or 6 feet of the easterly side of the south rest pier, and drawing  $9\frac{1}{2}$  feet of water, her port side thus ran upon the riprap work, and broke some planks so as to let in water enough to cause her to sink a few rods above.

The libelants contend that the bridge is an illegal obstruction and an illegal structure, because the draw is not 130 feet in the clear at the bottom of the river. Upon the petition of the railroad company, the tug was brought in as a party defendant, under the fifty-ninth rule, on the claim that the damage was owing to the negligence of the tug in navigating the tow.

The bridge was originally built by the New Haven, Middletown & Willimantic Railroad Company; but the defendant company appears to be in possession of the bridge, and operating it. The libel contains an indirect averment to that effect; and the answer contains no specific denial of it; so that if the bridge at the time when the accident happened was an unlawful obstruction, the defendant company must be held answerable for the damages properly attributable to the obstruction.

The bridge in question was constructed by the New Haven, Middletown & Willimantic Company, under a resolution of the general assembly of the state of Connecticut approved June 17, 1868, amending the

charter of that company and authorizing the construction of the bridge in the manner therein provided. See 6 Sp. Laws Conn. p. 329.

By that act the company was authorized to construct a bridge "provided with two draws, each of which shall be of such a width as to permit the free passage of the largest vessels navigating said river, and each of which draws shall not be less than 130 feet in width in the clear; said bridge and draws to be located and constructed in such manner and in such place and upon such plan as shall be approved by a competent board of engineers to be appointed by the superior court of Middlesex county upon public notice to parties interested, and opportunity to be heard, as shall be required by order of the court, and finally to make a return of their doings to said court"; and said corporation was "authorized to build and maintain the piers and works of said bridge in the places and in the manner to be designated in the plan which shall be so approved by said board."

The above resolution was confirmed by act of congress, passed February 19, 1869 (15 Stat. 272, c. 37), by which it was enacted, "that said bridge when completed in the manner specified in said resolution and in the place and in accordance with the plans of the board of engineers \* \* \* shall be deemed and taken to be a legal structure," the right being reserved by the third section to "withdraw the assent hereby given in case the free navigation of said river shall at any time be substantially and materially obstructed by such bridge."

At the April term of 1869, the superior court of Middlesex county, Conn., appointed Charles B. Stewart, George B. McClellan, and Q. A. Gilmore a board of engineers under the above resolution and act of congress, and the bridge was subsequently built under their supervision, upon plans and drawings submitted to that board, approved by it, submitted to the court and after public notice accepted and approved by the court; and in 1876, some time after the completion of the bridge, a committee was appointed by the court to inquire whether the bridge had been constructed in accordance with the plans so approved, which reported that it had been so built in all respects; and that report was subsequently confirmed by the court at the September term, 1876, by a decretal order which declared that the court accepted said report and found all the facts and matters reported therein to be true.

The libelants now contend that the bridge was an unlawful obstruction, because the available space of the draw, 130 feet in the clear at the level of low water was not so continued perpendicularly down to the bottom of the river; and because the sloping sides of the piers, built below low-water mark as above stated, gave vessels less available space under water than 130 feet in the clear.

It is manifest that the construction contended for was not the construction of the act adopted at the time, either by the board of engineers appointed by the act, or by the superior court of Connecticut. The written specifications in the plan of the bridge, which have been produced in evidence, provide expressly in reference to draws as follows:

"The draws of said bridge shall consist of two openings each 130 feet wide in the clear at the level of ordinary low water. \* \* \* The foundations of



the piers and abutments shall be constructed upon such plan and in such manner as this board shall approve after the character of the river bottom and the substrata shall have been fully ascertained."

—The drawings signed and approved by all the members of the board show the sloping foundations below low water.

These plans were approved by the court as above stated, and though the drawing of the south rest pier could not now be found, the testimony of Gen. Serrell leaves no doubt that it was similar to that of several of the other piers, the drawings of which were produced.

I am of opinion that the action taken in this case by the board of engineers as ratified and approved by the court, is conclusive as to the lawfulness of this structure at the time. The board of engineers appointed to determine the location, plan and structure of the bridge in conjunction with the court to which it was to report, constituted the special tribunal to which all questions pertaining to the mode of building the bridge, except such as were definitely fixed by the act itself, were referred; and their decisions, while thus acting within the scope of the statute, are binding. No doubt they could not bind the public to violations of any clear provisions of the statute. But particulars not clearly defined by the statute, and the construction of the statute itself, so far as was necessary to determine such details, were necessarily within the province of the board of engineers to determine, and when thus determined and acted on, that determination is a valid defense against the charge of building an unlawful obstruction. The questions relating to the mode of constructing the foundations of the piers below water, and the depth and extent of the unobstructed space at the bottom of the river, were, I think, questions of detail of that character. The act required a width sufficient for the "free passage of vessels of the largest class navigating the river." The evidence shows that at that time the largest draft of such vessels was  $9\frac{1}{2}$  feet. The channel way in the draw was from 12 to 13 feet. The act required "the draw to be 130 feet in the clear." A draw, as defined by all dictionaries, is "the movable section of a bridge," whether raised up, as was the earlier practice, or moved to one side, as at present. Literally, therefore, a draw would be 130 feet in the clear, if, when opened, it would leave an open passage of 130 feet measured on the line of the bridge; the board of engineers, however, provided for 130 feet in the clear on the line of low-water mark, as was done in the cases of *St. Louis & St. P. Packet Co. v. Keokuk & H. Bridge Co.*, 31 Fed. 755; *Hannibal & St. J. R. Co. v. Missouri River Packet Co.*, 125 U. S. 260, 8 Sup. Ct. 874.

As the language of the act does not expressly require 130 feet between the piers at the bottom of the river, it should be construed reasonably according to the objects to be attained, keeping in view the circumstances of the time and the existing usage and practice and understanding of engineers skilled in that business. When this bridge was built, the principal part of the navigation of the river was by sail vessels, and tows like those now in use were hardly known. The sails and booms of sailing vessels, as well as oars which are occasionally used, require more space above water than below. A reasonable slope to strengthen the foundation of the piers, therefore, was no

substantial obstruction of the passage; and accordingly bridges were generally so constructed. Gen. Serrell, who prepared these plans, testified to this fact, and that this was the usual understanding by engineers of such statutory provisions. The members of the board of engineers, of which Gen. McClellan was one, were themselves experts of high character. Their testimony could not be had, as all are dead. But their approval of the plan is itself evidence of their construction of the act; and I cannot regard the testimony of Maj. Adams, whose acquaintance with the subject extends but little more than half-way back to the date of this act, as outweighing the above evidence. The action of the war department also, on the report of Maj. Adams upon an investigation made after this accident, does not support Maj. Adams' contention; for the result of this investigation was a requirement that a guard or piles should be driven down around the piers at a distance of  $12\frac{1}{2}$  feet therefrom, and that any riprap beyond such piles should be removed. Thus, instead of applying the rule contended for, and requiring a space of 130 feet between the piers at the bottom of the river, the clear space, even above low-water mark, was reduced by the war department to 105 feet. It is not clear that this requirement has not created more obstruction than it has cured. The action of the war department, however, is based upon the act of September 19, 1890 (1 Supp. Rev. St. p. 800, § 4), and upon the reservation above referred to in the act of 1869; and it in no way affects the lawfulness of the structure before any action was taken thereon by the war department.

I have considered the above question as though it related solely to the piers of the draw itself; whereas in fact this accident happened at the rest pier, 130 feet below the bridge. The rest pier, though not strictly a part of the draw, is one of its incidental accompaniments. The language of the statute requiring 130 feet in the clear, cannot be applied literally to the rest pier, since the spaces measured at right angles from the east and west faces of that pier are wholly open and unobstructed for several hundred feet to the bank of the river on either side. The easterly face of the rest pier, moreover, as the evidence shows, was  $6\frac{1}{2}$  feet to the westward of the line of the easterly face of the pivot pier; so the point where the Volunteer struck was almost precisely in line with the easterly face of the pivot pier itself, as it stood above water. There was abundant room to the eastward and to the westward of the rest pier, and there is no sound reason for the contention that the few feet of sloping riprap at that point was of itself any material obstruction in the approach to the draw. There is no evidence of previous accidents there; and it must be assumed that the sloping foundations of all the piers was well known to the boatmen accustomed to navigate the river. The construction of such a rest pier being a part of the plan for the support of the draw, and authorized by the act, and being constructed in the mode approved by the board of engineers, and ratified by the court, it cannot be deemed an unlawful obstruction at the time this accident occurred. For the same reason no guards or piles can be held to have been required.

2. As respects the alleged negligence of the tug brought in under the fifty-ninth rule, I do not think the charge is satisfactorily made out.

The Volunteer was a large barge, flat-bottomed and not easily steered in shallow water; and it is shown by the evidence that she was peculiarly liable to sheer indifferently on either side. The tug pursued the customary course, which was always through the easterly channel in going up. Not only her own testimony, but the witnesses from the boats behind, show that below the draw they were heading properly and in the usual manner for the east channel. They were going up with the flood tide at the rate of about 6 or 7 miles an hour; and the Volunteer, when about 600 or 700 feet below the rest pier, and only a short distance to the westward of the center line of the easterly channel, sheered to port until her hawser led about a point to starboard. On a hawser of 300 feet this would give an offing of about 60 feet. While endeavoring to recover her position, the port side of the Volunteer grazed the riprap of the pier, as above stated.

The course of the fleet from a point about 1,000 feet below the draw had been a little to starboard, in order to reach the center of the east channel. The tug, according to the testimony of her pilot, passed about 25 or 30 feet to the eastward of the south rest pier, heading for the center of the passage above. A little before reaching the rest pier, the pilot had looked astern, he says, and saw the tow coming properly. This must have been just before the sheer of the Volunteer was taken. The point where the sheer began being only 600 or 700 feet below the rest pier, it is evident that the Volunteer struck within a minute afterwards, and the attention of the tug's pilot was at that moment occupied with the draw of the next bridge a little above. It was expected by those on the Volunteer that she would clear the rest pier, notwithstanding her sheer. But the flood tide prevented. No hail was given to the tug; and it does not seem to me to constitute negligence in the pilot of the tug that he did not anticipate a sheer by the Volunteer to the westward a moment after he had seen that the tow was following him rightly to go through the draw, or that he did not maintain a constant lookout astern. No evidence of such a practice is given. All the evidence shows that the tug was pursuing the usual course. The fleet was headed for the center of the draw. The sheer of the Volunteer with her heavy weight would, with the tide, draw the tug somewhat to port. The obligation of a tug is only that of reasonable nautical care and skill. I do not think the proof in this case is sufficient to show that the tug was at fault in this respect. The failure of the libelants to join in any such charge, even after the tug had been brought into the case under the fifty-ninth rule, is at least of some significance in this regard. The true cause of the accident was, I think, the liability of the Volunteer to sheer, and the difficulty of her recovery in shallow water. According to the evidence, there was no way in which this liability could be avoided. That the sheer happened at an unfortunate moment must, I think, be set down to accident, and not construed as a fault. See *The John C. Sweeney*, 55 Fed. 536.

The libel must, therefore, be dismissed, with costs to the defendant company as against the libelants, and with costs to the tug as against the defendant company, under the stipulation.

UNITED STATES *ex rel.* HURD v. ARNOLD, United States Marshal.

(Circuit Court of Appeals, Seventh Circuit. January 21, 1897.)

No. 334.

## APPELLATE JURISDICTION—MOOT QUESTIONS.

Where an appeal in habeas corpus is perfected after the time allowed, and after the prisoner has been transferred to another district for trial, so as to be beyond reach of the court's process, the questions for decision on the appeal become mere moot questions, which the court will not decide.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

B. M. Shaffner, for appellant.

John C. Black, for appellee.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

BUNN, District Judge. The history of this case, derived mainly from the record, but in small part from the admissions of counsel in their briefs and upon the argument, is this: The appellant, Charles Hurd, was indicted, with others, on March 19, 1896, by the United States grand jury sitting at Council Bluffs, in the Southern district of Iowa, under section 3894 of the Revised Statutes of the United States, charged with using the United States mails for the purpose of effecting the "green-goods swindle," commonly so called; the substance of the charge being that he was using the mails for the purpose of selling to his correspondents counterfeit United States notes, of the same appearance, as to color, engraving, and paper, as the lawful obligations of the government, and represented to be printed from the genuine plates which were used by the United States government, at the rates specified in the circulars mailed. Upon this indictment a bench warrant was issued by the United States district judge for the Southern district of Iowa for the arrest of Hurd, but, he being in the Northern district of Illinois, the warrant for his arrest was sent to the marshal of the Northern district of Illinois for execution, and Hurd was there arrested and placed in jail. Thereupon, on April 9, 1896, Judge Grosscup, the United States district judge, made an order, according to the usual practice in such cases, directed to the marshal, commanding him that he remove the prisoner to the Southern district of Iowa, and there deliver him to the marshal of that district, to be dealt with according to law. While in the hands of the marshal, and before he was transported to the Southern district of Iowa, Hurd petitioned Judge Showalter, the United States circuit judge at Chicago, and obtained a writ of habeas corpus, directed to the marshal, commanding him to produce the prisoner, which he did, making proper return of the facts. The case came on for hearing before Judge Showalter on April 9, 1896; the point urged by the prisoner's counsel being that no sufficient offense was charged in the indictment, and that, if indicted at all, it should have been under section 5480 of the Revised Statutes, which is a pro-

vision of a similar character to that under which the indictment was returned, but of different phraseology, and not under section 3894. Judge Showalter, upon the hearing, overruled these objections, and discharged the writ. Whereupon the prisoner on the same day prayed and was allowed an appeal to this court, upon his giving a bond within 10 days in the sum of \$6,000. Afterwards, the prisoner, not complying with the order with respect to a bond within the time required, and which was necessary to stay proceedings on the warrant, was transported by the marshal and delivered to the marshal for the Southern district of Iowa, where he was tried under the indictment, found guilty, and sentenced to a term of imprisonment in the state prison in that state, where he has since remained. On May 2, 1896, two weeks after the time for so doing had expired, the prisoner, by his counsel, filed a bond as upon an appeal under the order made on April 9th; and this court is now asked to review the decision of the circuit court discharging the writ, as though an appeal had been perfected within the time allowed by the order so as to stay proceedings. This we cannot do. By failing to perfect his appeal within the time required, so that it should operate as a supersedeas, the prisoner suffered himself to be transported out of the state, and beyond the jurisdiction of the circuit court, which thereby lost control of his person. Under these circumstances, it is apparent that the case, as it now stands, is a moot case, pure and simple. This court cannot be led to the decision of abstract questions of law, where the right of a party to the litigation is not dependent upon, and cannot be affected by, the decision. No judgment which this court might render could affect in the slightest degree the judgment of the court in Iowa, or change in any respect the status of the prisoner. The appeal is dismissed.

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**KANE v. CITY OF INDIANAPOLIS, IND., et al.**

(Circuit Court, D. Indiana. October 13, 1897.)

No. 9,462.

1. **REMOVAL OF CAUSES—JOINT AND SEVERAL CAUSE OF ACTION—JOINT ACTION**  
Where a plaintiff might sue either jointly or severally, and elects to sue jointly, the cause of action, as respects jurisdiction, becomes joint; and a defendant who, if sued alone, might have the cause removed to the United States circuit court, cannot claim such right unless each of the defendants is entitled to claim the federal jurisdiction.
2. **DEFECTIVE SIDEWALK—JOINT LIABILITY OF CITY AND PERSON CONSTRUCTING.**  
Where the allegations of a complaint against a city and a contractor show that the contractor built and maintained a dangerous and defective sidewalk, under the direction and supervision of the city, it shows a joint concurrence in the construction of the walk and knowledge of its defective and dangerous character, and the liability of both defendants is primary.
3. **NEGLIGENCE—STREETS AND SIDEWALKS—OBLIGATIONS AND LIABILITY OF LOT OWNER.**  
Outside of positive law, no obligation rests on a lot owner to keep the sidewalk or street in front of his lot in good repair, and no liability for injuries resulting from a failure to do so.

This was an action at law by Thomas E. Kane against the city of Indianapolis, C. E. Clark, and William E. Stevenson, to recover damages for personal injuries. The case was heard on motion to remand to the state court, from which it had been removed.

Holtzman & Leathers and John W. Kern, for plaintiff.  
Miller & Elam, for defendants.

BAKER, District Judge. This is an action instituted in the superior court of Marion county, Ind., to recover damages for personal injuries alleged to have been sustained by the plaintiff by a fall caused by a dangerous and defective step in the sidewalk on the south side of Washington street, in the city of Indianapolis. The complaint is in a single paragraph, and says that the defendant Stevenson was the owner of a certain described lot or parcel of real estate situate on the south side of Washington street, having a permanent sidewalk along its front; that the defendant Clark entered into a contract with Stevenson for the erection of a 12-story office building on said lot or parcel of land, agreeing to perform all the work and labor and to furnish all the materials in the construction of said building; that, in performing such contract, it was necessary to remove the sidewalk, and to construct a temporary wooden sidewalk immediately in front of said building. It is further alleged that Clark constructed said temporary sidewalk and a step forming a part of the same in an unskillful and negligent manner, and that they were in certain specified particulars unsafe and dangerous, and likely to cause injury to pedestrians having occasion to use them. The complaint then proceeds:

"Plaintiff further alleges that said temporary wooden sidewalk and said step to be used in connection therewith was [were] made and constructed by defendant C. E. Clark, under the direction and supervision of the defendant the city of Indianapolis, through its proper officers and agents; and plaintiff further alleges that said defendants William E. Stevenson, C. E. Clark, and the city of Indianapolis had full knowledge and notice that the step used in connection with said temporary wooden sidewalk was, by reason of the negligence and unskillfulness in the construction thereof, an insecure, unsafe, and dangerous place for pedestrians to use and step upon in passing along said sidewalk from the time said step was constructed and placed by the defendant C. E. Clark, as hereinbefore described, until plaintiff sustained the injuries hereinafter alleged."

The complaint then proceeds to show that the plaintiff was, by reason of said dangerous and defective step, thrown violently upon the walk, and seriously and permanently injured, without any fault or negligence on his part. The defendant Clark seasonably filed in the state court his petition and bond for the removal of the suit into the circuit court of the United States, alleging in his petition that he was at the time the suit was brought, and still is, a citizen of the state of Massachusetts, and that the defendants Stevenson and the city of Indianapolis were and are citizens of the state of Indiana; and further alleging that the cause of action was, as to him, separable from the cause of action against his co-defendants. The state court granted the prayer of the petition, and made an order transferring the suit into this court. The plaintiff, by counsel, now moves the court to remand the suit to the state court, on the ground that the cause of action dis-

closed in the complaint is joint, and not separable. Counsel for the defendant Clark insist that the complaint discloses no cause of action against the defendant Stevenson, and that the cause of action, as against Clark and the city of Indianapolis, is not joint, but several. The contention of the counsel for the defendant is that the complaint shows that the defendant Stevenson had let the contract for the erection of the building to Clark as an independent contractor, and that he reserved no right of control over the work of erecting the building, and was in no wise responsible for the manner in which the work was performed, and that the mere fact that he, as lot owner, knew that the sidewalk and step were carelessly and negligently constructed in the performance of the contract, gives no right of action against him. *Railway Co. v. Farver*, 111 Ind. 195, 12 N. E. 296; *Water-Supply Co. v. White*, 124 Ind. 376, 24 N. E. 747.

In the view which the court takes of the case, it is not important to determine whether or not a cause of action is shown against the defendant Stevenson, for, if no cause of action is disclosed as against him, the suit must still be remanded if a joint cause of action is disclosed as against the defendants Clark and the city. The court cannot take jurisdiction of a suit upon removal under the statute conferring jurisdiction on the courts of the United States, unless the suit is one which could have been originally brought in such courts. In the case of *Strawbridge v. Curtis*, 3 Cranch, 267, it was decided that, where a joint interest is prosecuted, the jurisdiction cannot be sustained unless each individual be entitled to claim that jurisdiction. And in *New Orleans v. Winter*, 1 Wheat. 91, 95, it was decided that in a case where the plaintiff might elect to sue jointly or severally, having elected to sue jointly, the case was incapable of distinction, so far as respects jurisdiction, from one in which he was compelled to sue all jointly. The doctrine so declared has never been departed from by the supreme court of the United States. Hence, in any case where the plaintiff may elect to sue jointly or severally, if he elects to sue jointly, so far as respects jurisdiction, the case must be treated the same as though the cause of action was joint. *Railroad Co. v. Wangelin*, 132 U. S. 599, 10 Sup. Ct. 203; *Torrence v. Shedd*, 144 U. S. 527, 12 Sup. Ct. 726; *Merchants' Cotton-Press & Storage Co. v. Insurance Co. of North America*, 151 U. S. 368, 14 Sup. Ct. 367. The cases decided on the circuit which are cited and relied on by counsel for the defendant Clark, in so far as they are in conflict with the doctrine declared in the cases above cited, are not authoritative or controlling on the question here involved, and an examination of them is unimportant; for, if the cause of action against Clark and the city was joint and several, it has, by the election of the plaintiff to sue them jointly, become, as respects jurisdiction, a joint cause of action. The city has the possession and control of streets and walks. Any work done above or below the surface is done presumptively by it, and, for any injury resulting from any obstruction or excavation, it is responsible; and it has a claim over against an individual only when it appears that such obstruction or excavation was made by the individual, or at his instance, or for his benefit. The liability of the individual is no greater because the injury took place on the sidewalk

than if it happened in the middle of the street. The only principle on which the individual can be held responsible is that he caused the injury, and not that he owns a lot in front of which the injury happened. There is, outside of positive law, no natural obligation resting on a lot owner to keep the sidewalk or street in front of his lot in good repair, and no liability for injuries resulting from a failure to do so. If the city permits a lot owner or other person to occupy the sidewalk, or to obstruct a free and safe passage over it, or to endanger its safety by excavations or otherwise, it does not thereby relieve itself from responsibility. It is as to third parties the same as though it had done these things itself. In other words, it cannot transfer to private citizens that responsibility which, for wise purposes of public policy, the law casts upon it in reference to the care and safety of its streets and walks.

From these principles it results that, as to third parties who have sustained injuries from the dangerous and defective condition of its streets and walks, the responsibility of the city is primary, and it cannot shift from itself this primary responsibility. The complaint clearly shows that the responsibility of the defendant Clark is also primary, because he constructed the defective and dangerous step which caused the injury. It is distinctly alleged that Clark and the city jointly concurred in constructing the defective and dangerous step. The temporary wooden walk and the step were constructed by Clark "under the direction and supervision of the defendant the city of Indianapolis"; and it is further alleged that each at all times knew and had notice that the step was dangerous and defective. The act of each, therefore, jointly concurred in the construction of the dangerous and defective step, and there was also a joint concurrence in the knowledge of their wrongful act. It is immaterial whether or not the city has a right of action over against Clark. So far as respects the plaintiff, it is clear that each jointly concurred in the construction of the dangerous and defective step which caused the plaintiff's injury. None of the cases cited and relied on by counsel for the defendant Clark exhibit a state of facts analogous to that presented in this case, and therefore they are not controlling or influential here. The motion to remand is sustained, at the cost of the defendant Clark.

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HONEY v. CHICAGO, B. & Q. R. CO.

CHICAGO, B. & Q. R. CO. v. HONEY.

(Circuit Court of Appeals, Eighth Circuit. September 20, 1897.)

Nos. 831 and 959.

**1. BILL OF EXCEPTIONS—AMENDMENT.**

The allowance of amendments to the bill of exceptions long after the close of the trial term, and after the end of the time for settling the bill as fixed by order of court and stipulation of parties, and after a writ of error has been allowed, and the cause removed to the appellate court, is unauthorized, and the amendments are void.

**2. SAME—APPEALABLE ORDERS.**

An order allowing the amendment of the bill of exceptions after the end of the term, and after the date fixed for settling the same and the removal



of the case to the appellate court, is not a final decision such as can be made the subject of a separate suit in error.

**8. APPEAL AND ERROR—DIRECTION OF VERDICT—EVIDENCE IN RECORD.**

In the absence of any showing that the record contains all the evidence, it is impossible to hold that the trial court erred in directing a verdict.

In Error to the Circuit Court of the United States for the Southern District of Iowa.

This was an action at law by W. O. B. Honey against the Chicago, Burlington & Quincy Railroad Company to recover damages for personal injuries. The circuit court directed a verdict for defendant, and entered judgment accordingly. The plaintiff brought the case to this court on error.

James McCabe (C. M. Harl and J. M. Junkin were with him on the brief), for W. O. B. Honey.

H. H. Trimble (J. W. Blythe and Smith McPherson were with him on the brief), for Chicago, B. & Q. R. Co.

Before BREWER, Circuit Justice, SANBORN, Circuit Judge, and RINER, District Judge.

BREWER, Circuit Justice. These two cases—831 and 959—grew out of a single action at law brought by W. O. B. Honey to recover damages for personal injuries. On the trial in the circuit court, the jury, on March 30, 1895, under the instructions of the court, returned a verdict in favor of the defendant, upon which verdict a judgment was duly entered. Time was given for the preparation of a bill of exceptions, which was extended by several stipulations of the parties to June 1, 1896. Before that date the bill was properly settled, signed, and filed. It was regular in form, and complete in all respects, save that it failed to state that it contained all the testimony given on the trial. This was through an oversight of counsel in the preparation of the bill, and not from any omission of the judge or neglect of the clerk. Thereafter, and on July 22, 1896, the transcript was filed in this court, and docketed as case No. 831. On April 7, 1897, on application of the plaintiff in error, and after notice and a hearing, the circuit court ordered that the bill of exceptions be amended by adding the statement that it contained all the evidence. The railroad company sued out a writ of error to reverse this order, and a transcript of the proceedings on this application was thereupon filed in this court, and docketed as case No. 959. It was also filed by the plaintiff in error as an amendment to the record in case No. 831. When these cases were called for argument, several motions were interposed by the railroad company. Without stopping to discuss any subordinate matters of practice, it is enough to say that the amendment of the bill of exceptions made long after the close of the trial term, and after the end of the time for settling the bill as fixed by the order of the court and the stipulation of the parties, and especially after a writ of error had been allowed, and the case removed to this court, was unauthorized and void. *Bank v. Eldred*, 143 U. S. 293, 298, 12 Sup. Ct. 450. It was not, however, a final decision of the circuit court, such as can be made the subject of a sepa-

rate suit in error in this court. In the absence of any showing that the record contains all the evidence, it is impossible to hold that the trial court erred in directing a verdict. *Railway Co. v. Cox*, 145 U. S. 593, 606, 12 Sup. Ct. 905; *Taylor-Craig Corp. v. Hage*, 32 U. S. App. 548, 16 C. C. A. 339, and 69 Fed. 581; *Oswego Tp. v. Travelers' Ins. Co.*, 36 U. S. App. 13, 17 C. C. A. 77, and 70 Fed. 225. Case No. 959 will therefore be dismissed, and in case No. 831 the judgment will be affirmed.

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LEARY v. COLUMBIA RIVER & P. S. NAV. CO. et al.

(Circuit Court, D. Washington, N. D. October 6, 1897.)

1. FEDERAL COURTS—JURISDICTION—SUIT TO WIND UP FOREIGN CORPORATION.

L., a citizen of the state of Washington, and a stockholder in an Oregon corporation, brought a suit in equity in a federal court in the former state against the corporation and against its officers, who were citizens of Oregon. The bill alleged an abuse by said officers of their trust, in utterly dissipating the earnings of the corporation, and a consequent danger of its insolvency, and prayed for a receivership, and for a decree that the individual defendants account and make good the depletion. The individual defendants were not within the jurisdiction of the court. The complainant claimed to be a creditor of the corporation for dividends that should have accrued, but had not reduced his claim to judgment. On demurrer, *held*, that the suit could not be maintained.

2. CORPORATIONS—RIGHTS OF STOCKHOLDER TO DIVIDENDS.

*Held*, further, that until the corporation had a surplus in its treasury a stockholder could not say that there was a definite sum due to him, nor insist on a dividend being declared.

3. SAME—RECEIVERS.

While in such a suit against a corporation and its managing officers a receivership may be proper as a mere conservative provision, incidental to the main object of the bill, the principle does not apply to a case where the officers, being beyond the jurisdiction, cannot be brought to account, nor be compelled by the court to restore ill-gotten gains, and where the appointment of a receiver, for the protection of complainant's interests, is the main object of the suit.

4. SAME—CONTRACT CREDITORS.

A court of equity will not appoint a receiver of a corporation, without consent of the corporation itself, upon the application of a mere contract creditor, who has not secured an adjudication of his claim, and a judgment for an ascertained sum.

5. SAME.

A fortiori, one who cannot even claim a definite or certain amount to be due is in no position to demand such relief.

6. SAME.

Courts having jurisdiction to enforce their decrees in the state where a corporation has its home office should be resorted to in all cases where it is necessary to inquire into and regulate the internal affairs of the corporation.

7. SAME.

A court of equity will not take control of the property of a foreign corporation with a view of experimenting to ascertain if a stockholder's investment may not be made more profitable by having the business conducted by a receiver.

Ballinger, Ronald & Battle and S. M. Shipley, for complainant.  
Preston, Carr & Gilman, for defendants.

**HANFORD**, District Judge. This is a suit in equity by John Leary, a citizen of the state of Washington, against the Columbia River & Puget Sound Navigation Company, a corporation organized under the laws of the state of Oregon, and against certain individual citizens of the state of Oregon, who are officers of said corporation. The bill of complaint avers that the complainant is a large stockholder in the defendant corporation; that the corporation is the owner of certain steamboats engaged in carrying passengers and freight on regular routes on Puget Sound, in the state of Washington, and on the Columbia river, between Portland and other points in the state of Washington and the state of Oregon; that the other defendants are officers of the corporation, and in control of its property and business, and that they have abused their trust, by paying large salaries to themselves, employing near relatives in the service of the corporation, whose services are unnecessary, and paying them extravagant salaries, and by permitting the corporation to become a creditor of a town-site company in the state of Oregon, in which the individual defendants are interested, without making any effort to collect from the town-site company the amount due to the navigation company, by which means the entire earnings of the vessels owned by the corporation have been absorbed, in fraud of the rights of the stockholders; that no dividends have been paid to the stockholders, although, if the business had been managed with ordinary business prudence, and if accounts had been honestly rendered, a considerable sum would have been accumulated, which would belong to the stockholders; and that there is danger of the corporation becoming insolvent, in consequence of a continuation of the extravagance of the present management. The object of this suit is to oust the present officers of the corporation from control of its affairs, by placing the corporation, its business and property, in the hands of a receiver, and to compel said officers to render accounts and make good the amounts which they have improperly diverted from the treasury of the company. The corporation has appeared by counsel, and demurred to the bill on the ground that the court has no jurisdiction to grant the relief prayed for, or any relief.

In the argument upon the demurrer it was conceded that the individual defendants whose conduct is brought in question are not inhabitants of this state, and not within the jurisdiction of this court, so that it will be impossible for the court to obtain jurisdiction to render any decree against them personally. The complainant claims to be a creditor of the corporation to the amount which should have accrued in dividends upon stock which he holds, and that he has an equitable lien upon the property of the corporation; but he has not reduced his claim to judgment, and, as the corporation has no money in its treasury, it is obvious that he is not in a position to take a judgment against the corporation, for until there is a surplus in the treasury there can be no distribution of undivided profits. All that the court might do in this suit, and within this state, if its jurisdiction was sufficiently enlarged, would be to take into its custody the vessels and property of the corporation, which are within this state, and employ the same so as to earn money, in order to put money into the treasury of the corporation, and make it available to the payment of dividends, or sell

the vessels and property, and distribute the proceeds among the creditors and stockholders. It is my opinion that a suit cannot be maintained for such purpose, without consent of the corporation, whether the complainant be regarded merely as a stockholder, or as a creditor and stockholder. Until the corporation has a surplus in its treasury, a stockholder cannot say that there is any definite sum due to him from the corporation, nor insist on a dividend being declared. The rule is well settled that a court of equity will not appoint a receiver of a corporation, without consent of the corporation itself, upon the application of a mere contract creditor, who has not secured an adjudication of his claim, and a judgment for an ascertained sum. Beach, Rec. (Alderson's Ed.) § 612. This being so, a fortiori one who cannot claim a definite or certain amount to be due is in no position to demand such relief. The decision in the case of Aiken v. Irrigation Co., 72 Fed. 591-594, cited by counsel for complainant, meets my approval, except in matters of minor importance; but, although the facts of the case are not fully reported, enough appears to show that the learned judge who gave that decision distinguished the case from a case in which the corporation is being proceeded against as the sole party defendant, and no relief is sought against its managing officers personally, and he held that a receivership was proper, as a mere conservative provision, incidental to the main object of the bill. In the case before me, as the managing officers of the corporation cannot be brought to account, nor be compelled by process of this court to restore ill-gotten gains, the situation is the same as if said officers were not named as parties defendant. The receivership applied for in this case is the main object of the suit, instead of being merely a conservative provision incidental to the main object. In the case of Earle v. Railway Co., 56 Fed. 909-915, this court has ruled that in a suit by minority stockholders against an insolvent domestic corporation and its managing officers and agents, where facts were shown to justify an accounting, it was right and proper to take the corporation and its books and property into the custody of the court, through the medium of a receivership, with a view of facilitating the accounting; but the grounds upon which the court acted in that case are entirely absent in the present case. If a receiver is to be appointed for the mere purpose of extending protection to the complainant's interests, by taking the property of the corporation into custody, so as to prevent the officers of the corporation from using it fraudulently, when may the court relinquish its custody? Certainly not until the officials whose honesty is questioned shall have disposed of their interests as stockholders, lest after an indefinite time the present relations of the parties be re-established, leaving the complainant in as bad a situation as he is now with regard to the future operations of the corporation.

The authorities cited by counsel for the defendant corporation show clearly and strongly that courts having jurisdiction to enforce their decrees in the state where the corporation has its home office should be resorted to in all cases where it is necessary to inquire into and regulate the internal affairs of the corporation. 6 Thomp. Corp. § 8011; Gregory v. Railroad Co., 40 N. J. Eq. 38; Mining Co. v. Field (Md.) 20 Atl. 1039; 8 Am. & Eng. Enc. Law, pp. 378, 379. I consider

that it will be unwise, and a dangerous precedent, for a court of equity to take control of the property of a foreign corporation with a view of experimenting to ascertain if a stockholder's investment may not be made more profitable to him by having the business of the corporation conducted by a receiver, instead of officers and agents chosen by a majority of the stockholders. Therefore I am constrained to sustain the demurrer.

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**JELLENIK et al. v. HURON COPPER MIN. CO. et al.**

(Circuit Court, W. D. Michigan, N. D. September 14, 1897.)

No. 115.

**1. STOCK OF MICHIGAN CORPORATION — PERSONAL PROPERTY — SITUS THAT OF OWNER.**

Stock in a Michigan corporation is personal property, and its situs follows the domicile of the legal owner, except in those instances where for special purposes the legislature has localized it.

**2. SUIT TO ESTABLISH TITLE TO CORPORATE STOCK—NOTICE BY PUBLICATION—JURISDICTION OF FEDERAL COURT.**

In a suit to establish their rightful title and ownership, by persons claiming equitable title to stock of a Michigan corporation, a federal court of that district cannot, by publication of notice, acquire jurisdiction of nonresident holders of the legal title to such stock.

Clarke & Pearl, for complainants.

Chadbourne & Rees, for defendants.

**SEVERENS, District Judge.** This case was argued and submitted some time ago. The question of jurisdiction is one upon which I have had much doubt and difficulty. Certain of the defendants are alleged to hold the legal title to certain stock in a Michigan corporation, and these defendants are nonresidents of the state. The complainants allege that by reason of certain transactions alleged in the bill those defendants have acquired the legal title in fraud of their rights, that they are equitable owners of this stock, and pray for a decree establishing their rightful title and ownership of it. The defendants referred to are necessary parties to the controversy, and the court cannot proceed to an effective decree without their presence. An order for publication of notice to them, under the provisions of the statute in that behalf, was made, and duly published; but they refused to appear in the case, and the question is whether the court has lawful authority to proceed further.

The decisive question which concerns the jurisdiction is whether the stock—which, upon general principles, as well as by express provision of the Michigan statute, is personal property—has its situs, for the purpose of determining the question in hand, within the district in which the suit is brought. It is stated in the text-books that stock in a corporation has its situs in the state under whose laws it is organized; but closer examination of the subject leads me to the conclusion that this is only so to the extent and for the purpose of authorizing legislation within the state upon the theory of its local existence there, and that the rule does not have so complete an effect

as to localize it for all purposes. It has been held by the federal courts in a number of decisions, which this court must respect, that the right of a shareholder is in the nature of a chose in action,—that it is personal property, and follows the person of the owner. The language of the courts in general is not altogether harmonious in respect of the character of the peculiar title and right which a shareholder has. It appears to me that the above-stated doctrine of the federal courts is in the clearest analogy to the general doctrine that the situs or locality of personal property is that of the person holding the legal title to it. The result of such a view must be that the shares of stock in question are not personal property within the district within the purview of the statute of the United States authorizing the bringing in by publication of notice of nonresident defendants who assert some right or claim to the property which is the subject of suit. If these views are sound, the proper forum for the litigation of the questions here involved would be in the state of which the defendants are citizens, and might be in the federal courts exercising jurisdiction there, if, as the bill states, the complainants are citizens of still other states. Although it may well be admitted that, inasmuch as the corporation itself is a citizen of the state of Michigan, and that, to obtain full relief, the corporation should be a party to the suit, to the end that the proper entries evidencing the title of the complainants to the stock may be made in its books, this consideration does not appear to me to be controlling. It may be that two successive suits may be necessary to fully accomplish the rights which the complainants claim, but the jurisdiction of the court is established by law, and it cannot transcend its limits upon the suggestion of expediency merely. The statute of Michigan declares shares of stock in such corporations as the Huron Copper-Mining Company to be personal property, but it goes no further than to make this bald declaration, and in truth this is no more than declaratory of the general doctrine. There is not, as it seems to me, any sufficient ground for holding that this statutory declaration displaces the rule that personal property follows the domicile of the owner. The probability is that the Michigan statute was not intended to do more than to make firm the ground upon which for special purposes, such as taxation and the levy of execution, shares of stock might be deemed to be present within the state, and so subject to local control and disposition. These considerations compel me to hold that, as the means for obtaining jurisdiction over the persons of the individual defendants, nonresidents of the state, have been exhausted without avail, the court is powerless to afford any effective aid to the complainants, and should dismiss the suit. Let an order be entered dismissing the bill for want of jurisdiction of necessary parties defendant.

**D. A. TOMPKINS CO. v. CATAWBA MILLS et al.**

(Circuit Court, D. South Carolina. October 25, 1897.)

**1. CREDITOR'S SUIT—JURISDICTIONAL REQUIREMENTS.**

In all cases where a court of equity interferes to aid the enforcement of a remedy at law, there must be—First, an acknowledged debt, or one established by a judgment rendered; and, secondly, an interest of the creditor in the property, or a lien thereon created by contract, or by some distinct legal proceeding, and giving a right to have it appropriated to pay the debt.

**2. SAME.**

This principle applies although the bill is filed on behalf of complainant and all other creditors, and although the debtor is an insolvent corporation.

**3. SAME—STATE STATUTES—FEDERAL COURTS.**

It also applies in the federal courts, although, by the statutes of the state where the suit is brought, these requirements are not essential to jurisdiction in equity.

**4. SAME—ACKNOWLEDGMENT OF DEBT.**

In a creditor's action based on certain promissory notes of the defendant corporation, not reduced to judgment, the answer admitted liability upon one of the notes. *Held*, that this fulfilled the first of the foregoing requisites of equitable jurisdiction.

**5. SAME—LIEN BY SUBROGATION.**

The bill alleged that defendant had given to trustees a mortgage upon its property as security in connection with its debts, including the notes held by complainant. *Held* that, even assuming that the mortgage was given to protect the indorsers on the notes, personally, complainant was entitled to be subrogated to all their rights, and thereby acquired such an interest in the property as to fulfill the second of the foregoing requisites of equitable jurisdiction.

**6. SAME—SUIT BY CESTUI QUE TRUST.**

By the terms of the mortgage, the sole duty of the trustees was to hold the property until defeasance; and no power over it, and no right or duty to foreclose, was given. The bill did not pray for foreclosure, but alleged insolvency, and prayed for an accounting, and that all other creditors be brought in, and for an injunction and receivership, and sale of all the property and franchises, and marshaling and distribution of assets. *Held*, that the principle that a cestui que trust, suing in his own name, must give a satisfactory reason for not using the name of the trustee, did not apply.

**7. SAME—PARTIES.**

*Held*, further, that, while all the creditors must be called in, the frame of the bill dispensed with them as formal parties to the record.

**8. SAME—RECEIVERS.**

The insolvency of the corporation was denied, but the allegation was not denied that in the board of directors and the administration there was a deep-seated division, which could not be healed. *Held*, that this rendered a receivership imperatively necessary.

H. B. Tompkins and Wilson & Wilson, for complainant.

Wm. A. Barber, J. L. Glenn, and A. G. Brice, for defendants.

**SIMONTON**, Circuit Judge. The bill in this case is filed by the D. A. Tompkins Company, a corporation of the state of North Carolina. The defendants are the Catawba Cotton Mills, a corporation of the state of South Carolina, and George W. Gage, B. M. Spratt, and John C. McFadden, trustees of a mortgage executed by the corporation. The bill is a creditors' bill. It alleges that the complainant holds six promissory notes of the defendant corporation. Of these, five are indorsed by D. A. Tompkins and R. M. Miller, Jr., who are directors of

the Catawba Mills, and one for \$5,000, dated 15th July, 1896, payable four months after date, is indorsed by D. A. Tompkins, R. M. Miller, Jr., Joseph Wylie, J. M. Smyly, S. B. Latham, and E. C. Stahn, all of whom are directors of the said Catawba Mills. The aggregate of the notes, on all of which protest was waived, is very nearly \$20,000. The bill alleges that each of these notes was for cash loaned by complainant to the Catawba Mills, and each debt was contracted upon the express understanding and agreement that its payment was secured by a certain mortgage executed and delivered by the Catawba Mills to the other defendants, and the bill avers that the whole of the said debt and interest is so secured. This deed of trust in the nature of a mortgage is dated 25th June, 1896, and recorded within one month thereafter. It sets out certain resolutions adopted by the stockholders of the Catawba Mills at a meeting held 25th June, 1894. These resolutions recite that the Catawba Mills is indebted for moneys expended in the equipment and operation of the mills, that a large part of this debt is secured by indorsement or guaranty of private individuals, and that it is desirable to secure said indorsers or guarantors against all loss by reason of such indorsement. They also recite: The necessity for still other indorsements to equip and operate the mills. That, in order to secure all said indorsers and guarantors, "resolved, that the president and secretary be authorized to execute to George W. Gage, John C. McFadden, and B. M. Spratt, trustees, a first mortgage on the franchises, real estate, and manufacturing plant, and personal property of the company, near the corporate limits of the city of Chester, South Carolina, for \$50,000; that the mortgage be so framed as to secure the debts already due by said company, on which its directors are liable as indorsers or guarantors, as well as such other debts which said company may hereafter contract with such indorsers or guarantors as it may secure thereto." In order to carry out this resolution, and for the purpose of saving harmless such indorsers or guarantors as the Catawba Mills may have heretofore secured or may hereafter secure on its paper for money borrowed or debts contracted to equip or operate the mills, the mortgage is then made. It conveys to these gentlemen above named, "as trustees for the purposes aforesaid," lands and plant of the Catawba Mills, describing these fully, as also its franchises and charter. The habendum is to them, as trustees for said purposes, and their successors and heirs, the survivor thereof, or such person or persons as may lawfully be substituted therefor. It closes with this defeasance clause: "If said company shall well and truly pay its said debts, so as to forever release and save harmless its said indorsers and guarantors therefrom, then," etc. The bill goes on to allege that the condition of this mortgage has been broken, not only in the fact that this debt to complainant is unpaid, but also from the further fact that the Catawba Mills owes other parties, secured under the same mortgage, to the full extent of \$50,000, the limit of the mortgage indebtedness, and also a large number of unsecured creditors; that the Catawba Mills is insolvent, or in imminent danger of insolvency; that its plant has been lying idle since June, 1897; that it has no money or credit to go on; that there is serious conflict and want of harmony among its officers



and directors, and its property is deteriorating in value, and the danger of irreparable loss is very great. The prayer of the bill is as follows: "And that an account may be taken, by and under the direction of this honorable court, of what amount is due to your orator upon and by virtue of the said recited mortgage debts; that all other creditors of said Catawba Mills be called in, and required to prove their several claims in this cause;" then comes the prayer for injunction and the appointment of a receiver; and then, "That all the property and franchise of said Catawba Mills be sold under the order of this court, and the proceeds thereof applied, after payment of all costs and charges incident to these proceedings, to the discharge of all valid liens, according to their respective priorities, and then to payment of other creditors," with a prayer for general relief. Upon the presentation of this bill a temporary receiver was appointed, and the usual rule to show cause, with a restraining order, was issued. The cause comes up on the return. The trustees, in their return, submit that the bill states no cause of action within the jurisdiction of this court. It admits the allegations of the corporate character and citizenship of complainant, and the allegations of the bill of the making of the mortgage. Declares that they do not know whether complainant comes within the protection of the mortgage. They say that they have been, and are always, willing to enforce their trust for the benefit of the creditors, and to perform "all other duties imposed upon them by virtue of said trust." They say that no one has ever called upon them to enforce the deed. The Catawba Mills, in its corporate capacity, also files its return. It admits the execution of the note for \$5,000, and the indorsement thereof by all the directors of the company, and avers that, if it has not been paid, it is due to the "machinations of D. A. Tompkins and R. M. Miller, Jr." It denies the validity of the other notes, and also denies that these other notes were secured by the mortgage. It attributes the misfortunes of the Catawba Mills to the arbitrary, secretive, and fraudulent manner in which the financial affairs of the mills were conducted by D. A. Tompkins and his coadjutors. Avers that D. A. Tompkins and R. M. Miller, Jr., control the complainant corporation. It denies that the Catawba Mills is insolvent, and charges that this bill is intended to postpone or defeat litigation now going on between this defendant corporation and one of its stockholders with D. A. Tompkins.

The grave question in this cause is as to the jurisdiction of this court. The objections to the jurisdiction are: (1) The complainant is an open creditor. Its claim is not yet reduced to judgment. Until this is done, it can have no standing in this court. (2) The bill seeks to foreclose a mortgage given to trustees, and held by them. It is not alleged that they have ever been called upon to enforce the mortgage. It is denied that any such application has been made, and this is, no doubt, the fact.

1. The general rule is that in the federal court a simple contract creditor, who has not reduced his claim to judgment, cannot come into equity to obtain the seizure of his debtor's property and its application to his claim. *Cattle Co. v. Frank*, 148 U. S. 604, 13 Sup. Ct. 691; *Cates v. Allen*, 149 U. S. 451, 13 Sup. Ct. 883, 977. And this is true

notwithstanding that the complainant files his bill in behalf of himself and all other creditors, and notwithstanding the fact that the debtor is an insolvent corporation. *Hollins v. Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127. The doctrine is put upon the ground that the claim is purely legal, involving a trial before a common-law jury (*Cates v. Allen*, *supra*), to which the defendant, under the constitution of the United States, has an unquestionable right. This is so even although legislation of the state in which the suit was brought allows such an action to be brought. Such legislation cannot affect the jurisdiction of the federal court. *New Orleans v. Louisiana Const. Co.*, 129 U. S. 45, 9 Sup. Ct. 223; *Mississippi Mills v. Cohn*, 150 U. S. 202, 14 Sup. Ct. 75; *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712. In this last-named case we have the doctrine discussed and stated, with its limitations. In that case the complainant, holding an open account against his debtor, not reduced to judgment, which was denied by the debtor, filed his bill to set aside certain conveyances made by the debtor, on the ground that they were fraudulent and void. The debt set up was in no respect different from any other debt upon contract. It had to be investigated and adjudged before any remedy could be obtained on it. It was the subject of a legal action only, in which the defendant, under the constitution of the United States, was entitled to a jury in the federal court. The bill was dismissed, notwithstanding that in Mississippi, where the bill was filed, a state statute gave such a creditor a right to proceed before obtaining judgment at law. Mr. Justice Field, who acts as the organ of the court, enters into an elaborate examination of the cases, and states the conclusion thus:

"In all cases where a court of equity interferes to aid the enforcement of a remedy at law, there must be an acknowledged debt, or one established by a judgment rendered, accompanied by a right to the appropriation of the property of the debtor for its payment; or, to speak with greater accuracy, there must be, in addition to such acknowledged or established debt, an interest in the property, or a lien thereon, created by contract, or by some distinct legal proceeding." See, also, *Talley v. Curtain*, 8 U. S. App. 347, 4 C. C. A. 177, and 54 Fed. 43.

In the case at bar the return of the corporation defendant, while it denies the validity of five of the promissory notes held by complainant, admits the execution of the note dated 15th July, 1896, payable in four months from date, for \$5,000, indorsed by all the directors; protest being waived. This fulfills one of the requisites set forth by *Scott v. Neely*. Has the complainant an interest in the property, or a lien thereon? This acknowledged debt comes within the class of debts protected by the trust deed executed by the Catawba Mills to the trustees, its co-defendants. Has the complainant an interest in the property mentioned in the trust deed, or a lien thereon, created by contract? The resolutions of the corporation desired this deed to be "so framed as to secure the debts already due by said company, upon which its directors are liable as indorsers or guarantors, as well as such other debts which the said company may hereafter contract with such indorsers or guarantors as it may secure thereto." This trust deed is dated 25th June, 1896. The note bears date 15th July, 1896. The property is held by these defendants as trustees for said

purposes. It would appear that the debts are secured, and so the indorsers are protected. But if a narrower construction be given to the deed, and it be held to protect the indorsers from liability, and that the trusts operate to protect them personally, still complainant has the right to be subrogated to their rights,—all their rights. It is an ancient and familiar doctrine in equity that a creditor shall have the benefit of any obligation or security given by the principal to the surety for the payment of the debt. *Keller v. Ashford*, 133 U. S. 622, 10 Sup. Ct. 494, and cases cited; *Hampton v. Phipps*, 108 U. S. 263, 2 Sup. Ct. 622. One of the cited cases (*Maure v. Harrison*, 1 Eq. Cas. Abr. 93) is among the earliest cases settling this principle. *Curtis v. Tyler*, 9 Paige, 432. The latest case on this subject is *Bank v. Rich*, 106 Mich. 319, 64 N. W. 339:

"A creditor is at once entitled to be subrogated to all rights secured to a surety by a mortgage executed by the principal debtor, without exhausting his remedies at law or reducing his debt to judgment."

It is clear that the complainant has rights in this property and under this trust. Thus, the other requisite for the jurisdiction exists.

2. The next objection is that this is a bill to foreclose a mortgage, and no reason is given for not bringing it in the name of the trustees. The deed of trust is peculiar in some respects. It puts all the property of the Catawba Mills in existence at its date in the hands of trustees, whose sole duty it is to hold it. They have no power whatever over it, expressed in the deed, and their trust is to hold it until defeasance occurs; that is to say, until the company pays all debts secured by the indorsement of anybody. None of the usual provisions appear which give the trustees the right to institute proceedings for foreclosure, or which make it their duty to do so on the request of creditors. And, if we assume that they could exercise that right if thereto requested, at whose request must they act,—of one creditor, or of a majority of the creditors, or of a smaller proportion? The most reasonable conclusion is that the purpose of this deed was simply to protect the property by a permanent lien, and by its aid to secure to the company the means, at all times in the future, of obtaining indorsers or guarantors for its paper. Under these circumstances, this case does not come within the class of cases in which the court will require a *cestui que trust* to explain with some satisfactory reason why he does not use the names of the trustees. Nor is this a bill for foreclosure. The bill does not confine the relief asked to the mortgage, or the property in the mortgage. It nowhere prays foreclosure; that is to say, a recognition of a right to redeem, fixing a time for redemption, and praying sale on failure, thus barring the equity. It is a creditors' bill seeking to marshal the assets of a corporation alleged to be insolvent, and praying a sale of all of its property, and the application of all of its assets to the payment of its debts after these shall have been marshaled. Had it been simply a bill to foreclose, the complainant could not get any other assets than those mentioned in the deed, towards paying his claims. Under this bill he gets these, and all subsequently acquired property, and all choses in action, of every character. It seems very clear that this court has jurisdic-

tion. It is true that all creditors must come in. The frame of the bill, however, as a creditors' bill, dispenses with them as formal parties to the record. Let them be called in at an early day. *Stewart v. Dunham*, 115 U. S. 61, 5 Sup. Ct. 1163. The insolvency of the corporation is denied. It is not denied that in the board of directors and in the administration there is a deep-seated division, not to be healed. This makes a receiver imperatively necessary. Let the rule be made absolute, and an order be prepared carrying out the conclusions reached in this opinion.

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BAILEY LIQUOR CO. v. AUSTIN et al.

(Circuit Court, D. South Carolina. October 9, 1897.)

1. MUNICIPAL CORPORATIONS—POWER TO PROHIBIT LIQUOR TRAFFIC.

A statute investing the town council with full power to make all such rules, by-laws, and ordinances respecting the police of said town as shall seem to them necessary and requisite for the security, welfare, good government, and convenience of the same, and for preserving the health, peace, and good order thereof (15 St. at Large S. C. 225), empowers the council to pass an ordinance entirely forbidding the sale of intoxicating liquors.

2. INTOXICATING LIQUORS—REPEAL OF STATUTES—SOUTH CAROLINA DISPENSARY LAWS.

The South Carolina dispensary laws (22 St. at Large, p. 123) do not repeal by implication the prior statutes forbidding the sale of intoxicating liquors in various localities in the state.

3. SAME—INTERSTATE COMMERCE—ORIGINAL PACKAGES.

Intoxicating liquors offered for sale in the original packages of importation in a city where the sale of such liquors is prohibited by a valid ordinance are subject, under the act of congress of 1890 (known as the "Wilson Act"), to the provisions of such ordinance, and may be seized by the authorities.

This was a suit in equity by the Bailey Liquor Company against W. G. Austin, A. V. Eichelberger, and J. A. Mays.

Ball, Simkins & Parks, for complainants.

F. Barron Grier, Wm. A. Barber, Atty. Gen., and C. P. Townsend, Asst. Atty. Gen., for respondents.

SIMONTON, Circuit Judge. The complainants opened, by their duly-authorized agent, an original package store in the town of Greenwood. They were offering for sale, in original packages, wines, whisky, and beer. The respondents, state constables, with others, who were acting under the authority of the town council, closed the store and seized the liquors. A rule having been taken out against them for this seizure, they filed their return. Among other things, they say that the sale of intoxicating liquors is forbidden in the town of Greenwood, both by act of the legislature and by an ordinance of the town council, passed under the authority of the legislature.

By the amended charter of the town of Greenwood (15 St. at Large S. C. 225), the town council was invested with full power to make all such rules, by-laws, and ordinances respecting the roads, streets, markets, and police of said town as should appear to them necessary and requisite for the security, welfare, good government, and conven-

ience of the same; and for preserving the health, peace, and good order thereof. The same power is conferred upon the town council of all towns of not less than 1,000 nor more than 5,000 inhabitants by Acts Assem. S. C. 1896 (22 St. at Large, 67). This last act was passed pursuant to the provisions of Const. 1895, art. 8, § 1. The ordinance of the town of Greenwood forbidding the sale of intoxicating liquors within that town was passed in the exercise of this authority. In 1882 (17 St. at Large, 1075) the legislature passed an act forbidding the sale of spirituous and intoxicating liquors within the limits of the town of Greenwood, or within two miles of said corporate limits, except with the consent of two-thirds of the qualified voters of said town at an election had for that purpose. This act and the ordinance above referred to are both, without doubt, a valid exercise of the police power, and, if not modified or repealed by subsequent legislation, must control this case.

It is urged by the complainants that the several acts of the legislature which contain what is known as the "Dispensary Law" have, in effect, repealed all legislation whatever theretofore existing upon the subject of intoxicating liquors. They contend that there are no longer any municipal communities in this state protected by prohibition laws, and that the sale of intoxicating liquors is or can be made lawful anywhere in this state, the most stringent legislation to the contrary notwithstanding. None of these acts in terms repeal the statutes forbidding the sale of intoxicating liquors in various localities throughout the state. If these are repealed, it must be by implication. Repeals of statute by implication are not favored, and can never be admitted when the former can stand with the new act, but only then when there is a positive repugnancy between the statutes, or the latter is plainly intended as a substitute for the former. *Chew Heong v. U. S.*, 112 U. S. 536, 5 Sup. Ct. 255. The act of 1882, above referred to, is not limited as to time. A perpetual statute (which all statutes are unless limited to a particular time), until repealed by an act professing to repeal it, or by a clause or section of another act directly bearing in terms upon the particular matter of the first act (notwithstanding an application to the contrary may be raised by a general law which embraces the subject-matter), is considered still to be the law in force as to the particulars of the subject-matter legislated on. *U. S. v. Gear*, 3 How. 120.

The repealing clause of the dispensary act of 1896, the summary of all the other acts (22 St. at Large S. C. 123), repeals all acts inconsistent with that act. So far from being inconsistent with the dispensary law, the act establishing the dispensary itself recognizes the existence of this prohibiting act and of all others of like character. It makes an exception in the authority to establish a dispensary in any part of the state, of any county, town, or city, wherein the sale of alcoholic liquors was prohibited prior to July 1, 1893. In such cities, counties, and towns no dispensary can be established except with the consent of the qualified voters, voting at an election to be ordered on the petition of one-fourth of them. Until this is done, the prohibition is absolute. In the act of 1882, prohibiting the sale of intoxicating liquors in the town of Greenwood, a provision essentially

similar in principle is made. No intoxicating liquors can be sold in the town of Greenwood except with the consent of the qualified voters, voting at an election called for the purpose of ascertaining their wishes on this particular subject. This being so, the act of the legislature of 1882 is still of force. The ordinance of the town council is a valid ordinance. Under the law as it now stands, no one, whether representing the state or a private person, can lawfully sell intoxicating liquors in the town of Greenwood. So far as that municipality is concerned, intoxicating liquors are not an article of commerce. Under the provisions of the act of congress of 1890 commonly known as the "Wilson Act," intoxicating liquors coming into that town of Greenwood are subject to all laws and ordinances passed in the lawful exercise of the police power. The act of the legislature in question and the ordinance of the town are the lawful exercise of the police power. The rule is discharged, and the bill is dismissed, with costs.

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MONTAGUE v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. September 27, 1897.)

No. 880.

1. MASTER AND SERVANT—INJURY TO RAILWAY EMPLOYEES—DUTY OF WATCHFULNESS.

Where employes of a coal dealer are moving loaded cars by hand, and employes of the railroad company are engaged in switching trains from track to track, the duty to be observant of each other's actions and regardless of each other's safety rests upon both classes.

2. SAME.

Before employes of a coal dealer place themselves in a dangerous situation between cars, and out of sight, it is their duty to either notify employes of the railroad company who are switching trains from track to track, or ascertain positively that no cars will be shunted down on them while concealed.

In Error to the Circuit Court of the United States for the District of South Dakota.

R. A. Murray, C. J. Porter, Frank R. Aikens, C. O. Bailey, and J. H. Voorhees, for plaintiff in error.

H. H. Field (A. B. Kittredge and George R. Farmer were with him on the brief), for defendant in error.

Before BREWER, Circuit Justice, and SANBORN and THAYER, Circuit Judges.

THAYER, Circuit Judge. This is a suit for personal injuries, and the sole question for consideration is whether the trial court erred in granting a peremptory instruction to find for the defendant at the conclusion of all the evidence. The plaintiff's husband, Jeremiah Montague, was killed at Madison, S. D., which is a station on the line of the Chicago, Milwaukee & St. Paul Railway Company, the defendant in error, on the morning of November 25, 1895, while he was engaged with two other persons in moving two box cars loaded with coal, which had been left standing on a side track at that station in close prox-

imity to a coal shed where the two cars were to be unloaded. For the purpose of pushing the coal cars a little further east in front of a bin in the coal shed, so that they could be more conveniently unloaded, the deceased and the two persons who were assisting him went between the two box cars, and, after uncoupling them, pushed the east car a little further east, leaving a space of about eight feet between the two cars. While they were standing on the track in the space thus formed between the two cars, and were engaged for the moment in holding the east car in place, and blocking the wheels, so that it would remain stationary, the coal car standing to the west, which had been left undisturbed, was struck by two other box cars also loaded with coal, which had been kicked or shunted down the side track from the west by an engine which was in charge of the defendant company's employés. The west stationary coal car was by this means driven suddenly against the east coal car at the end where the deceased was standing, and he was caught between the two cars, and instantly killed. For the injury thus sustained, Caroline Montague, plaintiff in error, brought the present action, alleging that the death of her husband was occasioned by the negligence of the defendant company. The testimony showed without contradiction that the side track where the accident occurred was used by the defendant railway company for the purpose of setting in coal cars to be unloaded at the coal shed where the accident occurred, and for the purpose of setting in empty cars to be loaded with grain from an elevator which adjoined the coal shed on the west. The side track in question was laid on the north side of the coal shed and elevator, in close proximity thereto, and it united with the main track at points some distance east and west of the coal shed and elevator. No regular switch engine or switching crew was employed at the station in question, but the switching at that station was done between 7 and 8 o'clock in the morning by the engine and crew of a freight train which was made up at Madison, and left that place for the west every morning at 8 o'clock. It was customary for the train crew to shunt cars down this side track to the elevator and coal shed, both from the east and the west, as happened to be most convenient; and it was also customary for the persons employed at the elevator and coal shed to move cars, which had been shunted down the track, by hand, for a short distance, when they were not left in the right position to be most conveniently loaded or unloaded. When the two box cars containing coal were shunted down the side track on the morning of the accident, a brakeman in the employ of the defendant company was stationed on top of one of the moving cars in charge of the brake, and he remained in such position, and had control of the cars, after the engine was detached, and until the accident occurred. He was looking east in the direction of the two stationary coal cars which stood in front of the elevator and coal shed, but did not see the deceased and the other persons who were with him, and was not aware of their presence on the track, because they were between the two cars, and could not be seen. Their presence in that position was not known to any of defendant's employés at the time of the accident. Although he had full control of the two moving coal cars by means of the brake, the brakeman did not arrest the mo-

tion of those cars before they came in contact with the stationary coal car, because he desired to push the stationary cars further east past the elevator, and place all the coal cars in front of the coal shed, where they could be unloaded. For some time before the accident occurred, the crew of the freight train had been engaged, in the usual manner, at and about the station, in switching cars and making up a freight train preparatory to leaving the station on the morning run, and the bell of the engine had been rung at intervals whenever the engine was in motion. According to the positive statements of the fireman and the engineer, the usual kicking signal was given, and the bell was sounded as the engine backed onto the side track, and shunted the two loaded coal cars down the track in the direction of the coal shed. There was no evidence that such signals were not given, except a negative statement by one witness, who was between the two cars in front of the elevator, to the effect that he did not hear the signals. The deceased had worked at the coal shed, and had been engaged in unloading coal from cars and in handling coal, for some time prior to the accident, and seems to have been familiar with the method of taking up and setting in cars on the side track which was pursued at that station.

In view of the foregoing facts, we are not able to say that an error was committed in withdrawing the case from the consideration of the jury. While the deceased was not a trespasser on the defendant's track at the time he was killed, yet he was there under circumstances which made it his duty to be watchful of the operations of the trainmen who were engaged in switching cars and making up a freight train, and who were doing that work on the morning of the accident in the usual way, and at the usual hour. The duty to be observant of each other's actions and regardful of each other's safety rested alike upon the men who were switching cars and upon the persons working at the coal shed who were attempting to move the two loaded coal cars into position for unloading, by hand. If either party of employes was in duty bound to be more vigilant than the other on the occasion in question, we are not satisfied that such higher obligation rested on the employes of the railway company, because the persons at the coal shed, at the usual hour for switching cars, had unfortunately placed themselves between the two box cars, in a position of great danger, where they were effectually concealed from view. Having placed themselves in that situation, where they could not be seen, we think it was their duty, before doing so, either to have given the switching crew some warning of their presence between the cars, or to have ascertained beyond peradventure that no cars would be shunted down the side track until they had had ample opportunity to place the two coal cars in position before the coal bins. *Railway Co. v. Miles*, 49 U. S. App. 101, 24 C. C. A. 559, 563, and 79 Fed. 257. Such precautions were not taken, and the switching crew proceeded with their work in the customary way, without knowledge or reason to suppose that any one was on the track between the two stationary coal cars.

Some stress was laid in argument on the fact that John Montague, a nephew of the deceased, testified, in substance, that on the morning



of the accident, and prior thereto, the defendant's station agent at Madison notified him that two other loaded coal cars had arrived at the station, and would be set in on the side track in front of the coal shed by the time the two loaded coal cars already at the coal shed were unloaded. The station agent testified, on the other hand, that he not only notified Montague that two other cars had arrived, but informed him at the same time that the two other cars in question were being switched by the train crew, and would be at the coal shed "shortly." We are not able to decide that such discrepancy in the statements of the two witnesses created a conflict of evidence which rendered it necessary to submit the case to the jury, for, if we accept the evidence of the witness Montague as true, we think that the information which was given to him by the station agent should have made him more watchful of the operations of the switching crew, and led him to take greater precautions for his own safety and for the safety of those who were assisting him in moving the coal cars. He was aware that all the switching at that station was done by the engine and crew of the freight train prior to its departure, that the train was scheduled to leave at 8 a. m. sharp, and that the two cars referred to by the station agent might, for these reasons, be shunted onto the side track at any moment. He does not claim to have been given any assurance that the trainmen would wait until the coal cars were unloaded before shunting the two other cars down the side track. Neither does he claim that he advised the station agent that it would be necessary to uncouple the two stationary cars, and move them by hand into position for unloading by going onto the track between the cars. In any aspect, therefore, in which the case may be viewed, we think that the evidence did not disclose facts which would have warranted an inference of culpable negligence on the part of the employés of the defendant company. It is manifest, we think, that the death of the deceased was either occasioned by an accident for which the defendant is not legally responsible, or that it must be attributed, to some extent at least, to a want of ordinary prudence on the part of the deceased and his associates. The judgment of the circuit court is accordingly affirmed.

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GABLEMAN v. PEORIA, D. & E. RY. CO. et al.

(Circuit Court, D. Indiana. October 21, 1897.)

No. 414.

1. ACTION FOR TORT OF EMPLOYE—PARTIES DEFENDANT—RECEIVER.

A railroad company is not a proper party defendant to an action for injuries caused by negligence of employés while the road is in the hands of a receiver.

2. MASTER AND SERVANT—TORT OF SERVANT—JOINT CAUSE OF ACTION.

A cause of action growing out of the negligence of a servant while engaged in his master's business is not a joint cause of action in tort against the master and servant.

3. REMOVAL OF CAUSES—RIGHT OF RECEIVER—EFFECT OF JOINDER.

A cause of action against a receiver appointed by a federal court, and one of his employés, for injuries occasioned by the negligence of such em-

ployé, is one arising under the constitution and laws of the United States; and, where the amount in controversy exceeds \$2,000, the receiver may remove the case, whether such cause of action be joint or several.

Cullop & Kessenger, for plaintiff.

Gilchrist & De Bruler and J. E. Williamson, for defendants.

BAKER, District Judge. This is an action by Louis J. Gableman, Sr., to recover damages for loss of the services of his infant son, in consequence of injuries received by him through the alleged negligence of the Peoria, Decatur & Evansville Railway Company, Edward O. Hopkins, receiver of said railway company, and George Colvin, an engineer in the employ of the receiver. The injury occurred while the railway was in the exclusive control and management of the receiver. The railway company is improperly joined as a party defendant. The complaint states no cause of action against it. It is not liable for the torts of the receiver or his employés. High, Rec. § 396; Railroad Co. v. Hoechner, 14 C. C. A. 469, 67 Fed. 456, and cases cited.

The injury is alleged to have been occasioned by the negligence of a watchman of the receiver at a street crossing, and by that of the engineer George Colvin, who is charged with negligently running an engine under his control against and over the plaintiff's infant son. The receiver filed his petition and bond in the state court, asking for the removal of the cause into this court. The petition sought the removal on the ground that the action against the receiver was one arising under the constitution and laws of the United States. It is made to appear by the averments of the complaint that the receiver was appointed as such by the decree of the circuit court of the United States for the Southern district of Illinois, and judgment is asked against him as such receiver for the alleged wrongful acts of his servants. The plaintiff now moves to remand. His motion must be denied. It is settled that an action against a receiver, as sole defendant, for a tort committed by him or his employés in the performance of the duties of his office, arises under the constitution and laws of the United States, and that he has the right to remove such cause of action from a state court into a court of the United States if the amount in controversy, exclusive of interest and costs, exceeds the sum or value of \$2,000. This is established by the case of Railroad Co. v. Cox, 145 U. S. 593, 603, 12 Sup. Ct. 905, 908. The ground of this ruling is thus stated by the chief justice, who delivered the opinion of the court:

"As jurisdiction without leave is maintainable through the act of congress, and as the receivers became such by reason of, and derived their authority from, and operated the road in obedience to, the orders of the circuit court in the exercise of its judicial powers, we hold that jurisdiction existed because the suit was one arising under the constitution and laws of the United States; and this is in harmony with previous decisions. Buck v. Colbath, 3 Wall. 334; Feibelman v. Packard, 109 U. S. 421, 3 Sup. Ct. 289; Bock v. Perkins, 139 U. S. 628, 11 Sup. Ct. 677."

See, also, Tennessee v. Union & Planters' Bank, 152 U. S. 454, on page 463, 14 Sup. Ct. 654.

The cases cited and relied on by counsel for the plaintiff as establishing a contrary doctrine do not support his contention. The case

of *Chappell v. Waterworth*, 155 U. S. 102, 15 Sup. Ct. 34, holds that under the acts of March 3, 1887 (chapter 373), and August 13, 1888 (chapter 866), a case not depending on the citizenship of the parties, nor otherwise specially provided for, cannot be removed from a state court into a circuit court of the United States, as one arising under the constitution and laws of the United States, unless that appears by the plaintiff's statement of his own case; and, if it does not so appear, the want cannot be supplied by any statement in the petition for removal or in the subsequent pleadings. The case of *Railway Co. v. Ziegler*, 167 U. S. 65, 17 Sup. Ct. 728, recognizes the same doctrine, but holds that the case made by the plaintiff's own showing was one arising under an act of congress, and that the circuit court of the United States clearly had jurisdiction. Other cases cited by counsel for the plaintiff are equally inapplicable.

The case here made by the plaintiff's own showing is one arising under the constitution and laws of the United States. As the present suit is one against a receiver appointed by a circuit court of the United States, and could only be brought, as it was, in a state court, without leave, by virtue of the acts of congress of March 3, 1887 (chapter 373), and August 13, 1888 (chapter 866), it is clearly one arising under the constitution and laws of the United States, and hence is removable unless the joinder of George Colvin as a party defendant precludes the receiver from asserting his right of removal. The complaint does not state a joint cause of action in tort against the receiver and the engineer. The liability of the engineer arises from his own wrongful act in running his engine against and over the plaintiff's son, while that of the receiver grows out of the master's liability for the negligent or tortious acts of his servant when engaged about the master's business. *Warax v. Railway Co.*, 72 Fed. 637. But, if the cause of action against the receiver and his engineer were joint, it would make no difference in the receiver's right of removal. No liability can be asserted against the receiver for misfeasance or nonfeasance in performing the duties of his office, except under and by virtue of the constitution and laws of the United States. The joint liability asserted in the complaint against the receiver and his engineer is one arising from and growing out of the operations of the receivership, and hence is one arising under the constitution and laws of the United States, under and in virtue of which the receivership was created and exists. *Landers v. Felton*, 73 Fed. 311. The motion to remand is overruled.

#### SEEBASS et al. v. MUTUAL RESERVE FUND LIFE ASS'N.

(Circuit Court, D. New Jersey. October 25, 1897.)

##### 1. PLEADING—ACTION ON CONTRACT—ANNEXATION OF COPY.

In an action upon a contract of insurance, a copy of the policy on which the suit is founded, annexed to the declaration and referred to therein, thereby becomes a part of the record, under section 123 of the New Jersey practice act.

##### 2. SAME—ASSIGNMENT OF BREACH.

An assignment of a breach, in the words of the contract, when no question of law is involved, is good pleading.

This was an action at law by Therese M. Seebass and others against the Mutual Reserve Fund Life Association to recover on a contract insuring the life of Oscar Seebass. The case was heard on demurrer to a plea filed by the defendant.

Preston Stevenson, for complainants.

J. Frank Fort, for defendant.

KIRKPATRICK, District Judge. This action is brought upon a contract of insurance upon the life of one Oscar Seebass, and a copy of the policy upon which the suit is founded is annexed to the declaration, referred to therein, and thereby becomes a part of the record, under the 123d section of the New Jersey practice act. *Harrison v. Vreeland*, 38 N. J. Law, 366.

The declaration alleges that the insured "duly executed and performed all the covenants and conditions, matters and things, whatsoever, required to be performed by him under said contract." It appears by an inspection of the policy, which is made a part of the record, that one of the considerations of the contract was that the assured should pay all mortuary assessments at the office of the association within 30 days from the date of each notice, with the express condition that, if any stipulated payment should not be paid when due, then and in every such case the certificate should be null and void. The defendant, by its third plea, denies liability, by reason of the failure of the assured to pay a mortuary assessment levied in 1895, and the plea is as follows:

"And for a further plea to the said declaration the defendant, by like leave of the court first had and obtained," etc., "says that the plaintiffs ought not to have or maintain their aforesaid action thereof against it, because it says that after the making of the said contract, and during the continuance thereof, and during the lifetime of said Oscar Seebass in said declaration named, to wit, on the 1st day of August, 1895, at the city, county, and state of New York, a certain assessment or mortuary call, No. 81, and for the sum of forty-five dollars and thirty cents, was made by the said defendant upon the said Oscar Seebass, due notice whereof, dated on said last-mentioned date, was given by the said defendant to the said Oscar Seebass in the manner provided in said contract, and which said assessment or mortuary call was by the terms of said contract payable to said defendant within thirty days from the date of said notice, yet the said Oscar Seebass did not within the said period of thirty days pay to the said defendant the amount of said assessment or mortuary call, or any part thereof, although the said defendant was ready and willing to receive the same during all the time the same was payable, whereby and by reason whereof the said contract became null and void; and this the defendant is ready to verify," etc.

To this plea the plaintiffs demur, and allege for cause:

"That it does not legally appear that the plaintiffs' intestate was obligated by the contract of insurance to pay the mortuary call specified in the plea, and that by reason of such nonpayment the contract became null and void."

The plea demurred to alleges, in the language of the contract, non-compliance by the assured with one of its conditions. No more than this is required by the correct rules of pleading. An assignment of a breach, in the words of the contract, when no question of law is involved, is good. 1 Chit. Pl. 332. It is only necessary that the plea contain sufficient matter, which, if substantiated by proof, will sustain

defense. *Deweese v. Insurance Co.*, 34 N. J. Law, 244. Whether the mortuary call in this case was properly made, or whether the assured had the required notice, or failed to pay in due time, are questions of fact, to be determined by the jury from the evidence. No doubt, the burden is on the defendant to prove the facts showing valid assessments made in strict conformity with the contract and the by-laws, but that is a matter of proof, not pleading. The plea in this case gives notice to the plaintiffs of the matter which the defendant sets up in defense of its action, and a joinder therein will, upon the trial of the cause, put the defendant to its proof that it has been absolved of its obligation by the failure of the assured to perform some duty imposed upon him by the contract. The demurrer will be overruled.

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KELLEY et al. v. BOETTCHER et al. CURRAN et al. v. CAMPION et al.  
DONOVAN v. SAME.

(Circuit Court of Appeals, Eighth Circuit. September 15, 1897.)

Nos. 870-872.

**ATTORNEYS—IMPROPER AND SCANDALOUS BRIEFS—STRIKING FROM RECORD.**

Where an attorney filed in an appellate court a brief filled with denunciation and abuse of the judges who decided the case against him below, and containing attacks upon their intelligence, integrity, and personal character. *Held*, that the brief would be stricken from the files, that the name of the attorney would be stricken from the record as solicitor or counsel, and he would not be permitted to be heard further in the case, either orally or by brief; but that appellant would be permitted to appear by other counsel, and file new briefs within a time limited.

Appeal from the Circuit Court of the United States for the District of Colorado.

This was a bill in equity by Thomas D. Kelley, Margaret O. Kelley, Michael P. Kelley, and Annie B. Kelley against Charles Boettcher, John F. Campion, A. V. Hunter, A. R. Meyer, William Boyd Paige, Max Boehmer, and the Ibex Mining Company. Demurrers to the original and an amended bill were sustained by the court below, and complainants declining to amend further, a decree was entered for defendants. From this decree the present appeal was taken. The cause was heard upon a motion to strike the brief of Mr. T. A. Green from the record.

Charles Cavender and Charles J. Hughes, Jr., for the motion.

T. A. Green and E. B. Green, opposed.

Before BREWER, Circuit Justice, and SANBORN and THAYER, Circuit Judges.

BREWER, Circuit Justice. A motion has been made to strike from the files the brief of appellants, signed by T. A. Green as solicitor, and affirm the decree. The ground of the motion is, in general terms, the irrelevant, scandalous, and offensive matter with which that brief is filled. The record discloses that appellants, as plaintiffs, on June 19, 1895, by T. A. Green, their solicitor, filed a bill in equity in the cir-

cuit court, seeking to set aside a deed to a one-sixth interest in the Little Johnny lode mining claim. This deed was charged to have been executed on January 16, 1893, and it was claimed that the execution thereof had been fraudulently obtained. Attached to and as a part of the bill were 72 interrogatories directed to one of the defendants, 47 to another, 72 to a third, and 20 to a fourth. The bill having been dismissed by complainants as to certain other defendants, the interrogatories as to them are not copied into the record before us, but it is stated that there were 49 typewritten pages of such interrogatories. With these interrogatories left out, the bill and remaining interrogatories fill 42 pages of the printed record. To this bill the defendants severally, on August 31 and October 5, 1895, demurred. The demurrers were, after argument before Judge Riner, and on January 30, 1896, sustained, and leave given to file an amended bill within 10 days. On February 5, 1896, amendments were filed, and to the bill as thus amended, after a motion to strike out had been overruled, a demurrer was, on May 4, 1896, filed, which, after argument, was sustained by Judge Hallett, and, the plaintiffs declining to further amend, a decree was entered on July 13, 1896, in favor of the defendants. From this decree an appeal was on the same day asked and allowed.

From the foregoing record it appears that there was no unreasonable delay on the part of either Judge Riner or Judge Hallett in deciding the questions raised by the demurrers, nor any attempt to interfere with the right of appeal. The order sustaining the demurrer to the original bill gave leave to file an amended bill. No conditions or terms were placed in this order, yet the amended bill contained two or three pages of matter like the following:

"Your orators and oratrices again most earnestly protest against this honorable court violating all rules, and especially the decisions of the supreme court of the United States, which complainants are advised and believe are binding and obligatory upon this honorable court, by compelling these complainants or their solicitor to violate all rules of pleading in order to prevent this honorable court, in violation of all law and all precedent, from sustaining demurrers to complainants' bill of complaint, and requiring complainants' solicitor to furnish affidavits of all of the facts and circumstances connected with the discovery of the facts constituting the fraud alleged in this case by complainants, and that, too, even when defendants' demurrer to complainants' bill of complaint is a solemn admission of all of the material facts and allegations contained in said bill; and your orators and oratrices most respectfully and earnestly insist that this honorable court should consider and determine all questions raised by demurrers in accordance with the decisions of the supreme court of the United States and of all precedent in all courts of equity, both federal and state, throughout the whole United States, as well as in the chancery courts of England; and complainants most earnestly and respectfully protest again against being compelled to violate all rules and all practice of good pleading in order to prevent this honorable court from sustaining demurrer after demurrer to this bill of complaint; and complainants insist most earnestly and maintain that their original bill of complaint was full and complete in every respect, and in strict accordance with all well-established principles of equity pleading, and contained specific charges of fraud enough to have supported a dozen ordinary bills of complaint for relief against fraud; \* \* \* and complainants respectfully and most earnestly insist that all such rulings of this honorable court are not only in violation of all precedent and all authority, both state and federal, but that such rulings are judicial acts of oppression as to complainants and a direct denial of all of the rights secured by the decisions

of the supreme court of the United States to complainants as well as to other litigants in this honorable court, and that such rulings on the part of this honorable court operate as an absolute denial of all rights in this honorable court, and as an act of great judicial wrong and oppression."

In sustaining the demurrer to the amended bill, the court observed:

"This is not an occasion for any observations respecting the scandalous matter inserted in the amendment in relation to the ruling of the court in the first demurrer. Punishment for the sins of the solicitor cannot be visited upon the unoffending suitor. We shall find opportunity to deal with that matter by and by. It is impossible to allow such offensive criticisms to remain upon the files of the court. The clerk will withdraw from the files the original bill and the amendment, seal them in a separate package, which shall be kept in some receptacle distinct from that allotted to the papers in the cause, and opened only upon the order of the court. Within thirty days from the date of the order complainants will be at liberty, if so advised, to file a new bill, which shall contain only the matters declared to be proper for consideration in this opinion. Such bill shall not exceed in length 25 typewritten pages. When presented, it shall be filed by the clerk as of the date June 19, 1895, when the original bill was filed, and it shall be taken to be the original bill of complaint in all further proceedings in the cause. The demurrers will be sustained, the original bill and amendment will be stricken from the files, and an order will be entered as indicated respecting a new bill to be filed."

—And entered an order to the same effect. Thereafter an appeal was, as stated, prayed, and allowed.

This is the record, and the entire record. On July 31, 1897, Mr. T. A. Green, as solicitor, filed a brief in behalf of the appellants. This brief contains 267 pages. Instead of being confined to a discussion of the questions arising on the record, and proper for consideration on this appeal, it contains page after page of denunciation and abuse of the two judges who decided these demurrers. It goes far beyond criticism or denunciation of the decisions. It is personal in its attacks upon the intelligence, integrity, and character of the judges. There are in it allegations of matters of a personal nature, in no manner connected with or suggested by anything in the record, and insinuations and charges against those judges in language which, speaking mildly, is not common among gentlemen. That this is an offense against the proprieties of professional life is not open to question. The matter thus poured into the brief is irrelevant and grossly scandalous. No self-respecting court can, for a moment, think of tolerating such conduct. After service of notice of this motion, and just before the time set for its hearing, a new brief was filed, signed by Mr. T. A. Green and Judge E. B. Green, the latter having been recently employed as associate counsel. It is not suggested that there is anything in this brief of an offensive character, and apparently it was prepared and filed to obviate any consequences which might flow from the character of the former brief. Judge Green evidently appreciates fully the situation, and seeks to relieve his clients from its difficulties; but, under the circumstances, we cannot recognize this latter brief as now properly in the case. What ought to be done? That the client should not unduly suffer on account of the wickedness and malice of counsel is clear, but at the same time no such outrage can be tolerated, and a client must expect to suffer somewhat for the misconduct of the counsel he employs.

The following order will be entered: The brief in favor of appellants, signed by T. A. Green as solicitor, and filed July 31, 1897, and also the brief signed by T. A. Green and E. B. Green, as counsel, and filed September 10, 1897, will be stricken from the files in this case; the name of said T. A. Green will be stricken from the record as solicitor or counsel of appellants, and he will no longer be heard in this case, either orally or by brief; the appellants will be permitted to appear by some other solicitor or counsel, and file new briefs within 30 days, and the appellees will have 15 days thereafter to reply thereto, and the case will be continued and set down for hearing at the next term of this court. All the costs of the case up to date will be charged to appellants.

The same order will be entered in case No. 871, Michael Curran et al. v. John F. Campion et al., and in case No. 872, James H. Donovan v. John F. Campion et al.

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CITY OF PHILADELPHIA V. WESTERN UNION TEL. CO.

(Circuit Court, E. D. Pennsylvania. July 16, 1897.)

No. 69.

MUNICIPAL CORPORATIONS — TELEGRAPH POLE AND WIRE TAXES — INTERSTATE COMMERCE.

The city of Philadelphia has no power to impose pole and wire taxes upon a telegraph company doing interstate business, in excess of the reasonable expense to the city of the inspection and regulation thereof, and an ordinance imposing charges several times larger than this amount is invalid. 40 Fed. 615, followed.

John L. Kinsey and E. Spencer Miller, for plaintiff.  
Reed & Pettit, for defendant.

DALLAS, Circuit Judge. This is an action for the recovery of certain charges imposed by two ordinances of the plaintiff, which the defendant contends are invalid. Upon the trial the counsel of both parties united in suggesting that the case was for decision by the court, but each of them claimed that a verdict should be directed for his client. Thereupon the jury was instructed to find for the defendant, and, a verdict having been rendered accordingly, the plaintiff now moves for a new trial.

One of these ordinances imposed a charge of \$1 per annum for each telegraph pole maintained in the city of Philadelphia by any telegraph company, including the defendant; and the other of them required, in addition to this pole charge, the annual payment of \$2.50 per mile on all wires suspended above ground. The defendant conceded that, if the amount of these charges was not unreasonably in excess of the amount needful to defray the expense to which the municipality was subjected for inspection and regulation of the appliances of the telegraph companies, the ordinances should be sustained; and to this question of reasonableness the evidence was directed. A witness, whose qualification as an expert plainly appeared and was not questioned, testified, without objection, that a liberal



estimate of all the cost to the city of issuing permits, inspecting, and exercising supervision, would not exceed 50 cents per pole, and that such a charge would, of itself, fully meet the expense of all that was actually done by the city; and hence it was argued that, to the extent of one-half of the pole charge and the whole of the charge per mile per wire, the sum imposed was excessive. The same witness presented the matter, also, in a more specific manner, by making a comparison, which is very striking and cogent. He stated that for maintenance of their poles and wires, including repairs and new material, when required, as well as office work, the defendant company has, for a number of years, expended only from \$2.60 to \$2.90 per mile per annum, whereas the charges imposed by these ordinances amount to about \$4.35 per mile per annum; and it is impossible to regard a charge of \$1.45 per mile more for inspection, etc., than is needed for maintenance and repair, as being reasonable. The witness to a part of whose testimony reference has been made is, it is true, in the employment of the defendant, but his veracity was not assailed, and he was not contradicted. The plaintiff called the chief of its electrical bureau, but he was not asked to gainsay the estimate which has been mentioned, and he did not do so, nor does his evidence appear to conflict with it. But the estimate of defendant's witness took into account only the expense incurred by the city's electrical bureau, and the plaintiff insists that it is therefore delusive, because, as it claims, additional duties and labors were devolved, not only on that particular bureau, but also upon its councils, and upon its police and fire departments, by reason of the presence and use of the plants of the telegraph companies. Accordingly, the plaintiff offered to prove the expense involved in the transaction of the entire business of councils, but, upon its being stated that it was not proposed to show what proportion or part of this expense was chargeable to business relating to telegraph companies, the offer was rejected, on the ground that the single fact proposed to be proved was, as respects the precise issue, too vague, indefinite, and uncertain to be of any practical materiality. There was evidence that the police were directed to report, with other entirely distinct things, "leaning telegraph poles, and detached, broken, or sagging wires," and that the firemen, in extinguishing fires, were compelled to do some additional work when they encountered electric wires; but there was no attempt to show to what extent the labors of either of these departments were augmented, or how much, if at all, the expense of maintaining them was increased, in consequence, and an assumption that to provide for any such increase a charge of 25 cents per pole would be requisite could rest only upon a most extreme conjecture. There can be no doubt that it is through its electrical bureau that the city's right of inspection and regulation is mainly—almost exclusively—exercised.

Upon the facts disclosed on the trial, it then seemed to me, as it still does, that, although the city should be fairly and even liberally treated, the ordinances in question could not be upheld. There is nothing to distinguish this case from the one between the same parties which was decided by this court in 1889, and which is reported in 40 Fed. 615. That decision was based upon the fact that a charge had

been imposed of five times the amount required. Here we have a pole charge which, to the extent of at least one-fourth of its amount, is plainly excessive; and there is required, in addition, the payment of \$2.50 per mile of wire, for which there is no legitimate need whatever, and the sum of the charges imposed is very considerably greater than the cost of actual maintenance. Therefore, I think that unreasonableness is as clearly apparent in this case as it was in that to which I have referred, and I remain of the opinion that the judgment in the latter was properly applied and followed upon this trial. The motion for a new trial is denied.

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COMMERCIAL NAT. BANK et al. v. PIRIE et al.

(Circuit Court of Appeals, Eighth Circuit. September 13, 1897.)

No. 791.

1. NATIONAL BANKS—GUARANTY.

The act of congress authorizing the organization of national banks confers upon them no authority, either in express terms or by implication, to guaranty the payment of debts contracted by a third person, and solely for his benefit; and acts of this nature, whether executed by the cashier or the board of directors, are necessarily ultra vires.

2. SALE—FRAUDULENT REPRESENTATIONS—RESCISSION.

The presentation by a merchant seeking to purchase goods of a written guaranty, by a national bank, of payment for any goods he may purchase, even if it implies a representation that the bank is financially sound, is not of itself a fraudulent representation, such as will justify a rescission, since the seller is chargeable with knowledge that in law such a guaranty by a national bank is ultra vires and void.

3. SAME—FRAUDULENT INTENT.

Whether goods are bought with a preconceived fraudulent intent not to pay for them is a question for the jury if there is evidence tending to show such an intent, but not of so conclusive a character as to convince all reasonable minds that such must have been his purpose.

4. VENDOR AND PURCHASER—INNOCENT PURCHASERS.

To vest a mortgagee of chattels with the rights of an innocent purchaser, a pre-existing debt alone is not sufficient, but, if any considerable sum of money is paid at the time of the execution of the mortgage, and as part of its consideration, then the mortgagee may be an innocent purchaser as to the full amount of his loan.

6. CONVERSION—WHEN MAINTAINABLE.

An action for wrongful conversion against one who has sold goods in his possession is not maintainable where defendant had a valid lien upon the property, so that his refusal to surrender it upon demand was not a tort.

In Error to the Circuit Court of the United States for the District of Kansas.

N. T. Guernsey and W. C. Perry (John H. Crain was with them on the brief), for plaintiffs in error.

Charles Blood Smith (W. H. Rossington and Clifford Histed were with him on the brief), for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This is a suit to recover the value of certain goods, which was brought by the defendants in error, com-

posing the firm of Carson, Pirie, Scott & Co., against the Commercial National Bank of Independence, Kan., and George T. Guernsey, the plaintiffs in error. The petition on which the case was tried in the circuit court simply alleged that the plaintiffs below, who are the defendants in error here, were the owners of the goods in controversy on June 10, 1892; that the defendants on said day wrongfully converted the same to their own use; and prayed judgment for their value in the sum of \$6,920.26. The answer on the part of both of the defendants was a general denial of all the allegations of the petition. The case, as developed by the evidence produced at the trial, was substantially as follows: In February, 1892, and for some time previous thereto, R. T. Webb was president of the Cherryvale National Bank, located and doing business at Cherryvale, Kan. He was also doing a mercantile business at the same place, having first become engaged in the latter business in September, 1891. On the 17th or 18th day of February, 1892, Webb applied to the firm of Carson, Pirie, Scott & Co., at their place of business in Chicago, Ill., to purchase a bill of goods, and on being asked by a member of the firm to make a property statement as a basis for obtaining credit he produced and exhibited the following document, which had been executed by T. C. Molloy, cashier of the Cherryvale National Bank, at the instance and request of Webb, prior to the latter's departure for Chicago for the purpose of buying goods:

"R. T. Webb, President. T. C. Molloy, Cashier. A. H. Harding, Vice Prest.  
C. F. Godbey, Asst. Cashr.

"Cherryvale National Bank. Capital, \$50,000.00.

"Cherryvale, Kansas, February 15th, 1892.

"Carson, Pirie, Scott & Co., Chicago, Ill.—Gentlemen: We will guaranty the payment of any bill of goods which Mr. R. T. Webb may buy of you while in Chicago, during the present week. If this guaranty is not specific enough, we will make it satisfactory to you.

"Yours, very truly,

The Cherryvale National Bank,

"By T. C. Molloy, Cashier."

On the production of the aforesaid guaranty, Webb was allowed to purchase a bill of merchandise amounting to \$6,395.25. The goods so purchased were shipped in several lots during the latter days of February, 1892, and the bills therefor, according to the terms of sale, matured on May 15th and June 15th following. Before the maturity of the bills, Webb made cash payments on account, amounting to \$439.60, and returned goods of the value of \$39.35. At the time of this transaction no representations were made by Webb touching his financial condition or solvency, or concerning the solvency or condition of the Cherryvale National Bank; the firm of Carson, Pirie, Scott & Co. being willing, apparently, to extend credit on the aforesaid guaranty of the Cherryvale National Bank, which the firm accepted and retained. In point of fact, Webb was at the time insolvent in the sense that he could not pay his debts as they matured, and the Cherryvale National Bank was also insolvent, and in a failing condition, though still transacting business in the usual manner. On June 10, 1892, a national bank examiner took charge of all the property and effects of the Cherryvale National Bank, and closed its

doors for the transaction of business, by direction of the comptroller of the treasury. On the same day Webb executed two chattel mortgages covering his entire stock in trade,—one in favor of the Commercial National Bank of Independence, Kan., to secure a liability to that bank in the sum of \$8,229.68; and the other in favor of George T. Guernsey to secure an indebtedness to said Guernsey in the sum of \$5,000. A part of the indebtedness to Guernsey which was thus secured consisted of money, some six or seven hundred dollars, on that day loaned to Webb by said Guernsey. The residue of said indebtedness was a pre-existing debt in the sum of forty-two or forty-three hundred dollars, which Webb then owed to said Guernsey, that was due and unpaid. Under the aforesaid mortgages, Guernsey, who was cashier of the Commercial National Bank of Independence, Kan., immediately took possession of all the mortgaged property, and advertised it for sale on June 27, 1892. Prior to the sale, and on the 27th day of June, 1892, the defendants in error, acting in the firm name of Carson, Pirie, Scott & Co., served a notice on the Commercial National Bank of Independence, Kan., that said firm had been induced to sell the goods in controversy to Webb by reason of certain representations made by Webb and by the Cherryvale National Bank as to Webb's financial responsibility, which representations were false in fact, and were made with a fraudulent intent, and that they had elected to rescind the sale, and reclaim the goods, on account of such fraud. The defendants below, when this notice was served on them, refused to restore the goods in controversy, which were then in their possession, and the same were thereafter sold under the mortgages, whereupon this suit was brought in the form heretofore stated. At the conclusion of the testimony, which established substantially the aforesaid facts, the trial court gave a peremptory instruction, directing the jury to return a verdict in favor of the plaintiffs below. Such a verdict was accordingly returned, and a judgment was rendered thereon against the defendants below in the sum of \$6,415.09. An exception, which was duly taken by the defendants to the giving of this instruction, presents all the questions which are to be considered.

We think that the trial court erred in withdrawing the case from the consideration of the jury, and that its action in that respect cannot be upheld. It is not claimed that any oral representations were made to induce the firm of Carson, Pirie, Scott & Co. to sell the goods in question on credit, or to ship them to the purchaser. The representative of the firm who negotiated the sale confessedly acted on the assumption that the written guaranty executed by T. C. Molloy, as cashier of the Cherryvale National Bank, bound the bank, and that the bank was able to meet all its engagements. For this reason he made no inquiries concerning the financial condition of the buyer or the bank, and no representations were made on that subject. The first of these assumptions—that the bank had power, under its charter, to guaranty the payment of the indebtedness contracted by Webb for merchandise—was due to a mistake of law, for which Webb is not legally responsible. The act of congress under which the bank was organized confers no authority upon national

banks to guaranty the payment of debts contracted by third parties, and acts of that nature, whether performed by the cashier of his own motion or by direction of the board of directors, are necessarily *ultra vires*. A national bank may indorse or guaranty the payment of commercial paper which it holds, when it rediscounts or disposes of the same in the ordinary course of business. Such power, it seems, a national bank may exercise as incident to the express authority conferred on such banks by the national banking act to discount and negotiate promissory notes, drafts, bills of exchange, and other evidences of debt (*People's Bank v. National Bank*, 101 U. S. 181, 183; *U. S. Nat. Bank v. First Nat. Bank*, 49 U. S. App. 67, 24 C. C. A. 597, and 79 Fed. 296); but it has never been supposed that the board of directors of a national bank can bind it by contracts of suretyship or guaranty which are made for the sole benefit and advantage of others. The national banking act confers no such authority in express terms or by fair implication, and the exercise of such power by such corporations would be detrimental to the interests of depositors, stockholders, and the public generally. *Norton v. Bank*, 61 N. H. 589; *State Nat. Bank of St. Joseph v. Newton Nat. Bank*, 32 U. S. App. 52, 58, 14 C. C. A. 61, 64, and 66 Fed. 691, 694; *Bank v. Smith*, 40 U. S. App. 690, 23 C. C. A. 80, and 77 Fed. 129. In contemplation of law, therefore, the vendors knew, when they sold the goods in controversy, that the guaranty in question was of no avail as a security, even though they supposed that it had been executed with the sanction of the board of directors. It results from this view that, if we were able to admit that the presentation of the guaranty to Carson, Pirie, Scott & Co. carried with it an implied representation that it had been executed by direction of the board of directors, and that the bank was in a sound financial condition, yet we would not be able to concede that either of these representations was material, inasmuch as the plaintiffs below must be presumed to have known that the guaranty imposed no legal obligation upon the guarantor.

It is suggested in behalf of the defendants in error that, although the evidence produced at the trial failed to disclose that any false representations, such as were alleged in the notice of rescission that was served on the Commercial National Bank, had been made to induce the sale, yet, as there was evidence which tended to show that Webb bought the goods with the preconceived intent not to pay for them, the court was authorized to direct a verdict for the plaintiffs below on that ground. With reference to this contention it is only necessary to say that, if there was evidence which would have justified a finding that Webb made the purchase with the intent last stated, and that the sale was voidable, and subject to rescission on that ground, then the issue as to such intent was one of fact, which should have been submitted to the jury. It is obvious, we think, that the testimony which tended to show that Webb had no intention of paying for the goods when he purchased them was not so conclusive as to convince all reasonable minds that such must have been his purpose. As before stated, he did make a payment on account amounting to \$439.60, and, if the issue in question had been fairly

submitted to the jurors, and they had found that Webb bought the goods with the expectation of paying for them, but was disappointed in his expectations, we think that finding should not have been disturbed.

Another question is presented by this record which deserves notice, in view of its possible recurrence on a second trial of the case. That question is whether, on the state of facts which is disclosed by the record, the trial court should have permitted the jury to determine, under proper instructions, whether the defendants below were innocent purchasers for value of the property in controversy. This defense appears to have been rejected by the trial judge on the theory that the defendants below could, in no event, be regarded as purchasers for value, because the bulk of the mortgage indebtedness which was secured by the two mortgages in favor of the Commercial National Bank of Independence, Kan., and George T. Guernsey, was a pre-existing debt due from Webb, the mortgagor, to the respective mortgagees. For this reason, apparently, the trial court relegated the defendants to the position occupied by Webb, who was alleged to be a fraudulent purchaser of the mortgaged property. It is insisted in behalf of the defendants that such action was erroneous; that, inasmuch as the evidence showed without contradiction that the sum of six or seven hundred dollars was paid to Webb by Guernsey when the mortgages were executed, they were for that reason entitled to be treated as purchasers for value, and to have the jury determine whether they accepted the mortgages in good faith, without knowledge of the fraudulent conduct of the mortgagor, and without notice of the alleged defect in his title. We are not prepared to say that the bank was a purchaser for value, because there was no evidence tending to show that the bank paid any money, surrendered any security, or incurred any new obligation in consideration for the mortgage which was executed by Webb in its favor. That mortgage seems to have been given solely for the purpose of securing a pre-existing debt, and it is well settled that a mortgage executed for such purpose, without any new or additional consideration moving from the mortgagee, does not vest the latter with the rights of a purchaser for value. He simply acquires such a title to the mortgaged property as is vested at the time in the mortgagor. It is manifest, however, that the jury might have found that Guernsey was a purchaser for value under the mortgage executed in his favor, since there was testimony to the effect that he advanced and paid to the mortgagor about \$700 contemporaneously with the execution of the mortgage, which loan formed a part of the consideration for that instrument. In other words, the proof showed that the mortgage to Guernsey was not given solely as security for a pre-existing debt. The payment of the sum of money last mentioned made the mortgagee a purchaser for value, and on the assumption that the jury would have found, if the question had been submitted to them, that Guernsey acted in good faith, without notice of the alleged defect in the mortgagor's title, we perceive no reason why the mortgage so executed should not be regarded as a valid security in Guernsey's hands for the entire amount of the indebtedness thereby secured. It is not a question of the

amount advanced or paid to obtain security for the debt specified in the mortgage which determines the validity of the security as against the defrauded vendors, but the fact that the mortgagee did advance and pay a considerable sum of money for that purpose, doing so in good faith, and without notice of prior equities. *Glidden v. Hunt*, 24 Pick. 221; *Bank v. Taylor*, 9 U. S. App. 406, 444, 4 C. C. A. 55, and 53 Fed. 854; *Henderson v. Gibbs*, 39 Kan. 679, 685, 18 Pac. 926; *Schumpert v. Dillard*, 55 Miss. 348, 361; *Thames & Co. v. Rembert's Adm'r*, 63 Ala. 561, 572; *Cary v. White*, 52 N. Y. 138, 142; *Fargason v. Edrington*, 49 Ark. 207, 214, 4 S. W. 763; *Port v. Embree*, 54 Iowa, 14, 6 N. W. 83; *Institution v. Young*, 55 Iowa, 132, 7 N. W. 480. But, even if we should concede that, as against the defrauded vendors (the firm of Carson, Pirie, Scott & Co.), Guernsey was only entitled to a lien on the mortgaged property for the sum loaned to Webb when the mortgage was executed, yet it would nevertheless be true that the plaintiffs below would not be entitled to recover in this action if such loan was made in good faith, without knowledge of the alleged fraudulent purchase. This action, as before shown, is a suit at law, and proceeds upon the theory that the defendants below were guilty of a tort in refusing to surrender the mortgaged property when the possession thereof was demanded. It is obvious, therefore, that, if Guernsey had a valid lien on the property to the extent of \$700, he was entitled to retain the possession of the same until that lien was paid, or until payment thereof was tendered; and no liability was incurred by the defendants in refusing to comply with the plaintiff's demand. The judgment of the circuit court is accordingly reversed, and the case is remanded for a new trial.

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NORTON v. EVANS et al.

(Circuit Court of Appeals, Eighth Circuit. September 23, 1897.)

No. 887.

PUBLIC LANDS—ATTEMPTED HOMESTEAD ENTRY—RAILROAD GRANTS—FORFEITURE.

In 1885 plaintiff applied to the local land office to enter certain lands under the homestead laws, which application was rejected. He nevertheless attempted to settle upon the lands, but was deterred by threats of one of the defendants, who had purchased the lands from a railroad company claiming the same under a railroad aid grant. In 1895 defendants were allowed to purchase the land from the government, under the act of March 3, 1887 (24 Stat. 556), which gives to bona fide purchasers from the companies a right to purchase their land from the United States, except in cases (1) where, at the date of the sale by the railroad company, the lands were in the bona fide occupation of adverse claimants under the pre-emption or homestead laws, and (2) where lands were settled upon prior to December 1, 1882, by persons claiming to enter the same; in which cases the said adverse claimants or settlers are authorized to perfect their titles. *Held*, that plaintiff's attempt to enter and to settle the land conferred upon him no vested rights, that he did not come within either of these exceptions, and therefore had no right to the land as against the defendants.

Appeal from the Circuit Court of the United States for the District of Colorado.

On December 2, 1895, appellant, as plaintiff, filed his bill of complaint in the district court of Jefferson county, Colo., praying that defendants, as holders of the legal title to the S. W.  $\frac{1}{4}$  of section 3, town 4, range 69, in said county, be adjudged and decreed to hold such title as trustees for the plaintiff, and be ordered to convey such title to him. The case was removed to the circuit court of the United States for the district of Colorado, and on May 8, 1896, a demurrer to the bill of complaint was sustained, and a decree entered in favor of the defendants, whereupon plaintiff appealed to this court. The bill alleges that the plaintiff is a native-born citizen of the United States over the age of 21 years, and possesses the other qualifications prescribed by statute for one seeking to make a homestead entry on the public lands of the United States; that on the 12th day of June, 1885,—more than 10 years before the filing of the bill,—he applied to the local land office to enter the entire tract under the homestead law; that the application was in due form, and the proper fees and commissions were tendered, but that said application to enter was rejected; that immediately thereafter he purchased lumber and made arrangements for entering and settling upon the land, but was prevented therefrom by the threats and intimidation of one of the defendants; that, after the refusal of the local land office to accept his application, he appealed from such decision to the commissioner of the general land office; that such appeal was sustained by that commissioner, and he was awarded the right to enter the land; that thereafter, on further appeal to the secretary of the interior, the ruling of the commissioner was reversed. It further appears that the Denver Pacific Railway & Telegraph Company, claiming the land as a part of its land grant, had, through its trustee, conveyed the tract on July 21, 1874, to Horace A. Gray and Peter G. Bradstreet; that on June 7, 1877, Horace A. Gray conveyed his undivided one-half interest to Margaret P. Evans; that in 1883 Evans and Bradstreet conveyed to John S. Stanger; and that subsequently, and pending the appeal to the secretary of the interior, the defendant Willard Teller acquired the interest of Stanger. The bill further shows that on September 21, 1892, the secretary of the interior, on consideration of the appeal from the decision of the commissioner of the general land office, sustained an application of the grantees of the railway company to purchase the land, under the authority of the fifth section of the act of March 3, 1887 (24 Stat. 556); that upon this decision, and on June 6, 1895, such grantees paid the sum of \$400, and received a receiver's final receipt, which in the due course of business in the land department would be followed by a patent. The act of March 3, 1887, is one providing for the adjustment of land grants made by congress to aid in the construction of railroads, for the forfeiture of unearned lands and other purposes, and contemplates in several of its sections the protection of bona fide purchasers from the railway companies. Section 5 is as follows: "Sec. 5. That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns: provided, that all lands shall be excepted from the provisions of this section which at the date of such sales were in the bona fide occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor: provided further, that this section shall not apply to lands settled upon subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settle-



ment laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases."

Frank J. Mott, for appellant.

Willard Teller, for appellees.

Before BREWER, Circuit Justice, and SANBORN and THAYER, Circuit Judges.

BREWER, Circuit Justice, after stating the case as above, delivered the opinion of the court.

Certain technical objections are made by the appellees to the sufficiency of the bill of complaint. One is that, while the plaintiff alleges that in 1895, at the time of the filing of the bill, he was over the age of 21 years, and duly qualified to enter a homestead under the laws of the United States, he does not allege that he was of that age or so qualified in 1885, when he filed his application to enter. Another is that it appears that the land was within the terminal limits of a railroad land grant; that by section 2357, Rev. St., the price of all public land within such limits was fixed at \$2.50 per acre; that under sections 2289, 2290, Rev. St., no one could take on a homestead entry more than 80 acres; and that, as plaintiff avers he offered to enter 160 acres, the application was, on account of the insufficiency of identification, void for either and both halves of the 160 acres. We do not care, however, to place our decision on any such technical objections, for we think the ruling of the secretary of the interior was right; that under said section 5 the right to purchase the land was properly awarded to the grantees of the railway company. There is no allegation that the purchasers from the railway company were not bona fide purchasers, or that the land was not within the numbered sections of the grant to the railway company, and coterminous with the constructed parts of the road. On the contrary, the decision of the secretary of the interior affirms these facts. Clearly, therefore, the grantees of the company come within the provisions of the first part of section 5, and, this being a remedial statute, and intended to protect those acting in good faith, should be liberally construed. There are two provisos to this section,—one excepting therefrom all lands which at the date of the sale by the railway company were in the bona fide occupation of adverse claimants under the pre-emption or homestead laws of the United States. That clearly has no application. There is no suggestion of any such adverse occupation. The other proviso is that the "section shall not apply to lands settled upon subsequent to the 1st day of December, 1882, by persons claiming to enter the same under the settlement laws of the United States." But plaintiff had not settled upon the land. He certainly does not come, therefore, within the letter of this proviso. He had not even entered the land. His contention is, however, that he had tried to enter the land, had a right to enter it; that his application was erroneously refused by the local land officers; that he had sought to settle upon the land, and had been prevented therefrom by the wrongful acts of one of the defendants; that all this took place before the passage of the act of 1887; and that thereby he had acquired

a vested right in the land, which even congress could not take away. He refers to *Ard v. Brandon*, 156 U. S. 537, 15 Sup. Ct. 406, as authority for the proposition that he could not be deprived of any rights by the wrongful acts of the local land officers, and insists that therefore the case must be treated as though he had actually made a homestead entry, and had acquired such a right in the land as was beyond the reach of congress to disturb by subsequent legislation; and concludes therefrom that the act of 1887 has no application to his case. We are unable to agree with this contention. He is in no better position than if he had been allowed by the local land office to make the entry. Such an entry creates no vested rights as against the United States, and does not interfere with the power of congress by subsequent legislation to dispose of the land. *Frisbie v. Whitney*, 9 Wall. 187; *The Yosemite Valley Case*, 15 Wall. 77; *Buxton v. Traver*, 130 U. S. 232, 9 Sup. Ct. 509; *Campbell v. Wade*, 132 U. S. 34, 10 Sup. Ct. 9. See, also, *Winona & St. P. R. Co. v. U. S.*, 165 U. S. 463, 17 Sup. Ct. 381. The decree of the circuit court was right, and it is affirmed.

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GERMANIA IRON CO. v. JAMES et al.

(Circuit Court, D. Minnesota, Fifth Division. October 26, 1897.)

PUBLIC LANDS—VOID PRE-EMPTIONS AND LOCATIONS—SECRETARY'S DECISION.

In a contest taken by appeal to the secretary of the interior, his decision and judgment that a scrip location and a pre-emption claim are fraudulent and void, and that the land in question is thus left open to disposal under the public land laws of the United States, fixes the status of the land, and takes effect immediately upon its rendition, and not upon the making of the proper cancellation entries in the local land office.

W. W. Billson, for complainant.

J. K. Reddington, for defendant James.

LOCHREN, District Judge. This cause is heard upon the demurrers of the defendants Houghton E. James and Charles W. Hillard to the bill of complaint, it being stated and admitted on the argument that the other defendants have disclaimed any interest in the land which is the subject-matter of the controversy, viz. the N. W.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  of section 30, in township 63 N., of range 11 W. of the fourth P. M. The bill alleges a hearing at the Duluth land office in April, 1886, in a contest between two claimants for said land, one of whom claimed the land by the location thereon of Sioux half-breed scrip, and the other claimed the right to pre-empt said land; and that by regular appeals such contest passed to and was on the 18th day of February, 1889, decided by the secretary of the interior, who adjudged that the scrip location was invalid, and that the pre-emption claim was fraudulent and void, and that the land in question was thus left open to disposal under the public land laws of the United States applicable thereto. That such decision of the secretary was on the same or next following day transmitted to the commissioner of the general land office, and that a copy thereof, duly transmitted to

the register and receiver of the Duluth land office, was received by such officers on the evening of the 22d day of February, 1889, a legal holiday, upon which said Duluth land office was not open for the transaction of business. That under the rules and regulations of the land department the office hours for public business at the local land offices were fixed at from 9 o'clock in the forenoon until 4 o'clock in the afternoon. That before the opening of the Duluth land office for business on February 23, 1889, the cancellation of the entries affected by said decision was made on the books and plats of said office. That said land office was opened for business promptly at 9 o'clock on that morning, and that at that moment one Emil Hartman in due form made application to the land officers there to locate a Porterfield land warrant upon the said land, tendering and paying the fees therefor; and that said application was accepted, and a certificate of such location then issued to said Hartman, who has since, by deed, conveyed all his right and title to said land to the complainant. The bill of complaint further alleges that at about 5 o'clock in the evening of February 18, 1889, the defendant Houghton E. James, at the said Duluth land office, made application to make a homestead entry of the same land, which was refused and rejected by the register, because the land office was not then open for business, and because by the records of that land office the said land then appeared to be appropriated by the said Sioux half-breed scrip location; and that on the 19th day of February, 1889, at about half past 8, and before 9 o'clock, in the morning, the same application was again presented and renewed, with tender of the proper fees and commissions, and, though orally rejected by the receiver to whom they were handed, were retained by him, and that later in the same day a written note of rejection was indorsed on said application by the local land officers, wherein the ground of rejection was stated to be that the land applied for was still appropriated by a former entry then intact upon the records of said office. Other applications were made to enter the same land, and a hearing at the local land office was ordered and had, and by appeals the matter came before the secretary of the interior, who heard all the parties, and on the 21st day of December, 1894, made his decision, wherein he adjudged that said Emil Hartman was the first person to enter said local land office on February 23, 1889, and the first person on that day to make application for entry, filing, or location upon said land; but he further adjudged that the homestead application of said Houghton E. James, made as aforesaid on the 19th day of February, 1889, was valid and effectual, and prior to the application of said Hartman, and that said James was entitled to make a homestead entry on said land, and that the location or entry of said Hartman be canceled, which was done; and that, acting upon such decision of the secretary of the interior, the said Houghton E. James was allowed to make, and did make on August 6, 1895, a homestead entry of said lands at the Duluth land office; and that on September 23, 1895, he filed in the same office a relinquishment in writing of his homestead entry and claim upon said land; and that thereupon William Craig did, immediately after such relinquishment, locate upon and enter the

same land with a Porterfield land warrant, and, in conformity with an arrangement with said Houghton E. James, afterwards conveyed to said Houghton E. James an undivided one-half of said lands, subject to a mining lease since assigned and transferred to the defendant Charles W. Hillard.

It is claimed by the bill of complaint that Mr. Secretary Smith erred in holding that the effect of the decision of Mr. Secretary Vilas made on February 18, 1889, adjudging the prior Sioux half-breed scrip entry of said land to have been invalid, and the pre-emption claim to be fraudulent and void, left the land, on the rendition of that decision, at once open to disposal under the public land laws of the United States; the bill claiming that under the rules and regulations of the land department the appropriation of said land under the Sioux half-breed scrip location did not cease, nor said land become open to other disposal, until the said decision of February 18, 1889, was transmitted to the Duluth land office, and the cancellation of the Sioux half-breed scrip location was duly entered and noted upon the records and plats of the local land office. And some of the rules and regulations read upon the hearing, issued for the guidance of officers of the local land offices in the orderly transaction of the business of these offices, seemed to have been framed upon the idea that the decisions and judgments of the secretary of the interior took effect upon such transmission to and notation in the local land offices, and in practice they would ordinarily be so transmitted and noted before other action would be attempted in relation to the lands. But, notwithstanding such rules and regulations, in all cases of contest taken by appeal to the secretary of the interior it is the decision and judgment of that officer which determines and adjudges the rights of the contestants, and fixes the status of the land which is the subject-matter of the controversy, and, as the law fixes no other time or proceeding when effect is to be given to such judgment, it must take effect upon its rendition; and in this case the segregation of the land from the public lands under the appropriation by the location of the Sioux half-breed scrip ceased upon the rendition of the decision by Mr. Secretary Vilas on February 18, 1889. *Anderson v. Railroad Co.*, 7 Land Dec. Dep. Int. 163. My conclusion is that no error appears to have been committed by Secretary Smith in the decision complained of. A decree will be entered dismissing the bill, with costs.

## MOSS v. DOWMAN.

(Circuit Court, D. Minnesota, Fifth Division. October 26, 1897.)

## 1. PUBLIC LANDS—HOMESTEAD ENTRIES—RELINQUISHMENT—RIGHTS OF SETTLER.

In May, 1890, one R. H. D. filed a homestead entry of certain unappropriated land, but never actually settled on it. On October 24, 1890, in consideration of \$1,000, he delivered to plaintiff a relinquishment of his rights, which was filed by her on that day, simultaneously with her own application to enter; and due records, entries, and receipts thereof were made. On April 22, 1891, she actually settled on the land, and began to build a house, and thereafter resided there continuously. But on September 19, 1890, defendant had made actual settlement on the land, and erected a house, which was completed October 10, 1890, and he was in possession on October 24th, when plaintiff filed her application, and he thereafter continuously resided there. *Held*, that at the instant when the relinquishment of R. H. D. was filed the right of defendant as an actual resident and settler attached.

## 2. SAME.

Defendant was temporarily absent, for proper reasons, from October 19th until October 24th. *Held*, that his residence and settlement continued during this absence, and that it was immaterial whether he was personally on the land at the instant when R. H. D.'s relinquishment was filed.

J. K. Reddington, for complainant.

L. C. Harris, for defendant.

LOCHREN, District Judge. This case is heard upon demurrer to the complainant's bill of complaint, the allegations of which, so far as they need be noticed, are to the effect: That on May 7, 1890, one Robert H. Doran filed in the United States land office at Duluth, Minn., his application to enter as a homestead the S. E.  $\frac{1}{4}$  of section 22, of township 65 N. of range 4 W., fourth P. M., in the Duluth land district, which was then subject to such entry, and unappropriated; and that the register and receiver of said land office allowed said application, and delivered to said Doran the receiver's duplicate receipt or certificate of original entry of said land, acknowledging the receipt of the proper fees for such entry; and that such entry was noted on the books and plats in said land office, and duly returned and reported to the commissioner of the general land office with the proofs on which it was founded, and there duly entered upon the books and records of the general land office. That by law and the rules of the general land office any person making such entry is allowed six calendar months from and after the entry within which to begin settlement and residence upon the land so entered, without forfeiture of any rights acquired by such entry. That within such period of six months from said entry, and on October 24, 1890, in consideration of the sum of \$1,000 then paid to him therefor by the complainant, said Robert H. Doran executed and delivered to the complainant, to be filed by her in said Duluth land office, an instrument of writing assigning and relinquishing to the United States all his right, interest, and claim to said land, and requesting that his said entry be canceled; such instrument being written and executed on the back of his original duplicate receipt aforesaid. That on said 24th day of October, 1890, at

from 11 to 11:30 o'clock in the forenoon, the complainant filed said instrument of relinquishment in said Duluth land office, and at the same time filed therewith her application to enter the same land as her homestead; and that the register and receiver then canceled upon their records the said entry of said Robert H. Doran, and accepted and allowed the said application of the complainant, and made the proper entries thereof upon the plats and books in their office, and issued and delivered to her the proper duplicate receipt or certificate of entry of said lands, acknowledging payment of the proper fees, and that such entry by complainant was duly reported to and entered of record in the general land office; and that within six months thereafter, on April 22, 1891, the complainant, with servants, household goods, utensils, and provisions, entered and made settlement on said land, and began to erect, and completed, residing on said land, a dwelling house, at a cost of more than \$700, and cultivated the land, making and intending to make it her home, residing thereon continually, and expending in such cultivation and in other buildings and improvements on said land a large sum of money. That on November 24, 1890, the defendant, Richard Dowman, made application to the register and receiver of said Duluth land office to enter the same land as his homestead, alleging that he had made settlement upon said land on the 19th day of September, 1890, and had erected a house thereon, and was in possession of said land on the 24th day of October, 1890, and entitled to enter said land as his homestead. It is further alleged that by direction of the commissioner of the general land office a hearing was had before the register and receiver of the Duluth land office in the months of June and July, 1892, upon testimony then taken to determine the rights of the respective parties. It is needless to follow the allegations of the proceedings before these officers, or their decisions, or that of the commissioner of the general land office upon appeal, as the bill alleges an appeal to the secretary of the interior, and his decision thereon, which is referred to as reported in full in 19 Land Dec. Dep. Int. 526. This decision of the secretary in favor of Richard Dowman and against the complainant is alleged to be erroneous, and contrary to law.

The facts found by the secretary upon the evidence are conclusive upon the parties, and cannot be re-examined; and the only question is whether his decision, based on those facts, was in accordance with law. He finds from the evidence that from February 6, 1885, until October 24, 1890, divers persons had consecutively made filings of homestead entries of this land without in that time making any settlement thereon; and that each of such persons at or near the expiration of six months after making his entry filed a relinquishment thereof, immediately followed by a like entry of another, until the entry by the complainant on October 24, 1890, and her settlement on the land April 22, 1891. Also that Richard Dowman applied on November 18, 1890, to make homestead entry on the land, and made actual settlement on the land September 19, 1890, and then began the construction of a house thereon, which he finished October 10, 1890, making his home there, and actually living there continuously until November,

1890, except a trip to the county town for provisions, made October 19, 1890, returning to the land October 24, 1890, the day when Doran's relinquishment was filed; and that his residence continued on the land thereafter till the hearing, except temporary absences on proper occasions, and not implying bad faith. The secretary found that under the circumstances of the case the settlement of Dowman upon the land September 19, 1890, was made in good faith; and that his residence and settlement on the land continued while he was temporarily absent for provisions from October 19 to October 24, 1890, and that it was immaterial whether he was actually in person on the land on the latter day at the instant when Doran's relinquishment was filed; and that, being such actual settler, residing on the land at the time such relinquishment was filed, his rights as such settler attached at that instant, and prior and superior to any rights that were acquired by the complainant by her application for entry, filed with the said relinquishment. I think the secretary was clearly right. The idea that Doran, by handing his instrument of relinquishment to the complainant for filing, even though for a large consideration, could invest the complainant with his rights or with any rights, is inadmissible. The filing of the relinquishment left the land open to appropriation; and the earliest appropriation of it under the land laws would attach to and hold the land. The arrangement gave the complainant opportunity to act quickly, but, if the right of another attached more speedily, she would fail. Dowman was then on the land, an actual resident and settler. While Doran's entry continued, Dowman could acquire no right by settlement, but the instant that entry was relinquished his right as settler attached, and no new entry, however "simultaneous" with the relinquishment, could be thrust in between Doran's relinquishment and Dowman's rights as a settler upon the land. That Dowman had acquired no rights by his settlement prior to Doran's relinquishment, and might, as respects Doran, have been regarded as a trespasser, makes no difference. When Doran relinquished, Dowman ceased to be a trespasser, and was not only an actual, but a lawful, settler. There was no evidence of mala fides about Dowman's settlement which should affect the legality when the time came for a right to attach to it under the land laws. Neither Doran nor any of the long line of speculative homesteaders who had kept up holdings by entries and relinquishments every six months had ever appeared on the land. The object of the homestead laws is not to encourage speculation, but settlement; and, if Dowman knew all the antecedent facts, he might well expect that an actual settler would acquire the right to the land lawfully upon the next relinquishment, and make his settlement, as the secretary finds as a fact that it was made, in good faith. I will not dwell upon the argument urged by the complainant based on the alleged fact of the simultaneous delivery to and acceptance by the officers of the land office of Doran's relinquishment and complainant's application to enter. No two acts could be so simultaneous as to shut out the effect of a fact existing at the time. To illustrate: Suppose A., for a valuable consideration, paid him by B., sells to B. a tract of land, there being at the time a

judgment against B. docketed in the county. Before receiving his deed from A., suppose B. sells the same land to C., and that B. makes his deed to C., handing it to A. with directions to deliver it to C., and also deliver A.'s deed of the land to B. at the same time to C., and that both deeds are at the same time, and in one envelope, delivered by A. to C., who passes both in the same manner to the register of deeds, and they are noted as received for record at the same hour and minute. The simultaneousness of these deliveries will not prevent the lien of the docketed judgment upon the land as the land of B. under A.'s deed to him, although delivered simultaneously with his own deed to C. The demurrer is sustained, and decree will be entered dismissing the bill, with costs.

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FULLER v. FIELD et al.

(Circuit Court of Appeals, Seventh Circuit. October 30, 1897.)

No. 432.

1. PRACTICE—PRODUCTION OF BOOKS—PATENT INFRINGEMENT SUIT.

The complainant in a patent infringement suit cannot, for the purpose of discovering alleged sales of infringing articles, compel the defendant to produce before the master all the numerous books pertaining to a large business, but must be satisfied with an order requiring the production of books which would show any transactions with respect to the sale of any article of the character of that covered by the patent. If the production of any particular books is desired, they must be specified.

2. DESIGN PATENTS—INFRINGEMENT—PENALTIES.

The penalty prescribed by Act Feb. 4, 1887, for unlicensed sales of articles bearing a patented design, attaches only in the case of willful infringement, and not to sales made in ignorance of the patentee's rights.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Abigail Rebecca Fuller, appellant's intestate, filed her bill in the court below to enjoin the alleged infringement of letters patent of the United States of America, No. 16,887, dated September 7, 1886, granting to her the exclusive right, for 3½ years from the date of the patent, to make, use, and vend a design for a rosette intended to enrich the appearance of wearing apparel trimmed with the same. Such proceedings were had that, on the 23d day of November, 1891, a decree was entered in favor of the complainant below, adjudging her right under such letters patent to the design therein referred to, that the defendants below (the appellees here) had infringed upon such patent and the exclusive right of the complainant therein and thereunder, that the complainant do recover of the defendants all gains and profits by them made, and the damages sustained by the complainant by reason of such infringement, and referring the cause to one of the masters of the court to take proof and to ascertain and report the amount of such gains and profits, and of the damages sustained by the complainant by reason of such infringement. The decree further provided "that such complainant in such accounting have the right to cause an examination of said defendants' officers, agents, employes, and workmen, and also the production of the books, vouchers, documents, or other papers of the defendants, and that the said defendants, by their proper officers, servants, or attorneys, attend for such purpose before said master from time to time, as such master shall direct." Following this decree there were, from time to time, many desultory proceedings before the master. The defendants, or such of them as the complainant desired, and their employes, or such of them as complainant desired, were from time to time produced and examined



as witnesses. The defendants also produced an account from their books showing what they claimed to be the entire extent of their infringement of the complainant's patent. This consisted of four dozen collarettes which had upon them the complainant's design, purchased in October and November, 1888, and which from the bill appear to have been purchased by them at the price of \$24 for the whole, and were sold by them at retail for the sum of \$36. On the 31st day of October, 1893, the court directed that the complainant have 15 days in which to close proofs, and that the master file his report within 20 days from that date. Afterwards, on the 12th of December, 1893, complainant moved for additional time in which to take evidence, which motion the court overruled. The hearing thereafter was continued before the master, who, on the 20th of December, reported: (1) That the defendants, during the lifetime of the patent, had purchased and sold four dozen collarettes which infringed upon complainant's design patent, paying therefor the sum of \$36; (2) that it did not appear what profit the defendants had made by the transaction; (3) that the defendants were liable, under Act Cong. Feb. 4, 1887, c. 105 (24 Stat. 387), in the sum of \$250. To this report the defendants filed exceptions, among other things excepting to the report wherein the master finds them liable under the act of congress; and the complainant filed exceptions, which are sufficiently stated in the opinion of the court. On the 5th day of March, 1894, the court sustained the exception of the defendants with respect to their liability to the penalty imposed by the statute, overruled all other exceptions, confirmed the master's report, and ordered that a decree be entered in favor of complainant for \$36 and costs of the suit. On the 19th day of October, 1896, a motion for rehearing, which is stated to have been filed June 4, 1894, was heard and overruled by the court, and on the 20th of October, 1896, a decree was formally entered in favor of the complainant against the defendants for the sum of \$36 and costs of suit, with the direction that the decree should be entered nunc pro tunc as of the 5th day of March, 1894, the date of the argument of the cause. On the 8th of April, 1897, the death of the complainant was suggested, and Ezerean Fuller, as administratrix, was substituted. Exceptions were filed to the decree to the effect that the circuit court erred (1) in overruling the exceptions to the master's report; (2) in confirming the report; (3) in directing a decree for \$36 and costs, when in fact a decree should have been entered for a much larger amount.

Ezerean Fuller, per se.

Frank P. Leffingwell, for appellees.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

JENKINS, Circuit Judge, after stating the facts, delivered the opinion of the court.

It is not well that one trained to the profession of the law should act as counsel for himself. Natural bias of mind in one interested in the event tends to obscure the mental vision, making light of obstacles that are weighty, and unduly exaggerating matters which are of slight or no importance. The evil is greatly increased when one unused to the ways and practices of the profession, and unversed in the practice of law, assumes to act as his own counsel, and especially is this so when that one is a lady not only unfamiliar with the practice of law, but unaccustomed to the ordinary usages of business life. In this case the excusable ignorance of business methods, and total unfamiliarity with the practice of the law and with proceedings in judicial tribunals, has not only contributed to swell unduly the voluminous record here with matters which, sitting as a court of review, we cannot consider, but may also have possibly resulted in the failure to produce evidence which might have aided the contention of

the appellant. Waiving every question of irregularity in the record, we have carefully examined the proceedings before the master to ascertain if, from anything that there took place, the appellant has suffered legal injury, and we have not been able to discover that she has just ground of complaint. The issue was sharply defined. The defendants insist that the total of their infringement was the purchase and sale of four dozen collarettes; that such infringement occurred from the purchase of the goods from the mother of one of their clerks, a widow whose husband had been in their service; that the purchase was made through generous motives, to aid her, and without knowledge on their part of the patent to the complainant, and without intent to infringe upon her rights; and that, when advised of infringement, they sought to make ample reparation for the unintentional wrong done. It would seem that the complainant was possessed of the belief that the infringement by the defendants assumed greater proportions. It was incumbent upon the complainant to establish this if it were so, and the attempt of the complainant to prove this without definite knowledge of the fact, and without understanding how to go about it, naturally resulted in failure. The master required the defendants to produce their books which would show the transactions with respect to the sale of any article of the character covered by the patent of the complainant, and all such books, as they insisted, were produced. The bookkeepers of the defendants testified to their examination of the books in respect to the purchase of articles in the departments of the defendants' business where such articles would naturally be purchased and exposed for sale, and they testify that no other purchase or sale than that stated had been made. The complainant, however, required that the defendants should examine other of their books, and insisted that the master should compel that to be done. This was manifestly a request which could not be entertained, and a proceeding which the master would not be authorized, under the decree, to order. It does not appear that the defendants objected to an examination of their books by the complainant or her agent. If the complainant had desired any particular books, she should have specified them, and when brought before the master they were subject to her examination; but to compel the production of cart loads of books covering the large transactions of the defendants, and which they insisted had no reference to the matter in hand, or to require the defendants to make such examination, would have been an abuse of the process of the court. We are unable to perceive that any wrong was done to the complainant in the proceedings before the master.

The defendants below purchased the infringing articles, as would appear from the bills of purchase, at the price of \$24, and sold them at the price of \$36. The court below, as also the master, awarded as damages and profits the total amount which the defendants received. Of this the appellees are not here complaining, and certainly the appellant, upon this branch of the case, cannot reasonably find fault with that conclusion. The master also allowed the sum of \$250, the penalty stated in the act of February 4, 1887 (24 Stat. 387). The court sustained the exception by the defendants to this finding of the master,

and the correctness of that ruling is before us. The statute in question declares it to be unlawful for any one, without the license of the owner, to apply a design secured by letters patent, or any colorable imitation of it, to any article of manufacture for the purpose of sale, or to sell or expose for sale any article of manufacture to which the design or colorable imitation of it shall, without the license of the owner, have been applied, knowing that the same has been so applied; and provides a penalty of \$250 for so doing, and that such sum may be recovered by the owner of the letters patent to his own use, either by action at law or upon a bill in equity for an injunction to restrain such infringement. We concur with the court below that this penalty only attaches where the infringer knows that the article exposed for sale has upon it a design protected by letters patent. It was not the object of the statute to impose that penalty upon an innocent infringer. It is in the nature of a punishment for the willful violation of another's protected right. So far as this record discloses, the infringement here was inadvertent, without knowledge of the complainant's right. It occurred through a laudable effort to aid a supposed deserving widow of a former employé, and the extent of the infringement was inconsiderable. We cannot, upon the language of this act, suppose that it was the intention of congress to impose such a penalty for an inadvertent and ignorant invasion of another's right.

At the argument the appellant, conducting the case in person, made statements to the court with respect to alleged infringement by the appellees of which she had been informed, the evidence of which does not appear in the record. It must be apparent, even to one wholly unused to judicial proceedings, that, sitting as a court of review, we are not at liberty to take cognizance of matters dehors the record, or to entertain new evidence pertaining to the issue, which, if properly presented to the court below, could have been there considered. The decree will be affirmed.

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PILLSBURY-WASHBURN FLOUR-MILLS CO., Limited, et al. v. EAGLE.

(Circuit Court, N. D. Illinois. October 13, 1897.)

**TRADE-MARKS—UNFAIR COMPETITION.**

A number of competing millers in Minneapolis, Minn., who make flour by the roller process, and each of whom uses his peculiar marks in connection with the words "Minneapolis, Minn.," and some of whom also mark their packages "Minnesota Patent," have no such joint or separate right in these words as will enable them to maintain a joint bill, in behalf of themselves and others similarly situated, to enjoin a grocer from selling flour made in Wisconsin, and branded with his own name, in connection with the words "Best Minnesota Patent, Minneapolis, Minn."

This was a suit in equity by the Pillsbury-Washburn Flour-Mills Company, Limited, and six other parties, against Harry R. Eagle, to enjoin him from using the words "Best Minnesota Patent, Minneapolis, Minn.," in connection with flour sold by him.

Aldrich & Reed, for complainants.

Peckham & Brown, for defendant.

**SHOWALTER**, Circuit Judge. The complainants, seven in number, are severally owners of flouring mills situated in Minneapolis, Minn. They sue "on behalf of themselves and of all other persons, firms, and corporations similarly situated and interested in respect to the subject-matter of this suit." They are, with respect to each other, competitors in trade. Each has his own peculiar marks or indicia of trade. Each uses the words "Minneapolis, Minn." But, on the theory of the bill, these words, as used by complainants, signify that the flour in the package so marked was ground at a mill in Minneapolis, and, per consequence, by some person or corporation for the time being operating a mill in that city. These words on a flour package are not, on this understanding, a representation that the flour therein was made by any particular person or at any particular mill. They have, hence, no function as a trade-mark. They are not a sign of origin of which, as incidental to the good will of any particular milling business, a property right could be predicated. Further, some of the complainants put upon packages containing flour the words "Minnesota Patent." Complainants say these words signify that the flour contained in such packages was ground at some mill in Minnesota, and, of course, by some miller operating a mill in that state. They say, also, that the flour ground at their several mills is of hard spring wheat, such as is grown in Minnesota, the Dakotas, and elsewhere in the Northwest, as distinguished from winter wheat grown in territory more southerly, and that such flour is ground by the Hungarian or roller process.

The complaint is that defendant, who is a grocer doing business under the name of H. R. Eagle & Co., and having his place of business in Chicago, sells flour in sacks branded, "H. R. Eagle & Co., Best Minnesota Patent, Minneapolis, Minn." Complainants say that this brand is a false representation, in that said flour is not made in Minneapolis, or in the state of Minnesota. But, on the theory of the bill, how can this misrepresentation affect injuriously any particular individual among the complainants? These words do not imply that any one of the complainants milled the flour sold by defendant. A person whose habit in buying flour, or whose disposition to buy, is within the good will of any one of the complainants, and of whose custom a property right vested in such complainant may, in the trade-mark sense, be predicated, could not be deceived by defendant's brand into the belief that he was buying flour made by such complainant. The idea seems to be that defendant sells to persons who, but for his false representation, might buy flour made by some one or other of these complainants. But which one? The false representation has no definite relation to any individual. Furthermore, the "wrong" or "injury" complained of is imaginary. It is not a deprivation of any right already fixed or vested. Where one dealer sells, the customer, to the extent that his wants are supplied, is out of the market, and a rival dealer has thus and to that extent lost the possibility of selling. But is the latter dealer wronged? Or is he any the more wronged if the former used a false representation, not touching any right vested in the latter, in effecting the sale? If a trader sells to

A., using fraud or artifice in effecting the sale, another trader in goods of a like kind has no cause of action merely because, as a matter of speculation, A. might possibly have dealt with him but for the prior sale.

The theory of this bill, if it be that some one of the complainants (though which cannot be known) will or may be injured by the alleged misconduct of defendant, and that, therefore, an injunction may be granted at the suit of all, is a mistaken one, as it seems to me. On the other hand, no one of these complainants, either alone or jointly with his co-complainants, has any property right in the reputation of Minneapolis or of Minnesota as a flour-manufacturing center or territory. Each complainant may sue for a wrong to his own reputation, or for a trespass on the good will of his own business; but that, it seems to me, is not the case here presented. There is nothing peculiar to Minneapolis or the state of Minnesota, as localities, which affects the quality of the flour made at that city or in that state. Complainants use steam and water power in running their mills. There is no special reason why flour precisely the same in quality, made out of the same material, with machinery of the same sort, may not be made in Wisconsin or Iowa or Illinois or elsewhere. The case does not belong to that category wherein the quality of the manufactured article depends upon some quality peculiar to the location where the manufacturing business is carried on. The complainants, as already said, are competitors in trade. They are not members of an association. This is not a case where the defendant is professing membership in a society of which he is not a member, whose privileges he is not entitled to enjoy, and whose guaranties for business or other purposes he has no right to appropriate.

The defendant states that in the year 1889 he procured his supply of flour to be ground and put up by some one or other of these complainants in Minneapolis. His flour sacks were then marked, "H. R. Eagle & Co., Best Minnesota Patent, Minneapolis, Minn." He states, also, that the words "Minnesota Patent" are descriptive. They signify to the trade a flour made by the Hungarian or roller process out of the hard spring wheat grown in the Northwest, such flour, wherever milled, being known in the market as "Minnesota Patent." It seems that in 1893 defendant ceased to patronize exclusively millers in Minneapolis. From that time he procured a portion of the flour, branded as stated, and sold by him, to be manufactured at a mill in Wisconsin. He states that the flour so ground for him at said mill was essentially the same, made of the same material, and by the same process, as that milled and put up for him in Minneapolis; that since 1895 he has procured his flour exclusively from a mill in Wisconsin; and that he retained the markings which identified to his customers the kind and quality of flour sold by him. He insists, further, that the words "Minneapolis, Minn.," on a package of flour, have come to signify in the trade, not that the flour was made at a mill in Minneapolis, but that it is the kind of flour made at that city. He calls attention, also, to the showing on the face of the complainants' bill that one of the complainants grinds flour at a mill, not in the city of Minneapolis, but

some 18 miles distant therefrom, and marks the flour so ground "Minneapolis, Minn." Primarily, of course, the words "Minneapolis, Minnesota," printed upon a manufactured article, would signify either that that was the place of manufacture, or that that was the place of business of the vendor; but on the showing here, as well on the side of complainants (take, for instance, the affidavit of Harry B. Mitchell, among others) as on that of defendant, it is by no means clear that the defendant's contention is not true, namely, that "Minneapolis," on a flour sack, has come in reality to signify to purchasers the quality of the flour, rather than the place of manufacture. If it be true, as insisted by complainants, that the word "Minneapolis," as a brand on flour, signifies the location rather than the quality, and that people buy the flour so marked merely because they believe it was made at Minneapolis, then the fact that one of the complainants mills his flour, or a large part of it, not at Minneapolis, but at a point some 18 miles distant therefrom, and yet marks it "Minneapolis, Minn.," would make another difficulty in the way of the proposed injunction. For reasons first above given herein, however, my opinion is that no injunction should issue, and the motion is denied.

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THE NEW YORK.<sup>1</sup>

UNION STEAMBOAT CO. v. ERIE & W. TRANSP. CO. et al.

(Circuit Court of Appeals, Sixth Circuit. October 5, 1897.)

No. 461.

1. COLLISION IN DETROIT RIVER—CANADIAN STATUTE.

In a suit for a collision occurring on the Canadian side of the Detroit river, the appellate court cannot consider the Canadian statute of navigation as governing the case, where the same was not introduced in proof in the court below, and neither party relied on its provisions.

2. SAME.

Quere: Whether two American vessels proceeding from one port of the United States to another, and incidentally crossing and recrossing the boundary between the United States and Canada, are not still to be held as governed by Rev. St. § 4233, and the supervising inspectors' rules, though a collision occurs between them while in Canadian waters.

3. SAME—SUPERVISING INSPECTORS' RULES—CROWDED CHANNELS.

Rule 2 of the supervising inspectors, requiring steamers approaching in an oblique direction to pass to the right of each other, is not inapplicable, on the ground of the existence of a "crowded channel," to the case of a steamer descending the Detroit river, two miles below Detroit, in rear of a tug and tows, which are rounding to, across the river, to make a landing on the American side, where such steamer has the full width of the river to her right, in which to avoid an ascending steamer, by merely running down into the light of the tow, and submitting to a very little delay.

4. SAME—CHANGE OF COURSE.

A vessel whose duty it is to hold her course does not depart therefrom, so as to violate the rule, by merely turning temporarily from her general course to avoid obstructions known to the other vessel, and for the effect of which the latter is bound to allow.

5. SAME—KEEPING OUT OF THE WAY.

A steamer which is bound to keep out of the way of an approaching steamer does not fulfill that duty when she presses so close upon the course

<sup>1</sup> Rehearing pending.

of the preferred steamer that the latter, after making the necessary deviation to pass an obstruction known to both, has not room to come back to her course by an easy sweep, but is required to make a sudden turn around the obstruction.

6. SAME—MAINTAINING SPEED.

A steamer having the right of way when approaching another steamer is entitled to maintain her speed, as well as her course, unless there is some distinct indication that the other is about to fall in her duty of keeping out of the way.

This is an appeal from a decree of the district court for the Eastern district of Michigan, in admiralty; for about \$70,000, against the steamer the City of New York, owned by the appellant and claimant, the Union Steamship Company, in favor of the Erie & Western Transportation Company, the libellant, and owner of the steamer Conemaugh, for damages sustained by the latter from a collision between the two steamers, which resulted in the sinking of the Conemaugh in the Detroit river.

The collision occurred in the Detroit river, near the Canadian bank, at a point a little above, and nearly opposite, a coal station known as "Smith's Coal Dock," where vessels are accustomed to secure their supplies of coal, about 2 miles below the city of Detroit. On the evening in question (that of October 21, 1891), about 8 o'clock, the weather being clear, with no moon, the steamer Burlington, with a tow of four lumber-laden barges, bound down, was rounding to, to take coal at Smith's dock. She had taken her tow well over towards the Canadian shore, and her speed while rounding to was at a rate of less than 4 miles an hour, including the  $2\frac{1}{2}$ -mile current of the river. Before the Burlington had reached the midstream in executing this maneuver, she sighted the steamer City of New York, a propeller 270 feet in length, coming up the river on the American side, about a mile below. The Burlington blew a single blast to the New York, which was answered by a single blast, and the New York ported her helm and swung towards the Canadian shore, to pass the tow on her port hand. The Burlington proceeded slowly across the river, and as she was rounding to Smith's dock, and 500 or 600 feet distant from it, her master discovered the lights of a steamer, which afterwards proved to be the Conemaugh, bound down the river. The Conemaugh was then on the American side of, and 250 feet away from, the Kasota spiles, a lighted obstruction in the middle of the river, and some 3,500 feet from Smith's dock. The Burlington blew a blast of two whistles to the Conemaugh, which was answered by the Conemaugh. The Conemaugh thereupon put her helm hard a-starboard, swung around south of the Kasota spiles, and headed directly across the river, towards the Canadian shore. As she starboarded the captain checked her speed, so that her engines, instead of making 70 revolutions, made but 40. As she steadied on the starboard helm, her captain descried the tail of the tow, about two points off his starboard bow, going down the river on the Canadian side, and directed his wheelsman and his second mate, who was assisting at the wheel, to port and follow the tail of the tow down. About the time of this order the captain and his lookout discovered the New York coming up the river, and gave two blasts of his whistle. The New York did not answer this signal, and, as the Conemaugh ran on, her captain repeated the double blast, which again was not answered. A short time afterwards, as he drew near the wake of the last barge of the tow, he gave a third double blast, which was also unanswered. The New York, after having ported on exchanging signals with the Burlington, continued up the river, across the midstream, heading in such a way that, if she had continued on her course, she would have run down the Amaranth, the third barge of the tow. When about 700 or 800 feet from that barge she ported again, and on a parallel course with the two last barges, which were sagging downstream so that their bows pointed two points from an up and down course, she passed them both at a distance of from 50 to 100 feet. The answer of the New York admits that

those in charge of her did not hear the first two double blasts of the *Conemaugh*, and avers that they only heard the third double blast, and that even then, not discovering the *Conemaugh*, they did not think this signal was intended for the New York. When the New York did not answer the third signal, the *Conemaugh*, which until then had been following the barges of the tow down, put her wheel hard a-starboard, blew alarm signals, and swung over towards the Canadian bank, across the bows of the New York. The New York put her helm hard a-starboard and struck the *Conemaugh* on her starboard bow, about 30 feet from her stem. At the time of the collision the captain of the *Conemaugh* rang up the engine to work ahead strong, and her engines did so for more than a minute. She sank on the channel bank of the Canadian shore. The collision occurred astern of the last barge in the tow, and a little towards the Canadian shore. At the close of the evidence for the libelant the respondent declined to introduce evidence, contending that, on the evidence for the libelant, the respondent was entitled to a decree dismissing the libel. The district court held that the City of New York was at fault—First, in failing to keep a proper lookout and answer signals; second, in failing to keep her course; and, thirdly, in not stopping and reversing when there was danger of collision. The court further held that the *Conemaugh* was also at fault, in failing to stop and reverse when the risk of danger was imminent. The proctors for the *Conemaugh* filed a motion for rehearing, and for a modification of the decree in so far as to free the *Conemaugh* from fault, and for leave to introduce certain additional evidence. The court heard the motion for rehearing, and, without granting leave to introduce evidence, modified the decree so as to relieve the *Conemaugh* from fault, and to assess the entire damages against the New York. Subsequently the proctors for the New York, on the ground that the interlocutory decree entered had been a surprise to them, applied for leave to introduce evidence. This was denied. A hearing was then had before a commissioner, the damages were assessed, and the decree entered, and this appeal taken. There are other parties to this bill, who were interveners in the court below. These interveners were several insurance companies, who had underwritten the cargo, who had received and accepted an abandonment of the same subsequent to the collision, who had paid the owners as for a total loss, and who had thereby become subrogated to the rights of the owners of the cargo. As the decree appealed from distributed a part of the sum awarded as damages to the interveners, they were made parties to this appeal.

H. C. Wisner and C. E. Kremer, for appellant.

H. Goulder and John C. Shaw, for appellees.

F. H. & G. L. Canfield, for interveners.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge (after stating the facts). We must first decide what are the rules of navigation to which the colliding vessels were obliged to conform. The collision occurred in Canadian waters, and it is contended by counsel for the appellee that the Canadian statute of navigation must govern the court in the consideration of the conduct of the parties. It is settled by the decisions of this court in *The North Star*, 22 U. S. App. 242, 10 C. C. A. 262, and 62 Fed. 71, and *The City of Mackinac*, 43 U. S. App. 190, 20 C. C. A. 86, and 73 Fed. 883, that, in the absence of proof of the Canadian statute, the proper navigation at the time of this collision was prescribed by section 4233 of the Revised Statutes of the United States, as supplemented by the rules adopted by the supervising inspectors under the authority of section 4412, Rev. St. It is conceded that



at the hearing in the court below the Canadian statute was not introduced in proof, and that neither the counsel nor the court relied on its provisions. It is also apparent from the evidence that the captains of the colliding vessels both regarded themselves as acting under and subject to the federal statute and the supervisors' rules at and before the time of the collision. At the hearing of the motion made by libellant for a rehearing and a modification of the decree so as to hold the Conemaugh free from fault, some reference seems to have been made to the Canadian statute. This we gather, not from the record, but from the affidavits of the counsel for libellant, and the clerk of the district court, filed in support of a motion for a certiorari. From the affidavit of the clerk it is to be inferred that the reference to the Canadian statute was only arguendo, and that there was no formal offering of the same in evidence. Indeed, it is difficult to understand how there could have been an offering of the same as evidence upon the issue made on the pleadings, because the action of the court in modifying the interlocutory decree seems to have taken on the evidence as adduced at the trial, and without a new hearing of the cause. The motion of libellant for rehearing asked for leave to introduce new evidence, but the Canadian statute was not mentioned in the description of the evidence to be offered. The respondent asked leave to introduce new evidence after the court had modified the decree, and this was denied. Now, the respondent had stood upon the evidence of libellant at the trial, and had adduced no evidence of its own. If the libellant had been permitted, on a rehearing, to introduce the Canadian statute, and to change materially the rules of conduct to which the parties were to be held, then it would seem hardly fair not to have allowed the respondent to call its witnesses to meet a different case from that in which it had not deemed it necessary to call any one. But, disregarding these considerations, the conclusive reason why the court cannot consider the Canadian statute as part of this record is found in the return of the district court to the writ of certiorari. It contains no certificate that the Canadian statute was made part of the record by being offered and received in evidence, but only a statement by the clerk that that which is returned is a correct copy of the Canadian statute, as published. The district court and the clerk seem to have construed the action of this court in issuing the writ as a decision or finding that the Canadian statute was a part of the record below, and an order to certify the same, whereas the writ merely directed the court to complete the record if, in any respect, it was defective, leaving to that court to decide what constituted its record. We cannot regard the Canadian statute, therefore, as in evidence, or as part of the record before us. It might have been a question, even if the Canadian statute had been properly proved, whether two merchant vessels of the United States, proceeding from one port of the United States to another, and incidentally crossing and recrossing the national boundary, were not, though in Canadian waters, still to be held by a court of the United States as bound by section 4233, the opening words of which are as follows: "The following rules for prevent-

ing collisions on the water shall be followed in the navigation of vessels of the navy and of the mercantile marine of the United States." We do not decide this point, because, though suggested by counsel, it is not before us. All that we do hold is that, in the absence of the proper proof of the Canadian statute, the presumption is that section 4233 and the supervising inspectors' rules furnish the law of navigation for the cause.

It is not disputed that the courses of the two vessels were crossing, so as to involve risk of collision, and that the Conemaugh had the New York on her own starboard side. Under such circumstances, by rule 19 of section 4233, Rev. St., the Conemaugh was required to keep out of the way of the New York; and by rule 23 the New York was required to keep her course, unless, as provided in rule 24, special circumstances existed, rendering a departure from rule 22 necessary to avoid immediate danger. Rule 2 of the supervising inspectors further limited the discretion which the Conemaugh had in selecting the manner in which she could keep out of the way by providing that when steamers were approaching each other in an oblique direction, as these were, they should pass to the right of each other, as if meeting "head and head," or nearly so. The learned district judge was of opinion that rule No. 2 did not apply in this case, because he thought the situation here was within an exception to rule 2 stated in a note to the supervising inspectors' rules, by which all the rules are made inapplicable to steamers navigating in a crowded channel. In this we cannot agree with him. The width of the navigable channel between the tow and the Canadian shore before and at the time of the collision was variously estimated as from 500 to 750 feet. For reasons which we shall hereafter state, we think it was about 500 feet. The Conemaugh had not entered that channel, but was above it in the river at least 300 feet. She had the whole width of the river on her starboard hand, and had full opportunity to port her helm and run down into the bight of the tow, out of any danger, had she desired to do so, and this with very little delay. Had she done this, there would have been no collision. It follows that she was guilty of a fault which caused the collision. We should have reached this conclusion even if the Conemaugh was not bound by rule 2 of the supervising inspectors, and was only under obligation to keep out of the way of the New York, with discretion to pass her on either hand. The evidence satisfies us that the Conemaugh was in the course of the New York when the collision occurred. What was the course of the New York? Her general course was upstream, and probably, if she followed the usual track of steamers (though this was not invariable), a little towards the American side of midchannel. It is well settled, however, that a vessel does not depart from her course when she turns from her general course to avoid obstructions, of which the vessel keeping out of her way must know the existence and must allow for the effect. *The Iron Chief*, 22 U. S. App. 473, 11 C. C. A. 196, and 63 Fed. 289; *The John L. Hasbrouck*, 93 U. S. 405; *The D. S. Stetson*, 4 Ben. 508, 7 Fed. Cas. 1132; *The John Taylor*, 6 Ben. 227, 13 Fed. Cas. 896; *The Velocity*, L. R. 3 P. C. 44; *Mars. Mar. Coll.* (2d Ed.) 473.

The proper course of the New York was that which the Conemaugh ought to have known she would naturally have taken had the Conemaugh not been in sight. As the New York came up the river the Burlington's tow was stretched across the river, and by an exchange of single blasts a proper agreement had been reached, by which the New York was obliged to go round the tail of the tow, having it on her port hand. This required the New York, coming up on the American side of the channel, to port her wheel and change her course towards the Canadian shore. As she was about a mile distant when the signals were exchanged, it is highly probable that she could not, in a dark night, at once determine the length of the tow, or fix the place of the last barge in it. It was entirely natural and proper navigation for her to change her course only moderately to starboard until she could pick up the tail of the tow, and avoid going uselessly near the Canadian shore, and more out of her general course up the river than necessary. The evidence shows, then, that after first porting her wheel she ran on a course which would have carried her into the Amaranth, the third barge in the tow; that when about 800 feet away she ported again, and took a course which was about parallel with the then course of both the Amaranth and the Ferguson, the last two barges of the tow, and 100 feet distant therefrom, towards the Canadian shore. Their course was about two or three points towards the American shore from the course of the river and channel, and so the course of the New York was then two or three points from the midchannel line towards the Canadian shore. The great weight of the evidence establishes that the New York did not again change her course to starboard after she ported her wheel 800 feet away from the tow to pass the last two barges. The libel charges that when near the last barge she ported her wheel and swung violently to starboard, and thus brought about the collision. We think the evidence utterly fails to show this, and that she made no change of her course to starboard which the presence of the tow, sagging downstream, and slowly crawling across the river, did not make necessary. But it is said that after the New York passed the tow her proper course was to swing to port under the stern of the last vessel in the tow, and thence over towards midchannel, instead of which she continued on towards the Canadian shore, and ran into the Conemaugh. It is undoubtedly true that the New York's proper course, after passing the tow, was to resume her general course upstream near midchannel. The John L. Hasbrouck, 93 U. S. 405. All the witnesses who observed her course admit that just before the collision she was swinging under a starboard wheel. It would seem, therefore, that she had begun to change her course to port; and the only question is, did she begin to do this as soon as she ought to have done it? How soon ought she to have done it? She was not obliged to turn a sharp corner round the stern of the last barge on the tow. She certainly would not have done this had the Conemaugh not been there, and, as we have seen, her proper course could not be affected by the fact of the Conemaugh's presence. Her natural course would have been to swing gradually to port under a slowly-turning starboard wheel, so as to make an easy sweep back to

midchannel. The Conemaugh could not, by pressing on it, make the course of the New York one requiring her to dodge in between the tail of the tow and the Conemaugh. In answering the question whether the actual course of the New York was in accord with her proper course thus stated, we may derive considerable light from the evidence as to the distance of the New York and the Conemaugh from the tow when the collision occurred. The captain of the Conemaugh says the distance was 750 feet. The captain of the Ferguson puts it at about the same distance. The mate of the Conemaugh makes the distance about 300 feet, and this is the effect of the evidence of the captain of the Amaranth. We are of opinion, from the circumstances in the case, that the smaller distance is much more likely to be correct. An examination of the chart shows that the distance which the Conemaugh was from the tail of the tow, when her engines were checked, did not exceed 1,200 feet. The statement of her engineer as to the time between that check and the collision was about four minutes. The relative speeds of the Conemaugh and the tow were such that the former was gaining on the latter at least three miles an hour. Allowing for the curved course the Conemaugh took in following the tow down, and allowing half a minute between the hard a-starboard swing of the Conemaugh and the collision, she must certainly have been within 300 feet of the tow when the swing occurred. But it is said that this conclusion is at variance with the place where the Conemaugh grounded on the channel bank. The weight of the evidence shows that the distance of the tow from the Canadian shore was about 750 feet. The channel bank was about 235 feet from shore. This left the channel between the tow and the bank about 515 feet. It is not clear just how much time there was between the starboarding of the Conemaugh's wheel and the collision, but it is quite evident that there was some time in which to make headway towards the Canadian shore, and after the collision the evidence is that the engines of the Conemaugh worked ahead strong for a minute or more. This is quite sufficient to show that the Conemaugh might have starboarded her wheel at a point about as far from the shore as was the tow, and though when she blew her alarm signal she was but 300 feet from the tow, that after being struck by the New York, and working hard towards the Canadian shore, she might have brought up on the bank at a point much further than 300 feet from the position of the tow, which had been constantly moving away from the point of collision. With the distance between the Conemaugh and the tow but 300 feet, where was the course of the New York with respect to them? It is clear to us that the course of the New York would not naturally be confined to swinging on her starboard wheel through the passage not much wider than her length. That would not have been the easy sweep which she was entitled to make in turning back towards midchannel. The Conemaugh, therefore, being where she was, was either in, or dangerously near, the course of the New York, and was not keeping out of her way. More than this, she increased her fault by throwing herself right across the bows of the New York. The point where the New York struck

her, to wit, only 30 feet from her stem, shows that if, when she blew her alarm whistle, she had ported her helm, instead of starboarding, she would have entirely avoided the New York, by passing that vessel port to port. It is very difficult to explain the navigation of the Conemaugh, or to reconcile some of the statements of the captain of the Conemaugh with the admitted situation of the vessels. He says that when he steadied, after swinging round the Kasota spiles and heading across the river, he saw the red light of the New York coming up the river, and whistled two blasts to her; that as he swung slowly around on his port wheel, following the tail of the tow, he saw both side lights of the New York; and that he continued to do so when he whistled his second signal of two blasts and his third signal of two blasts. An examination of the chart and the necessary courses of the two vessels makes it impossible that he could have seen the green light of the New York from the second to the third blast. The New York was proceeding from the American side in a slanting direction across the river, while the Conemaugh was proceeding down the river in a slanting direction, and each must have been showing to the other but one light. We did not hear in the argument of counsel, nor can we find in the briefs, any explanation of how both lights of the New York were so long visible to the Conemaugh as her captain testifies. The other witnesses from the Conemaugh differ with the captain as to the lights shown by the New York. Hogan, the mate, saw only her red light at the time of the third signal, and Crowe saw her red light immediately after the second signal. The only importance of this error in the testimony of the Conemaugh's captain is that it shows that the porting of the New York's wheel twice in her course from the American side to the tail of the tow must have been evident to him before there was any danger of collision. Another circumstance of much significance in this case is the course of the Conemaugh with respect to that of the two last barges of the tow. Both barge captains say that for some time before the third signal blast they saw both side lights of the Conemaugh. Now, this is only possible if the Conemaugh, instead of crossing their wake, was following along in it for an appreciable time while she was blowing the last one, and probably the last two, of the signals to the New York. It thus appears that, while she was blowing signals indicating a purpose to pass the New York starboard to starboard, she was continuing on a course port to port of the New York. It is not explained why, if the captain of the Conemaugh regarded himself as having the right to select his course, and intended, as he says he did, to pass on the Canadian side of the New York, he did not direct his vessel towards the Canadian shore at once, instead of following the tow down on the American side of the course which the New York must follow to clear the barges, and then suddenly swinging across the bows of the New York when that vessel was so near that collision was inevitable. On the whole case, we are clear in the conclusion that there were several glaring faults in the management of the Conemaugh, which caused the collision.

The question remains, was the New York also guilty of faults in

navigation contributing to this collision? Her owner, in its answer, admitted that those in charge of her neither saw nor heard the Conemaugh until the third double-blast signal, and that then they only heard the signal, without seeing the vessel giving it, and so supposed that the signal was not intended for them. The witnesses for the Conemaugh unite in saying that the New York was going at a speed of 10 miles an hour, and apparently not under check. The district court found, from her failure to see and hear the Conemaugh, that the New York's lookout was defective, and that she thus committed the fault of not answering the Conemaugh's signals. He further held that she should have checked or stopped when there was risk of collision, and that her failure to do so was a fault contributing to the disaster. It must be conceded that, if the New York had heard the signals of the Conemaugh, she would not have been obliged to respond by a double blast, and signify her willingness to pass starboard to starboard, instead of port to port. Under rule 2 of the supervising inspectors, the Conemaugh was obliged to keep on the New York's port hand, and nothing but her consent—expressed in a double blast—to depart from the rule would justify the Conemaugh in assuming that consent. This was not a case where silence gave consent. Rule 2 requires signals to be given and promptly returned. It has been suggested that this requirement of a prompt answer applies only to the case where the first signal is to indicate a compliance with the rule, and not, as in the case at bar, where the signal invited a departure from it. This suggestion finds some support, it is said, in the language of Mr. Justice Brown in *The Delaware*, 161 U. S. 459, 16 Sup. Ct. 516, where, speaking for the supreme court, he limits the use of signal blasts by the preferred vessel of two crossing vessels to an announcement that she is maintaining her course according to rule. The learned justice said:

"These rules, however, so far as they require the whistle to be used, are applicable rather to vessels meeting end on, or nearly end on; and the signals therein provided for are designed to apprise the approaching vessel of the intention of the steamer giving the signal to port or starboard, as the case may be. As applied to vessels upon crossing courses, however, it means, when a single blast is given by the preferred steamer, nothing more than that she intends to comply with her legal obligation to keep her course, and throw upon the other steamer the duty of avoiding her."

We do not find it necessary to decide whether the New York should have returned a signal of one blast or not, because it is clear to us that her failure to do so did not contribute to the collision. So far as the Conemaugh was concerned, the New York's silence was exactly equivalent to her express refusal to consent to depart from the rule by a single blast. There are several cases in which the point has been decided. *The John King*, 1 U. S. App. 64, 1 C. C. A. 319, and 49 Fed. 469, was a case of crossing vessels, in which the preferred vessel was condemned by the district court for not promptly returning an answer to a signal inviting her to depart from rule 2. The circuit court of appeals of the second circuit reversed this decree, and Judge Wallace, in delivering the opinion of the court, said, referring to the other vessel:

"It was her duty, under sailing rule 19, to keep out of the way, and the duty of the ferryboat to keep her course. The red light of the ferryboat was plainly visible to the propeller, and there was nothing in the way to prevent the latter from passing astern of the ferryboat. She had concluded previously to pass across the bow of the ferryboat, but had received no consent from the ferryboat to such a course, and there was still time to abandon that purpose and go astern. The latter course was plainly safe; the former, doubtful; and, quite irrespective of any rule of the supervising inspectors, common prudence required her to adopt the safe course and pass astern. She cannot invoke the aid of any rule of the supervising inspectors to justify her departure from duty without showing that her proposition to depart was heard, understood, and accepted by the ferryboat. If, by her signals, she invited a departure from the ordinary rules of navigation, she took the risk, both of her own whistles being heard, and, in turn, of hearing the response, if response was made."

Again, Judge Wallace says, speaking of the ferryboat:

"The signal she gave to the propeller when she got out into the river was the proper signal, viz. one blast, to indicate that she proposed to keep to the right. If she had heard the second signal of the propeller, she could have done no more by way of a proper answer, and would have been under no obligation to give a different signal. This signal was given at a time when there was yet opportunity for the propeller to alter her course to starboard and pass astern. If we should assume that she heard the propeller's signal, or ought to have heard it, and should have answered it by two blasts of her whistle, we do not see how the propeller was misled by the conduct of the ferryboat. We do not think, however, that, if the ferryboat had heard the propeller's signals, her failure to answer them would have been culpable. The case, in its legal aspects, is quite similar to that of *The B. B. Saunders*, 23 Blatchf. 383, 25 Fed. 727, in which the court used this language: 'Notwithstanding the inspectors' regulations, therefore, the pilot of the *Saunders* was not bound to assent to the movement proposed by the *Orient*, unless due regard to the particular circumstances of the situation required a departure from the ordinary rule. Consequently, his failure to answer the signal of two blasts of the whistle from the *Orient* was not culpable, unless it was apparent that the *Orient* could not safely pass astern of the *Saunders*.'"

See, also, *The Florence*, 68 Fed. 940; *The St. John*, 7 Blatchf. 220, Fed. Cas. No. 12,224; *The Milwaukee*, Brown, Adm. 313, Fed. Cas. No. 9,626.

It is manifest to us that the failure of the *New York* to respond by a one-blast signal to the two blasts of the *Conemaugh* had no causal relation to the collision, because the silence of the *New York* was full notice to the *Conemaugh* that she must obey rule 2.

Again, how did the *New York*'s failure to see the *Conemaugh* contribute to the collision? Suppose the *New York*'s lookout had seen every maneuver of the *Conemaugh*; would her course have been different from what it was? We do not think so. She had the right and duty to maintain her course, and that we have found that she did. She would have had no right to infer that the *Conemaugh* would suddenly cross her bows, however alert her watch. She would have been justified in supposing that the *Conemaugh*, not having established an agreement to pass starboard to starboard, would maintain her bearing to the port of the *New York*, and swing clear on that side. Especially is this the case when, if she had seen the *Conemaugh*, she would have observed her swinging slowly to the port of the *New York*, in the wake of the barges in the tow, although

blowing signals of her intention, if assented to, to change her course to the starboard of the New York. But it is said she ought to have stopped and reversed when there was risk of collision. The only risk of collision would have been in the Conemaugh's failure to keep to the port hand of the New York, and this failure she was not bound to anticipate. The law on this subject has been settled by the supreme court in *The Britannia*, 153 U. S. 130, 14 Sup. Ct. 795, and *The Delaware*, 161 U. S. 459, 16 Sup. Ct. 516. In the latter case Mr. Justice Brown, speaking for the supreme court, used this language:

"The duty of a steamer having the right of way, when approaching another steamer charged with the obligation of avoiding her, has been the subject of much discussion both in the English and American courts. That her primary duty is to keep her course is beyond all controversy. It is expressly required by the nineteenth rule of the original International Code (Rev. St. § 4233), and of the sixteenth rule of the Revised Code of 1885, and doubtless applies so long as there is nothing to indicate that the approaching steamer will not discharge her own obligation to keep out of the way. The divergence between the authorities begins at the point where the master of the preferred steamer suspects that the obligated steamer is about to fail in her duty to avoid her. The weight of English, and perhaps of American, authorities, is to the effect that, if the master of the preferred steamer has any reason to believe that the other will not take measures to keep out of her way, he may treat this as a 'special circumstance,' under rule 24, 'rendering a departure' from the rules 'necessary to avoid immediate danger.' Some even go so far as to hold it the duty of the preferred vessel to stop and reverse when a continuance upon her course involves an apparent danger of collision. Upon the other hand, other authorities hold that the master of the preferred steamer ought not to be embarrassed by doubts as to his duty, and, unless the two vessels be in extremis, he is bound to hold to his course and speed. The cases of *The Britannia*, 153 U. S. 130, 14 Sup. Ct. 795, and *The Northfield*, 154 U. S. 629, 14 Sup. Ct. 1184, must be regarded, however, as settling the law that the preferred steamer will not be held in fault for maintaining her course and speed, so long as it is possible for the other to avoid her by porting, at least in the absence of some distinct indication that she is about to fail in her duty. If the master of the preferred steamer were at liberty to speculate upon the possibility, or even the probability, of the approaching steamer failing to do her duty and keep out of his way, the certainty that the former will hold his course, upon which the latter has a right to rely, and which it is the very object of the rule to insure, would give place to doubts on the part of the master of the obligated steamer as to whether he would do so or not, and produce a timidity and feebleness of action on the part of both which would bring about more collisions than it would prevent. *Belden v. Chase*, 150 U. S. 674, 14 Sup. Ct. 264; *The Highgate*, 62 Law T. (N. S.) 841, 6 Asp. 512."

This clearly shows that the New York had the right to maintain her speed, as well as her course, unless there was to her some distinct indication that the Conemaugh was not going to keep out of her way by porting. She received no such distinct indication until the Conemaugh suddenly starboarded her helm and swung across the fast-approaching bows of the New York, and then it was too late to avoid the catastrophe. We find, then, that it was the fault of the Conemaugh which alone caused this collision, that the libel of her owner should therefore be dismissed, and that on the cross libel of the owner of the New York a decree in personam against the owner of the Conemaugh for the agreed damage to the New York should be entered. This conclusion disposes also of the petition of the inter-



vening insurance companies, which must also be dismissed. The decree of the district court is therefore reversed, with directions to enter a decree in accordance with these conclusions.

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### THE GENERAL

#### BROWNELL v. THE GENERAL.

(District Court, D. Rhode Island. September 29, 1897.)

No. 1,031.

**1. COLLISION—WEIGHT OF EVIDENCE.**

The direct and positive testimony of the captain and pilot of a steamer that they were keeping a careful lookout, and saw no light on a sailing yacht with which they collided, and that neither the lookout at the bow or the quartermaster at the wheel discovered or reported a light, cannot be disregarded, in the absence of absolute inconsistency with the circumstances; and such testimony is a very strong circumstance in support of the contention that the yacht's light was obscured by her jib.

**2. SAME—STEAMER AND SAIL—HOLDING COURSE.**

The rule that a sailing vessel shall hold her course on the approach of a steamer does not justify her master, on seeing a steamer a mile and a half away at night, in holding his vessel on an intersecting course, making no calculation as to a strong tide which is bearing him towards her, and giving her so little further attention that he first discovers her dangerous proximity on looking under his boom, and seeing her only 40 feet away.

This was a libel by Edward I. Brownell, owner of the sloop yacht *Gypsy*, against the steamer *General*, to recover damages resulting from a collision.

H. W. Hayes, for libellant.

C. A. Ives, for claimant.

BROWN, District Judge. This libel is for a collision between the small sloop yacht *Gypsy* and the steamer *General*, of the Newport & Wickford Line, shortly after 8 o'clock on the evening of August 5, 1896, in Narragansett Bay, at a point in the northern entrance to Newport Harbor, three or four hundred feet westerly of Coaster's Harbor Island. The yacht was approaching the harbor through the northern entrance on a course estimated as S. E. by S., with the wind on her port side a little abaft the beam. The steamer's course was N. by W., until, at a point about 400 feet westerly of Poor House Point, it was changed to N. Soon after this change the collision occurred, the yacht being struck on her starboard quarter, and considerably damaged. The important question in the case is whether the steamer *General* was in fault for failure to discover the green light of the *Gypsy*. The presence of the sloop was not known aboard the steamer until the steamer's headlight showed the sloop's mainsail at a distance of about 30 feet, and it was then too late for the steamer to keep clear. The fact that the lights of the sloop were burning is not conclusive evidence of the fault of the *General* in not observing them. If the evidence from the steamer is to be credited, she fully performed her duty of keeping a

careful lookout. Her captain and pilot testify that on the night of the collision unusual precautions were taken to discover small craft, as it was known that the yacht squadron in Newport Harbor would attract a large number of pleasure craft, and as the northern sky was darkened by an approaching thunder storm. In addition to the lookout at the bow on the saloon deck, the captain and pilot were in the wheel house, solely engaged in keeping a careful lookout, the quartermaster being at the wheel. Of these four persons no one discovered or reported a light or saw the sloop until they all simultaneously saw the sloop's mainsail by the steamer's headlight. This direct and positive testimony from persons whose calling and interest require constant diligence, as to their conduct upon an occasion that would naturally excite diligence, is entitled to great weight, and cannot be disregarded unless absolutely inconsistent with the circumstances. That four persons should have failed to see a light which, if visible, must have been nearly in their course for four or more minutes, is a very strong circumstance in support of the respondent's contention that the light was obscured by the jib of the yacht. *The Daylight*, 20 C. C. A. 81, 73 Fed. 878. The testimony from the sloop seems entirely consistent with the contention that the sloop's jib was full and obscured her starboard light, and inconsistent with the claim of the libellant that the jib was flattened.

As was said in *The Charles L. Jeffrey*, 5 U. S. App. 370, 5 C. C. A. 246, and 55 Fed. 685:

"When one vessel makes a claim against another in the case of a collision, admiralty courts are bound by the same rule which forbids any other court from condemning any one in damages, except in behalf of a party who supports his demand by a preponderance of evidence."

Finding no reason to discredit the testimony of the witnesses for the steamer as to their actual diligence, and the obscuration of the *Gypsy's* light being, under the circumstances, a reasonable explanation of their failure to observe it, I am of the opinion that the libellant has failed to establish by a preponderance of evidence any fault in the steamer.

The charge that the steamer did not perform her duty to stand by is fully met by the positive testimony that she did do so; and, although she declined the request to tow the sloop into Newport Harbor for the reason that there was danger of sinking her, she did stand by, ready to render assistance, until the sloop proceeded into the harbor under her jib. The burden of proof, therefore, is not cast upon the steamer by a failure to perform her duties arising after the collision. Nor am I satisfied that, but for a violation of her own duty, the sloop could not have avoided the collision. The sloop's owner was manifestly under a complete misapprehension of his own duty, and erroneously supposed that the duty of the steamer to keep clear relieved the sloop of her duty to keep a lookout. Though seeing the *General* brilliantly lighted at least a mile and a half away, he held his sloop on a course that intersected the usual path of the steamer, making no calculation upon the strong tide that was bearing him towards her, and paying so little attention to the rapidly approaching steamer that he first

discovered her dangerous proximity when, looking out under his boom, he saw her only 40 feet away.

In the case of *The Sunnyside*, 91 U. S. 208, 217, conduct in respect to the lookout similar to that of the owner of the *Gypsy* was characterized as negligence, manifest, culpable, and indefensible. In that case, after the light of a steamer was sighted, the mate said to the lookout that he guessed she would take care of herself, and no further attention was paid to her until she was so close that a collision could not be averted. Had the sloop immediately observed the steamer's change of course, she might have done her part to avoid the collision, as a slight departure from her course would have taken the sloop clear. Knowledge of the single rule that a steamer shall keep clear of a sailing vessel is by no means a complete guide for a sailing vessel approached by a steamer. Article 20 of the sailing rules provides:

"Nothing in these rules shall exonerate any ship, or the owner, master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen or the special circumstances of the case."

The rule that a sailing vessel shall hold her course is a rule for the prevention of collisions, and "no vessel is justified, by a pertinacious adherence to a rule, for getting into a collision with a ship which she might have avoided." *The Sunnyside*, 91 U. S. 208, 217. The duties of approaching vessels are reciprocal, and, even if one vessel is clearly in fault, it is the duty of the other to use all means in her power to avert the danger, even under the condition of affairs unlawfully produced by the other's negligence.

So complete a disregard of the duty to observe an approaching vessel as existed in the present case was a grave fault, since it prevented the sloop from promptly learning that the steamer had not seen her, and was bearing down upon her, and prevented any effective action by the sloop based upon this knowledge. The libel is dismissed.

## SAMPSON et al. v. CAMPERDOWN COTTON MILLS.

(Circuit Court, D. South Carolina. October 19, 1897.)

## 1. CORPORATIONS—ULTRA VIRES—CONTRACTS FOR FUTURE DELIVERY.

The fact that a cotton-mill corporation purchases cotton for future delivery, through a broker, and puts up margins necessary to carry it, does not render the purchases ultra vires, if they were not in fact speculations on the rise and fall of cotton, but were made in the ordinary and legitimate business of the mill for its own use.

## 2. CONTRACTS FOR FUTURE DELIVERY—VALIDITY.

Where such contracts are not illegal in their origin, the carrying of them, and paying from time to time the margins on them, are not invalid if their purpose is to save the corporation from loss.

## 3. SAME—TEST OF VALIDITY.

The true test of the validity of a contract for future delivery is whether it could be settled only in money, and in no other way, or whether the party selling could tender and compel the acceptance of the particular commodity sold, or the party buying could compel the delivery of the commodity purchased.

## 4. SAME—INTENT OF PARTIES.

Under Acts Assem. S. C. 1883 (18 St. at Large, p. 454), relating to contracts for sales for future delivery, validity depends upon the bona fide intent of the parties.

## 5. SAME—BURDEN OF PROOF.

The burden of showing that a contract of sale for future delivery, which expressly gives the right to the seller to deliver and to the buyer to demand the delivery of the article sold, is invalid, is on the party attacking its validity.

## 6. SAME—ADVANCES BY THIRD PARTY—MARGINS.

Though a third party advancing money to pay losses on an invalid contract of purchase for future delivery might, under some circumstances, be so connected with the immorality of the contract as to be affected by it, yet where he had no knowledge of the inception of or early payments on the transaction, which was on its face regular and valid, and carried on in good faith, and his advances were made to prevent loss, and after the whole risk had been incurred, it would not be equitable to hold him responsible.

## 7. SAME—VALIDITY OF MORTGAGE.

In such a case a mortgage given to the third party by the purchaser, a corporation, to secure his advances, would be binding.

Cothran, Wells, Ansel & Cothran, for complainants.  
Haynsworth & Parker, for defendant.

SIMONTON, Circuit Judge. This case comes up on an original and a cross bill. The original bill is filed to foreclose a mortgage given by the Camperdown Mills to secure past and future advances. Pending this main cause, Julius C. Smith and other stockholders filed their petition for leave to intervene in the cause, and to be made parties hereto. Leave having been granted, they came in, and, filing their answers, filed also their cross bill. The cross bill charges that certain items of indebtedness to the complainants, as shown in their account, were incurred by the officers of the corporation without lawful authority, in fact and in law, and are not binding on the corporation; certainly not on those stockholders who did not authorize or participate in the unauthorized and illegal acts.

The main facts are these: The Camperdown Mills is a corporation of the state of South Carolina, engaged in the manufacture and sale of

cotton goods. In the year 1887, during the presidency of Mr. Hammett, he bought for the mill 2,700 bales of cotton for future delivery. Closing out this transaction, the mills made a profit. In 1890, President Hammett made another purchase of 1,500 bales of cotton for future delivery, and in 1891 Mr. Beattie, president, under the instruction of the board of directors, made another purchase of 1,500 bales of cotton for future delivery. O. H. Sampson & Co., having their offices in New York and Boston, were the commercial agents of the Camperdown Mills, aiding them by advances towards their commercial capital, and receiving and selling all the output of the mill, having a lien on all goods in their hands for securing the balance of account. When these purchases for future delivery of cotton were made, the transaction was through Woodward & Stillman, of New York, brokers, the money for margins being put up by the Camperdown Mills, at first directly, and afterwards by drafts upon or instructions to the commercial agents, O. H. Sampson & Co. After the transactions were made, but before they were closed out, Charles E. Sampson, a member of the firm of O. H. Sampson & Co., was made president of the Camperdown Mills, and thenceforward he managed the contracts for future delivery made by his predecessors. The course of the cotton market was such that it was deemed most advisable to carry, and not to close out, these contracts, under the delusive hope that a change for the better would occur. While this was done, Sampson & Co. continued to make all the advances necessary to carrying the cotton, and Mr. Charles E. Sampson, the president, at one time, in order to avoid the anticipated result of the Hatch bill, forbidding such contracts, transferred all the contracts from the New York Cotton Exchange, where they originated, to the Liverpool Cotton Exchange. Finally the evil moment came. The transactions were closed out at a loss of \$87,551.41. This constitutes the chief part of the account of complainants, as most of the money to meet the losses was paid by them as the commercial agents of the mill. The manufacturing business proper of the mill was successful. Each year but the last there was a profit made. In the reports to the stockholders this profit appeared. The money paid out on the future contracts did not appear in the profit and loss account. This money was carried as money paid to the brokers, not precisely as an asset, but certainly not treated as a loss, until the end, when the account was closed, and the loss realized. The directors of the company were cognizant of and approved these transactions, and at a meeting of stockholders a majority approved them also. O. H. Sampson & Co. were large stockholders, having, through their own stock and that of their friends, a controlling voice in the corporation. O. H. Sampson, the head of the firm, was at one time vice president. He was also a director. Charles E. Sampson, another member of the firm, as president, as we have seen, succeeded Mr. Beattie, who had succeeded Col. Hammett. There were several other members of the firm of O. H. Sampson & Co. These had no other connection with the Camperdown Mills, save as commercial agents, and also having an interest in the stock standing in the name of O. H. Sampson & Co. The minority stockholders, complainants in the cross bill, contend that these transactions in futures were purely

speculative in their character; that so they were ultra vires, and also in contravention of the express law of the state of South Carolina, whose creature this corporation was; that O. H. Sampson & Co., by reason of the close connection of two of the members of their firm with the direction and control of the company, and by reason of the fact that they were stockholders, had full notice of the illegality of the transactions; that they advanced all the money which they did advance with this notice; that they are affected by it, and cannot now recover it back.

The first question to be discussed in reaching a conclusion of this most difficult and interesting case is, what was the character of these transactions? Were they entered into as speculations on the rise and fall of cotton, or were they made in the ordinary and legitimate business of the mill,—purchases of cotton for the use of the mill? The answer to this question involves an inquiry into the motive which induced the purchases in the first instance. What was the purpose of Mr. Hammett and of Mr. Beattie in making the purchases of cotton on the New York Exchange, and why did Mr. O. H. Sampson advise and approve them? It is a difficult thing, generally, to get at the motive for an act. Usually we try to ascertain the motive by the declarations and conduct of the parties, and by the circumstances which surround them. In deducing the motive in this way, much depends upon the personal integrity and character of the parties. In the present case we are dealing with men of the highest business character for integrity and honesty. No fraud or bad motive is charged against any of them. No room exists for such a charge. Personally none of them had any private interest to subserve. Except as the transactions affected the interests of the corporation of which they were officers and stockholders, none of them had a dollar's interest in the matter. As far as the firm of O. H. Sampson & Co. was concerned, they made none of the contracts, had no interest in any one of them, and furnished the money needed in carrying the contracts precisely in the same way as they made any other advance to the corporation. There is a letter in the record which gives a clue to the intent with which Col. Hammett went into these operations in futures. He inaugurated the practice, and we can safely presume that it was continued by his successors and colleagues for the same reasons which actuated him. The letter is as follows:

“Greenville, S. C., November 26, 1887.

“Messrs. O. H. Sampson & Co., Boston, Mass.—Gentlemen: In a recent letter from you in reply to one of mine, in which I had reported that we had purchased all the cotton we should need at Piedmont, you expressed a regret that we could not say the same thing for Camperdown. There are several reasons why I did not do the same thing for Camperdown. One was that we had no place to store it until our new warehouse was completed, which has now been done; but the principal reason was that we did not have the money to pay for it, and had to run along as best we could from hand to mouth. On the 25th of October I became uneasy, and thought it very probable that the price would advance materially, and before we could buy a supply; and, in order to protect ourselves against such, I bought some contracts in New York. I bought 300 bales for each of the nine months beginning with January and ending with September, as follows: [Bales set out in detail, the aggregate being 2,700 bales.] The same afternoon of the day I bought these contracts they ad-

vanced 8 points, and in less than three weeks they had advanced one cent per pound, which is \$5 per bale, and upon these contracts \$13,500 profit, less the expenses, which will be about \$700. It declined somewhat after that, but yesterday it was advanced to nearly the same price, and we could sell to-day, I presume, at \$12,000 profit. This was, of course, a great temptation to realize the profit, but I did not buy for that purpose. My plan is this: As we buy the spot cotton to sell the months against these contracts, so as to reduce the cost to us. If cotton advances here, and we have to pay a high price for spot cotton, when we sell the contract we get a higher price in New York, so that the advantage to us is that the price is fixed, and will not cost us here more than 9 to 9¼ cents for the average through the season for the 300 bales per month. Our consumption is about 375 bales per month, and I now regret that I did not buy 400 instead of 300 per month. I think I have talked to you about this plan of running a mill before, and that you heartily approved of my suggestion. It means this, and nothing more: That we fix the price for our cotton before we pay for it, and know just what we are doing. Our goods are usually sold largely ahead, and, if we make the sales without the cotton to produce them, it is the worst kind of dealing in futures; but when we protect ourselves by buying futures of cotton, we fix the price for it to make the goods already sold, which is perfectly legitimate and proper. At any time when futures are low, it is the best way to run a mill, because it saves you a large amount of interest and insurance and loss in weight, which necessarily attaches to the purchase of spot cotton. I thought you would be gratified to know this, and I really feel very glad to be able to make such a report. So far as the 300 bales per month is concerned, it does not matter to us whether the price goes to 15 cents or to 5 cents. It is fixed to us at 9 to 9¼ cents.

"H. P. Hammett.

"President Camperdown Cotton Mills."

It clearly appears from this letter that the purpose of purchasing cotton deliverable in the future was to advance the business of the Camperdown Mills in the course of that business, and it was deemed a wise—perhaps necessary—precaution in the business; that they were not entered into as a speculation, or for the purposes of speculation. The question is not whether the course suggested was wise or unwise, prudent or rash. Was it business, or was it speculation? Is it a part of the method of conducting a manufacturing enterprise and the disposing of its product? If it is, then the bare fact that contracts were made for the future delivery of cotton does not show that the contracts were ultra vires and void. If the origin of these contracts was not illegal, then the carrying of them, and paying from time to time the margins on them, were not invalid, if their purpose was to save the corporation from loss.

It is said, however, that such contracts are illegal per se. The contracts in the case at bar were made according to the rules of the New York Exchange, and afterwards according to the rules of the Liverpool Cotton Exchange. The general law does not forbid contracts for the future delivery of any kind of personal property. Nor is the contract made illegal if one or the other settles the contract by the payment or receipt of money. The true test of the validity of the contract is whether it could be settled only in money, and in no other way; or whether the party selling could tender, and compel the acceptance of, the particular commodity sold; or whether the party buying could compel the delivery of the commodity purchased. *Bibb v. Allen*, 149 U. S. 481, 13 Sup. Ct. 950. Under the rules of the New York Cotton Exchange, all sales or purchases for the future delivery of cotton contain an express provision that there must be an actual delivery of cot-

ton if this be required. For this reason the validity of these contracts has been sustained by the courts of New York. This being the general law, is there anything in the law of South Carolina which conflicts with it? It may be assumed, for the purpose of this discussion, that such a law in South Carolina would enter into and be a part of the charter of the Camperdown Mills, a South Carolina corporation. The legislation of this state is found in Acts Assem. 1883 (18 St. at Large, p. 454), "An act to declare unlawful contracts for the sale of articles for future delivery made under certain circumstances, and to provide a remedy in such cases." This act makes unlawful "every contract, bargain or agreement, whether verbal or in writing, for the sale or transfer at any future time \* \* \* of any cotton, grain, meats or any other animal, mineral or vegetable product of any and every kind unless the party contracting, bargaining or agreeing to sell or transfer the same is at the time of making such contract, bargain or agreement the owner or the assignee thereof, or his duly authorized agent to make or enter into such contract, bargain or agreement for the sale or transfer of such \* \* \* cotton, grain, meats or other animal, mineral or vegetable product so contracted for, or unless it is the bona fide intention of both parties to the said contract, bargain or agreement at the time of making the same that the said \* \* \* cotton, grain, meats or other animal, mineral or vegetable product so agreed to be sold and transferred shall be actually delivered in kind by the party contracting to sell and deliver the same and shall be actually received in kind by the party contracting to receive the same at the period in the future mentioned and specified in said contract, bargain or agreement for the transfer and delivery of the same." The regulations of the New York Cotton Exchange are not in conflict with this act. All depends upon the bona fide intent of the parties; and, as the words of the contract expressly give the right to the seller to deliver, and to the buyer to demand the delivery of, the article sold, this expresses that intent. The burden of showing that a contract like this, valid on its face, is invalid, is on the complainants in the cross bill. *Irwin v. Williar*, 110 U. S. 499, 4 Sup. Ct. 160. The record in this case discloses no direct evidence on this point.

There is yet another view to take of this case. The contracts in question were made by the Camperdown Mills, through its own brokers in New York. O. H. Sampson & Co. were connected with them only in lending to the Camperdown Mills the money used for margins. This money was advanced in the performance of their duties as commercial agents of the corporation. It inured for the benefit of the corporation alone. Sampson & Co. had no interest in the contracts at all. During the whole currency of the contracts the corporation had the opportunity of profit, and by advances made by Sampson & Co. the corporation had all the chances of protection from loss. They enjoyed all the opportunities for profit. When the loss was realized, the controlling officer of the corporation, with the approval of a meeting of stockholders, executed this mortgage. Suppose that the contracts made through Woodward & Stillman, the New York brokers, and Weld & Co., the other brokers, were tainted with illegality; this



mortgage, made after the transaction to secure moneys advanced to pay the losses, is binding. "An express promise to pay money advanced to satisfy an illegal claim will sustain an action." *Armstrong v. Toler*, 11 Wheat. 258. When losses have been made in an illegal transaction, a person who lends money to the loser with which to pay the debt can recover the loan, notwithstanding his knowledge of the fact that the money was to be so used. *Armstrong v. Bank*, 133 U. S. 469, 10 Sup. Ct. 450, quoting many cases. This is also the law of England. *Warren v. Billings*, Law J. 55. The language of the supreme court in *Roundtree v. Smith*, 108 U. S., at page 276, 2 Sup. Ct. 630, applies to this case. There the brokers who were employed by Roundtree to make contracts like those in this case sued for the money paid by them on the margins for Roundtree and for their services, and recovered judgments. The case went up. In the opinion of the court, delivered by Mr. Justice Miller, he says:

"It is to be observed that the plaintiffs in this case are not suing on these contracts, but for services performed and money advanced for defendant at his request. And, though it is possible they might, under some circumstances, be so connected with the immorality of the contract as to be affected by it, if proved, they are certainly not in the same position as a party sued for the enforcement of the original agreement."

There is still another view to be taken of this case. It is pressed by counsel for complainants, and, although its presentation is not necessary to the decision of the case, it may prove conclusive. Mr. Hammett's purchase of 1,500 bales of cotton in 1890 was made upon his own judgment, and not under the advice of O. H. Sampson & Co. Mr. Hammett, as president of the Camperdown Mills, himself sent on to the New York brokers, Woodward & Stillman, the money necessary to inaugurate the transaction, and from time to time he sent on the money necessary to keep up his margins. After a time he began to draw on O. H. Sampson & Co. to furnish the money, and thenceforward they carried the cotton. The record does not disclose any knowledge on their part of the inception of, and the early payments upon, this transaction. It is to be presumed that when they began paying the drafts they had notice, or were put on notice. It would require an extreme view of this matter to hold them particeps criminis in this act of Mr. Hammett, and so work a forfeiture of all the sums paid out by them upon his order. The purchase had been made by Mr. Hammett in accordance with his views of the best interests of the manufacturing business of the mills. It may have been an error, may have been unbusiness-like, may have set a dangerous precedent; yet he was selected as president because of his business character and experience, and among the powers belonging to him was that of purchasing material for manufacture. It would not be equitable or in accordance with law to hold them responsible for the supposed error or blunder or conduct of Mr. Hammett. When they began to pay out money on the contract, the whole risk had been incurred, and what they did was done to save loss, if possible. This being so, the account may be stated so as to take out all items of money advanced upon contracts entered into with the full knowledge and approval of O. H. Sampson & Co.:

Aggregate of account of O. H. Sampson with Camperdown Mills secured by mortgage.....	\$92,021	25
Total loss in futures.....	\$87,551	41
Deduct loss on the transaction of 1890.....	34,470	21
	<hr/>	53,081 21
Balance .....	\$38,940	04
Credit proceeds of yarn on hand, sold by O. H. Sampson & Co.....	26,101	88
	<hr/>	
Balance due on mortgage debt.....	\$12,828	16
Proceeds of sale had on foreclosure made in this case.....	9,050	00
	<hr/>	
Balance unpaid .....	\$ 3,778	16

So, charging off losses on futures with which O. H. Sampson & Co. were participants, their debt is not yet paid out of the proceeds of the mortgage sale.

The account by complainants in the original bill is made up with monthly rests. This is not correct. Simple interest alone can be allowed, and, on both sides of the account, charges and credits. The cause will be recommitted to the special master to restate the account in accordance with this opinion. Let the cross bill be dismissed.

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### COTTING v. KANSAS CITY STOCK-YARDS CO.

#### HIGGINSON v. SAME.

(Circuit Court, D. Kansas, First Division. October 4, 1897.)

Nos. 7,427 and 7,453.

#### 1. STATUTES—CONSTITUTIONALITY—TITLES.

There is nothing in the constitution or laws of Kansas requiring the journals of the legislative bodies to disclose the title of bills pending before them; and it is sufficient if a title sufficient to satisfy the constitutional requirement first appears in the engrossed and enrolled bills, and thereafter on the journal, and as published in the official papers and the Session Laws.

#### 2. SUBJECTS OF INTERSTATE COMMERCE—STOCK-YARDS BUSINESS.

Live stock shipped from other states to the stock yards at Kansas City, to be either sold there, or, if the market is unsatisfactory, to be shipped to other markets, is a subject of interstate commerce, and remains such until it reaches its destination, and is sold and mingled with the general mass of property of the state.

#### 3. SAME—CORPORATIONS SUBJECT TO INTERSTATE COMMERCE LAW—STOCK-YARDS COMPANIES.

The interstate commerce law applies only to common carriers, and its provisions in respect to reasonable and just charges are not applicable to the business of a stock-yards company which neither operates nor uses any railway, motive power, or rolling stock, nor otherwise engages in any transportation.

#### 4. INTERSTATE COMMERCE—STOCK-YARDS BUSINESS—REGULATION BY STATE.

Neither the act of congress concerning the unloading of live stock for feeding, watering, and resting (Rev. St. §§ 4386-4388), nor the act of May 29, 1884, to prevent the exportation of diseased cattle (23 Stat. 31), nor the act of March 3, 1891, in reference to the inspection of cattle, sheep, and hogs which are the subjects of interstate commerce, etc. (26 Stat. 1089), are of such a nature as to show that congress has assumed the exclusive regulation of interstate commerce in live stock, to such an extent as will prevent a state legislature from prescribing reasonable maximum charges and other regulations in respect to the yarding, feeding, care, and sale of stock by a stock-yards company.

**5. SAME.**

The fact that the yards of a stock-yards company are located on both sides of a line between two states, so that the stock may pass to and from over the state line, in the yards, in feeding, handling, etc., does not of itself impress the traffic with the character of interstate commerce.

**6. SAME.**

The business of a stock-yards company in receiving, yarding, and feeding live stock, and making sales thereof, for the owners, though performing these services for a mixed interstate and local traffic, is such an incident to commerce as may be subject to restriction in its charges by state legislation.

**7. CONSTITUTIONAL LAW—TAKING PROPERTY WITHOUT DUE PROCESS.**

In determining whether state legislation limiting or regulating the charges of a corporation engaged in a business affected by a public interest, as that of a stock-yards business, amounts to a taking of property without due process of law, the primary inquiry is whether the act deprives the owners of a fair and reasonable return on their investment, the rights of the public being considered. And, in determining what is the investment upon which a reasonable return must be allowed, the legislature is not bound to accept the present valuation of the corporate stock, which has been built up to a premium on the assumption that its status would continue the same and the legislature would never exercise its power of regulating charges.

**8. SAME—STATE STATUTES.**

A state statute so limiting the charges of a stock-yards company as to allow it a net income equal to 5.67 per cent. annually on the actual value of its plant, or of 4.24 per cent. of its value as expressed in its shares of capital stock at their par value, does not operate to deprive it of its property without due process of law.

**9. SAME.**

The Kansas statute of March 3, 1897, regulating stock yards, fixing compensation for yarding, feeding, and watering live stock, and fixing a limit for the prices of feed, etc., is not in violation of any provision of the federal constitution, as applied to the Kansas City Stock-Yards Company.

Albert H. Horton and D. R. Hite, for complainants.

L. C. Boyle and David Martin, for the attorney general.

Pratt, Dana & Black, for other defendants.

FOSTER, District Judge. These cases are again before the court on the complainants' applications for a temporary injunction. In connection therewith, the demurrers to the bills, the master's report, and exception thereto, have been discussed by counsel. The chief question involved is the validity of the act of the legislature of March 3, 1897, regulating stock yards; fixing compensation for yarding, feeding, and watering live stock; and fixing a limit for the prices of feed, etc. This law is assailed by the complainants on several grounds: First, because its title was never adopted by the legislature; second, because the business of the stock-yards company is interstate commerce, and the law is inapplicable; and, third, because it deprives the complainants of a fair and reasonable return on their capital invested, and is in violation of the fourteenth amendment to the constitution. I shall consider the several questions in the order stated.

Without reference to the oral testimony of members of the legislature as to what was done by that body in its proceedings touching this law, and adopting this title, we find from the house journals that house bill No. 87, "An act to regulate stock yards, and providing punishment for the violation thereof," was introduced on January 15,

1897, and referred to the committee on live stock. On February 3d the chairman of that committee reported the bill back to the house, with a substitute. From that time forward this substitute is described in the journals as "substitute for house bill No. 87, an act to regulate stock yards, and providing punishment for the violation thereof." This substitute was finally passed, and its title, as published, appears for the first and only time in the journal in the report of the committee on enrolled bills. The engrossed and enrolled bills both bear the title as published. It seems that the title, wherever it is used in connection with house bill 87, was the title of the original bill, and not of the substitute; and all that we know of the substitute or of its title is that it was a substitute for "house bill 87, an act to regulate stock yards," etc. The chief object of numbering bills is to identify them. There is nothing in the constitution or laws requiring the journals to disclose the title of any bill. All of the legislative proceedings could have been had on this substitute, and its identity preserved, by simply calling it "Substitute for House Bill No. 87." When the title of this act does appear in the journals, it is in the words of the act as enrolled and published in the official paper and chapter 240 of the Session Laws. It seems to me, this is sufficient.

Is this live stock, as transported by the railroad companies, and handled by the Kansas City Stock-Yards Company, the subject of interstate commerce? It appears from the evidence and the report of the master that the shipments of live stock received at these yards originate from various states and territories. The following tabulated statement gives complete information of the sources and the numbers of stock received at the yards during the year 1896:

ORIGIN OF STOCK BY STATES AND TERRITORIES.

State or Territory.	Cattle.	Calves.	Hogs.	Sheep.	Horses and Mules.	Total.
Kansas.....	863,480	33,123	1,625,848	294,907	32,188	2,849,596
Texas.....	217,257	19,036	12,842	146,555	45	394,735
Missouri.....	204,271	6,908	667,248	109,621	20,525	1,008,373
Indian Territory.....	188,918	20,247	68,875	2,494	27	280,511
Oklahoma.....	78,720	6,673	87,579	5,769	122	178,868
Colorado.....	41,746	2,737	582	90,806	782	139,715
New Mexico.....	35,876	2,988	494	8,141		128,299
Nebraska.....	28,178	1,023	136,394	31,527	1,868	198,985
Iowa.....	11,451	2,651	232	49	590	14,973
Minnesota.....	8,909	2,879	42		2	12,832
Old Mexico.....	6,512			3,120		9,632
Utah.....	5,552	15		162,531	176	168,274
Arkansas.....	4,327	934	5,143	4,17	1	14,572
Idaho.....	4,304	151	490	6,910	99	11,954
Arizona.....	2,808			33,638	65	36,511
Wyoming.....	2,077	252		3,479	641	6,429
Oregon.....	1,410	1		7,350	293	9,234
Illinois.....	694	11		68	58	824
Montana.....	491				91	582
California.....	293			225	29	547
Washington.....						
Alabama.....						
Georgia.....						
Louisiana.....						
Nevada.....						
South Dakota.....						
Tennessee.....						
Wisconsin.....	3,306	497	306	1,344	252	5,705
<b>Total.....</b>	<b>1,714,532</b>	<b>100,166</b>	<b>2,605,575</b>	<b>993,126</b>	<b>57,847</b>	<b>5,471,246</b>

It will be observed that, of the 5,471,246 head of live stock received during that year, Kansas furnished 2,849,596 (more than one-half of the whole number); Missouri furnished 1,008,473; Texas, 394,735; Nebraska, 198,985; Utah, 168,274; Colorado, 139,715; Indian Territory, 280,511; Oklahoma Territory, 178,863; New Mexico, 128,299; and other states and territories lesser amounts. About 60 per cent. of the whole shipments were consigned to the Kansas City stock yards, and about 40 per cent. were billed through to other markets, with the privilege of stopping over at Kansas City, testing the market there, and, if not satisfactory, they were to be shipped forward on the original bills. It resulted, however, as the master reports, that over 95 per cent. of all the stock received was disposed of at the Kansas City stock yards. There can be no doubt that all live stock shipped from other states than Kansas and Missouri to these yards is the subject of interstate commerce; nor can there be any doubt that shipments of stock originating in Kansas and Missouri, and consigned to other states, come under the same designation. Stock shipped from points in Kansas, consigned to the yards, and sold there, would be local business. So it will be seen that a large proportion of the stock, by reason of the points of loading, and the places to which it is consigned, enters upon the stream of interstate commerce; and, having become the subject of commerce, it remains such until it reaches its destination, and is sold and mingled with the general mass of property of the state. *Brown v. Maryland*, 12 Wheat. 419; *Leisy v. Hardin*, 135 U. S. 108, 10 Sup. Ct. 681. All interstate commerce, and all instrumentalities of such commerce, are under the control of congress; and the state cannot regulate or tax them, except in a limited respect. In a general sense, the failure of congress to act is indicative that commerce between the states shall be free and untrammelled. Such matters, however, as appertain to the police power of the state, and such as are merely aids or incidents to commerce, where congress has not acted, are recognized as being within the limit of state authority. *Robbins v. Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. 592; *Bowman v. Railway Co.*, 125 U. S. 497, 8 Sup. Ct. 689, 1062; *Leisy v. Hardin*, 135 U. S. 110, 10 Sup. Ct. 681. It is contended that congress has taken such action in the matter of the shipment and transportation of this live stock as would prohibit the state from passing the act in controversy, and stress is laid especially upon the interstate commerce act (24 Stat. 379). It will be observed that this act, by its terms, is confined to common carriers engaged in the transportation of persons and property by rail or water, or both, and includes all instrumentalities of such shipment or carriage. It prohibits discrimination or preference in rates for like services. It prohibits a greater charge for transporting persons or property for a shorter than for a longer distance. It prohibits pooling of earnings between common carriers. It requires them to publish their rates and fares for freight and passengers, and exacts a great many other requirements of common carriers. It further provides that:

"All charges made for services rendered or to be rendered in the transportation of passengers or property as aforesaid or in connection therewith, or for

the receiving, delivering, storage or handling of such property, shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

This declaration by congress that all charges shall be reasonable and just, if applicable to the stock-yards company, has added nothing to the requirements of the law before that act was passed. It is merely a reiteration of the common law. It does not undertake to fix any specific price for any service rendered, and it cannot be said that the stock-yards company is in any sense a common carrier. The master's report shows that the company neither owns, operates, nor uses any railway motive power or rolling stock. Section 8 of the act provides that any common carrier, subject thereto, who shall do, cause to be done, or permit to be done, any act prohibited or declared to be unlawful, etc., shall be liable to the person injured for all damages sustained. This penalty being aimed at, and recoverable only from, common carriers, makes it clear that the act was intended to apply to them alone. No one would think of suing this stock-yards company, under that section, for excessive charges. The law of congress concerning the unloading of cattle during their shipment (sections 4386-4388, Rev. St.) is a humane provision, fixing a maximum period of 28 hours for confining live stock without rest, food, or water. No one would question the necessity of unloading, feeding, watering, and resting this live stock; and the duty, from a moral, if not from a financial, standpoint, to do this act of humanity for these poor creatures, was just as imperative before as after the passage of the law. But this requirement has not imposed any regulation which conflicts with the law of the state. The act of congress of May 29, 1884 (23 Stat. 31), to prevent the exportation of diseased cattle, has been referred to. When this case was before this court for consideration upon an earlier hearing, I had occasion to say that there was nothing in said act to conflict with the provisions of the act of the legislature. I see no reason for changing the views then expressed.

Considerable stress has been laid in the argument by counsel for the complainants upon the act of congress of March 3, 1891 (26 Stat. 1089), in reference to the inspection of cattle, sheep, and hogs. Section 3 of the act provides that the secretary of agriculture shall cause to be inspected, prior to their slaughter, all cattle, sheep, and hogs which are the subjects of interstate commerce, and which are about to be slaughtered, and that the inspector shall stamp or label the carcasses, etc., approving or condemning them as fit or unfit for human food. Section 5 makes it unlawful for any person to transport or cause to be transported from any state or territory into any other state or territory any meat so condemned, etc. Under these acts of congress for quarantine and inspection of cattle, sheep, and hogs, the secretary of agriculture has established quarantine regulations for cattle shipped from Southern localities during certain months of the year, and has established a system of inspection of cattle, sheep, and hogs about to be slaughtered. These Southern cattle are put in separate pens, and are under the direction, as to sanitary requirements, of the government live-stock inspector. There is nothing in these laws, or in the rules and regulations made thereunder, that touches

the matter of charges for yarding or feeding the stock, or the receiving of the same, by the stock-yards company, in the regular course of business.

On this line of consideration, the remaining question is this: Are these stock yards, as operated, such incidents to commerce, only, that the state may be permitted to fix the charges for the services performed, and for the feed furnished for the stock? Of course, no act of the legislature can have an extraterritorial operation, and just what application the act would have to any particular transaction by reason of the yards being on both sides of the line between Kansas and Missouri, or the details that may arise from the unique situation of the yards, need not be anticipated; but the passing of this stock to and fro over the state line, in the yards, for convenience in feeding or handling, does not of itself impress the traffic with the character of interstate commerce. We have to deal with the matter in a broader sense, and speak of the subject of this act as a matter within the territorial jurisdiction of the state, and in some degree the subject of commerce between the states. The evidence shows that the yards are chiefly in Kansas, and that more than one-half of all the stock is received and unloaded there. The yardage and feeding are mostly rendered before the stock is sold. From the best consideration I have been able to give this subject, reasoning from analogy, and applying principles announced in decided cases, I am of opinion that this stock-yards company, performing duties for a mixed traffic, interstate and local, is such an incident to commerce as may be restricted in its charges by act of the legislature, in the absence of congressional action. This corporation has its existence under the laws of Kansas, and the law requires it to keep a general office for the transaction of business within the state, and the use of the property is one in which the public has an interest. The question presented here is essentially the same as in the cases of *Munn v. Illinois*, 94 U. S. 113; *Budd v. New York*, 143 U. S. 517, 12 Sup. Ct. 468; *Brass v. North Dakota*, 153 U. S. 391, 14 Sup. Ct. 857; *State Taxes on Railway Receipts*, 15 Wall. 293; *Cooley v. Board of Wardens*, 12 How. 299; *Packet Co. v. Keokuk*, 95 U. S. 80; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 5 Sup. Ct. 826; *Henderson Bridge Co. v. Henderson City*, 141 U. S. 679, 12 Sup. Ct. 114.

The next and last question to be considered is whether this act of the legislature violates the constitution of the United States, by taking the property of complainants without due process of law, or depriving it of the equal protection of the laws. This is one of the material questions reserved from the hearing of these cases in April last. In the opinion of this court at that time the following language was used:

"The rule is well settled that any legislation, fixing rates, which deprives a person or corporation of all compensation on capital invested, is obnoxious to the constitution, and the enforcement of such legislation will be enjoined by the courts." *Cotting v. Stock-Yards Co.*, 79 Fed. 683; *Reagan v. Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047; *Turnpike Co. v. Sandford*, 164 U. S. 578, 17 Sup. Ct. 199.

After citing *Dow v. Beidelman*, 125 U. S. 680, 8 Sup. Ct. 1028; *Southern Pac. Co. v. Board of Railroad Com'rs*, 78 Fed. 261; *Chi-*

cago, M. & St. P. Ry. Co. v. Minnesota, 134 U. S. 418, 10 Sup. Ct. 462, 702; Ames v. Railway Co., 64 Fed. 165; New Memphis Gas & Light Co. v. City of Memphis, 72 Fed. 952,—the court in this case says:

"So it seems to be established by most recent interpretations of the constitution that legislation which prevents a fair and reasonable return—the rights of the public considered—for capital engaged in legitimate business is obnoxious to the constitution." *Cotting v. Stock-Yards Co.*, supra; *Ames v. Railway Co.*, supra; *Budd v. New York*, supra; *Banking Co. v. Smith*, 128 U. S. 174, 9 Sup. Ct. 47.

So the question, briefly stated, is this: Does this act of the legislature deprive the complainants of a fair and reasonable return—the rights of the public considered—on their investment? In order to answer this question intelligently, we have primarily to ascertain the amount or value of the capital invested, and the probable return or income which will be realized under the rates fixed by the law. On this line of investigation, the parties have introduced voluminous testimony before the master; and his report, after considering all the evidence, has condensed the matter to several findings of facts. It should not be assumed that courts, in deciding this constitutional question, can undertake to fix rates, but merely to decide whether the rates prescribed by the law are in violation of the complainants' constitutional rights. It appears from the sixth finding of the master that the origin of the stock-yards business at Kansas City was as follows: In September, 1871, a corporation known as the Kansas Stock-Yard Company was incorporated, with a capital stock of \$100,000. In February, 1875, this was increased to \$200,000. In 1876 the company reorganized under the name of the Kansas City Stock-Yard Company, with a capital stock of \$500,000, and in July following received from the old corporation a conveyance of all its property. In November of the following year it increased its capital stock to \$1,000,000. On December 10, 1883, the company again reorganized,—this time as the Kansas City Stock-Yards Company,—with a capital stock of \$2,500,000, and on January 1, 1884, the new company received from its predecessor a deed of conveyance of all property owned by it, for the express consideration of \$5, and the assumption by the grantee of all the debts, duties, and obligations of the grantor; and the new company issued to the stockholders of the old company certificates of stock of the aggregate par value of about \$2,000,000, each stockholder receiving two shares for each share held by him in the old corporation. The stockholders in the two companies at said time were identical. The capital stock of the last-named company was increased in July, 1887, to \$5,000,000, and in February, 1894, to \$7,500,000. On December 31, 1896, there had been issued and was outstanding stock of the par value of \$7,368,650, of which \$2,484,590 had been paid for in cash, and the balance had been issued to the stockholders by way of dividends at various times, and for various purposes. It is explained that the action of the present corporation in issuing two shares of its stock for each share of its predecessor was based upon the fact that the value of the property had really doubled at the time of the transfer. The master has made a detailed report of the different pieces and parcels of real estate owned by the defend-



ant corporation, when acquired, cost of same, and also of the buildings, pens, and other improvements which have been constructed thereon, with the cost and present value thereof, and has reached the conclusion that at the present time the fair value of all the tangible property owned by the defendant, and used for stock-yards purposes, is \$5,388,003.25. It is contended by the complainants that this is an unfair and illegal mode of reaching the value of the property; that it first destroys the plant, as a living, going business, and then values its parts in detail. It is contended that the business or good will of the property should be considered, and the plant, as a whole, in operation, should be taken into account, in fixing its value. On this line of estimation, several of complainants' witnesses have valued the property as high as \$10,000,000. The evidence shows that for about 15 years past the corporate stock of the defendant has been held at a premium of from \$10 to \$40 a share. It must be admitted that the value of corporate property, as represented by the stock, will rise or fall in proportion to its power to make dividends, either present or prospective; and that, again, depends largely upon the rates which the corporation is permitted to charge for its services and property. It appears from the master's report that when the legislature was considering the passage of this law the capital stock dropped nearly to par, and that after its passage it was held at a figure not much above its par value. This fact demonstrates that the reason for its reaching a premium was because the company had been permitted to fix its own rates for yardage and feed, without interference by the state. Now, assuming that the legislature may regulate these charges within reason, it would be absurd to say that a valuation of tangible and intangible property created and builded up to a premium on the assumption that the status would continue, and the legislature would never exercise the power it possessed, must be accepted by the state in fixing rates and charges. Mr. Justice Brewer, in deciding the rule for valuing property for such legislation, after referring to depreciation from original cost (*Ames v. Railway Co.*, 64 Fed. 165), says:

"Nevertheless, the amount of money that has gone into the railroad property—the actual investment, as expressed, theoretically, at least, by the amount of stock and bonds—is not to be ignored, even though such sum is far in excess of the present value. \* \* \*"

And then he cites from the case of *Reagan v. Trust Co.*, 154 U. S. 412, 14 Sup. Ct. 1059, as follows:

"It is unnecessary to decide, and we do not wish to be understood as laying down, as an absolute rule, that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclusive that the tariff is unjust and unreasonable. And yet justice demands that every one should receive some compensation for the use of his money or property, if it be possible without prejudice to the rights of others.

\* \* \*

The learned justice further says in that case:

"It is not always reasonable to cast the entire burden of the depreciation on those who have invested their money in railroads."

The converse of this proposition is equally true. If the investor may not bear all the burden of the depreciation, he should not enjoy

all the benefit of the appreciation. It does not appear that complainants paid anything beyond the par value for their stock. Under this view of the case, neither the complainants nor the stockyards company can maintain a valuation on this property, beyond the par value of the stock, for the purpose of determining the reasonableness of the rates fixed by the legislature. Indeed, when we consider the amount of money actually paid by the stockholders,—the amount of money they have invested in this enterprise, and on which the constitution guaranties them a fair return,—it is exceedingly doubtful if the value reported by the master is not the correct basis. The following table exhibits, in brief and graphic form, the character and amount of the capital stock of the defendant company and its predecessors since their organizations, together with the percentage of profits declared and paid to stockholders in cash, in stock based upon earnings, and stock based upon increased value of real estate. The first column represents the actual cash paid by stockholders; the second, the dividends paid. The dividend in 1883, of \$321,295, was composed of both cash and real estate. The third column represents the per cent. on the stock actually paid; the fourth represents stock dividends paid from earnings; the fifth, dividends based on increased valuations of lands; the sixth column represents the total capital stock issued; the seventh column, the total dividends declared; and the last column, the per cent. of profit.

Year.	Capital Stock Paid for in Cash.	Cash Dividends Paid to Stockholders, and Real-Estate Dividends Declared and Paid.	Rate per Cent. of Profit.	Stock Dividends Declared from Earnings.	Stock Dividends Based upon Increased Value of Lands.	Total Capital Stock.	Total Dividends Declared.	Rate per Cent. of Profit.
1871	96,000					96,000		
1872	96,000	13,890	14 47			96,000	13,890	14 47
1874	96,000	33,000	35 00			96,000	33,000	35 00
1875	96,000	16,800	17 50	96,000		96,000	112,800	117 50
1876	169,000	9,600	5 68	66,300		192,000	75,900	39 53
1877	169,000	26,504	15 68	331,300		331,300	375,804	108 00
1878	211,400	28,000	13 24	235,000		662,600	263,000	39 69
1879	211,400	21,150	10 00		40,000	980,000	61,150	6 24
1880	211,400					980,000		
1881	226,400	98,720	43 60			980,000	98,720	10 07
1882	226,400	99,480	43 89			993,500	99,480	10 00
1883	226,400	321,295	142 30			995,000	321,295	32 39
1884	226,400	119,391	52 73		995,000	1,990,000	1,114,391	55 99
1885	226,400	149,250	65 92			1,990,000	149,250	7 50
1886	226,400	119,400	52 73			1,990,000	119,400	6 00
1887	761,400	150,600	19 77	456,938		1,990,000	607,538	30 53
1888	761,400	282,800	37 14		1,058,067	4,040,000	1,340,367	33 19
1889	761,400	323,200	42 44			4,040,000	323,200	8 00
1890	762,300	323,200	42 39	404,000		4,040,000	727,200	18 00
1891	762,300	311,143	40 81			4,444,900	311,143	7 00
1892	762,300	370,592	48 61			4,444,900	370,592	8 33
1893	817,400	296,694	36 29		500,000	4,944,900	796,694	16 11
1894	2,484,500	451,138	18 15	268,100		5,000,000	719,233	14 39
1 95	2,484,500	554,816	22 33			6,935,200	554,816	8 00
1898	2,484,500	429,160	17 27	433,450		6,935,200	862,610	12 44
		110,658	4 45	78,090		7,308,650	188,648	2 56
	\$2,484,500	\$4,660,976		\$2,369,173	\$2,593,067	\$7,308,650	\$9,623,216	

It appears that the company did not always divide its total net earnings among its stockholders in the form of cash dividends, but sometimes placed portions to construction account and surplus. Thus in the year 1896 the gross earnings were \$1,023,870.20; operating expenses, \$368,059.05; net earnings, \$655,811.15. Of this amount, \$429,160.00 was taken for cash dividends, \$169,584.65 for construction, and \$57,066.50 was passed to surplus account. It will be observed that the total net earnings, not including the \$169,584.65, as part of the operating expenses, would be about 8.09 per cent. on all the capital stock issued. If, however, the sum placed to construction account be deducted from the earnings, the net amount would be \$486,226.50, or about 6.6 per cent. on the capital stock. There has been much controversy over this item of \$169,584.65; the complainants contending that it is properly chargeable against the earnings, as operating expense or cost of maintenance, while the attorney general controverts this proposition. It appears that the company has not charged it to operating expenses, but to construction account. Referring to the items which make up the \$169,584.65, the master reports as follows:

Extending and enlarging water and sewer mains, rendered necessary by reason of a rearrangement of the system and structures.....	\$ 6,342 49
New viaduct, chutes, and fences, brick paving, sheep sheds, completion of the power plant and of the new addition to Exchange Building, begun in 1885, new hay and grain barns, and other buildings; all being original construction, and extensions of improvements where there had been none before.....	109,481 56
Brick paving in pens and alleys, to replace wornout plank flooring; this expenditure adding its cost to the value of the plant..	38,002 64

It will be seen that the largest item in this account is clearly for an extension of the plant, and not for maintenance or repairs. In the operation of this plant there is a constant wear and tear, and damage by the elements, to all the buildings, pens, and appliances, which have to be restored from the earnings before the net profits are determined. Whether this be called "operating expenses," "cost of maintenance," or "construction," matters but little, so that it is a proper charge for maintaining and preserving the property. But under this account the company could not construct new and original improvements. It could reconstruct or repair buildings or other appliances to take the place of others worn out or impaired. Inasmuch as these repairs must vary from year to year, sometimes being large in amount, and at other times small, it is necessary to reach something like a general average for the yearly expenditures. After a new pavement has once been constructed, it will last many years, with a trifling expense for repairs; hence the whole cost of such construction, even though it be in the line of maintenance, should not be charged up as an annual expense. The evidence shows that, aside from this item of \$169,584.65 in controversy, there is already a charge of \$32,251.95 against the earnings for repairs. The report of the master and the evidence shows that the total value of all buildings and other improvements of all kinds upon the land is about \$1,500,000. Of this sum, about \$250,000 is in the brick Live-Stock Exchange Building, and probably

as much more in brick stables, steel bridge over the Kansas river, riprapping, power plant, and other permanent structures, of which the yearly expense of maintaining would be small. Besides this, the vitrified brick paving cost \$175,000, leaving about \$825,000 of improvements of a more perishable character. About one-half of this amount consists of wooden structures of various kinds, which are not subject to unusual wear and tear or depreciation, while the other half is subject to unusual wear and damage, by coming in contact with live stock. The master has not reported what would be the average yearly expense of maintaining these improvements, and the testimony of the witnesses differs widely on the subject; but, from the best judgment I can form from the testimony, a yearly depreciation of 2 per cent. on the first class of improvements, 5 per cent. on the second class, and 10 per cent. on the third class, making an aggregate of \$75,400, would be reasonable.

The master, in making up his valuation, omitted two tracts of real estate, containing, respectively, 8.028 and 12.122 acres, owned by the company, which were regarded by him as disconnected from the stock-yards business. The complainants contend that they should be included within the plant; and I think their contention may be acceded to, in this matter. The master finds the value of this property to be \$126,140, which, added to the valuation found by him, makes the sum of \$5,614,143.

The master has applied the rates fixed by the statute in controversy to the business of the company for last year, and finds that the net income would have been reduced \$300,651.70. The property produced a gross income of \$1,023,870.20. Deducting the operating expenses, \$335,537.10, and \$75,400 for maintenance and repairs (\$410,937.10), we have net earnings of \$612,933.10. Under the statute it would be reduced \$300,651.70, leaving net income of \$312,481.40,—a percentage of 4.24 on the stock at par, and 5.67 on the value of the plant as found by the master, with the addition above noted. If we accept the latter valuation, the returns on the investment seem to be fair and reasonable. If we take the property at its stock value, it is a closer question. A cut of \$300,651.70 on a net income of \$612,933.10 is radical legislation; it may be, too radical. The largest reduction is on cattle, the former charge being 25 cents per head, and under the law 15 cents per head is allowed. The other reductions are not so great, and the prices fixed for feed are liberal. It is a matter of common knowledge that a great deal of money, during the last decade, has sought investment in government bonds, and other high-class securities, at interest as low as 4 per cent. per annum. The answer to this argument is evident. It is not the case of money invested in business, with the risks and uncertainties of trade. There are other matters worthy of consideration. In 1893 the company increased its rate on cattle from 20 to 25 cents per head. In view of the large earnings of the company at that time, and the amount of cash actually invested, it is difficult to conceive of any good reason for this increase. There is about \$1,000,000 of property owned by the company which is not connected with the yards, or used for stock-yards purposes. It appears from the report of the master that the total taxes

paid by the company, both in Kansas and Missouri, in 1896, were \$22,671.25. Besides, it does not always follow that a decrease in rates results in a corresponding decrease in net earnings. Generally, business under the stimulus of reduced rates increases in volume. I have but little in the way of precedent to guide my judgment in this matter. In the case of *Turnpike Co. v. Sandford*, 164 U. S. 596, 17 Sup. Ct. 205, the court, speaking of the income of the turnpike company, uses the following language:

"We could not say that the act was unconstitutional merely because the company, as was alleged, and as the demurrer admitted, could not earn more than four per cent. on its capital stock. It cannot be said that a corporation is entitled, as of right, and without reference to the interest of the public, to realize a given per cent. upon its capital stock."

While this question is not entirely free from doubt, I am not willing to say that the percentage of profit which will be realized upon this property under either of the valuations above referred to is so unfair and unjust as to make the law unconstitutional. The application for temporary injunction is denied, and the temporary restraining order revoked.

#### COTTING v. KANSAS CITY STOCK-YARDS CO. et al.

#### HIGGINSON v. SAME.

(Circuit Court, D. Kansas, First Division. October 28, 1897.)

Nos. 7,427 and 7,453.

#### 1. COMMERCE—LEGISLATIVE REGULATIONS—STOCK YARDS.

A stock-yard business, located in a large city, at the junction of many railroad lines, which furnishes the only proper facilities for the unloading, resting, and feeding of live stock in transit, and for the sale of cattle within said city, is affected with a public use, so as to be subject to legislative control, and the proper legislative body may prescribe a maximum rate of compensation for the care and handling of stock thereat.

#### 2. INTERSTATE COMMERCE—STOCK-YARDS BUSINESS.

It is doubtful whether the business of a stock-yards company, which itself neither buys nor sells live stock, but merely renders services to the owners thereof, in yarding, feeding, watering, and weighing the animals, constitutes interstate commerce, though a large proportion of the animals come to its yards from other states, and are therefore themselves subjects of interstate commerce. The fact that a particular stock yard extends over the boundary line between two states does not make the business there carried on interstate commerce.

#### 3. SAME—REGULATION BY STATE.

Conceding that the business of a stock-yards company in handling live stock in transit from other states is so intimately related to interstate commerce which is transacted in its yards by other persons that congress might lawfully prescribe maximum charges for yarding, feeding, and caring for stock coming from other states, yet this power is not of such an exclusive character as to prevent the state from prescribing such rates, in the absence of any legislation on the subject by congress.

#### 4. CONSTITUTIONAL LAW—DUE PROCESS AND EQUAL PROTECTION—CONFISCATION—FIXING COMPENSATION FOR SERVICES RENDERED.

In determining whether a state statute prescribing rates of charges by a stock-yards company is reasonable, or confiscatory, so as to amount to a taking without due process of law, or the denial of the equal protection of the laws, a prime factor is the valuation which shall be placed on the

property of the stock-yards company used in its business of yarding and feeding stock.

5. SAME.

When a valuation is placed on property, which has become affected with a public use, for the purpose of ascertaining whether the maximum rate of compensation fixed by law for its use is reasonable or otherwise, the income derived therefrom by the owner before it was subjected to legislative control cannot always be accepted as a proper test of value, because the charges then made may have been excessive and unreasonable. And, when the property has been capitalized by issuing stock, neither the market value nor the par value of the stock can be accepted in all cases as a proper criterion of value, because the stock may not represent the money actually invested, and because the property may have been capitalized mainly with reference to its income-producing capacity, on the assumption that it was ordinary private property, which the owner may use as he pleases, without being subject to legislative control. On the other hand, the owner is entitled to the benefit of any appreciation in value above original cost resulting from natural causes, such as improvements made in the vicinity, growth of the town, etc.

6. SAME.

A state statute prescribing maximum charges to be made by a stock-yards company; and which allows an income of 5.3 per cent. annually on the actual value of the property used for stock-yards purposes, or of 4.6 per cent. on the capitalized value of the property and business, is not confiscatory, though it reduces the previous net income nearly 50 per cent.

7. TEMPORARY INJUNCTION—DISMISSAL OF BILL.

In a suit to enjoin the enforcement of a state statute prescribing maximum charges of a given business, on the ground that it amounts to an unconstitutional confiscation of property, where the questions involved are doubtful, the court, though it decides to dismiss the bill, will grant a temporary injunction pending a probable appeal; it appearing that the enforcement of the statute meantime would produce great harm to the complainant's business.

J. M. Woolworth, A. H. Horton, and D. R. Hite, for complainants.  
L. C. Boyle and David Martin, for the attorney general.

Before THAYER, Circuit Judge, and FOSTER, District Judge.

THAYER, Circuit Judge. These cases have been before this court on two previous occasions—First, on an application for a preliminary injunction; and, second, on a motion to continue the injunction. 79 Fed. 679; 82 Fed. 839. The nature of the litigation, and the questions involved therein, have therefore become well known, and are familiar to the bar. For these reasons it does not seem necessary on the present occasion to do more than announce in a succinct form the conclusions which have been reached on the points in controversy.

1. The property of the Kansas City Stock-Yards Company located in Kansas City, Kan., and Kansas City, Mo., which is used for yarding, feeding, watering, and weighing cattle, has, by the voluntary act of the corporation which owns the same, become affected with a public use, and is therefore subject to legislative control, state or national, to the extent, at least, that the proper legislative body may prescribe a maximum rate of compensation to be charged for the services rendered at said yards in caring for live stock. The public have a greater interest in said property, and in the management thereof, than in other private property, because it is located in a large city, at the junction point of many lines of railroad, which radiate there-

from in all directions; because of the vast number of cattle and other live stock which annually seek a market in the cities where the property is located, or pass through said cities on their way to other markets; and because of the manner in which, according to business usage, the traffic in cattle is carried on. The stock yards in question furnish the only proper facilities in the cities where they are located for unloading, resting, and feeding stock which is in course of transit to other markets. It is the place where buyers and sellers of live stock congregate and transact their daily business, and for that reason it is the only available market place in said cities where live stock can be conveniently sold and delivered. The stock-yards company, by its foresight and energy, has doubtless done much to create these conditions; but the fact remains that nearly all cattle shippers and dealers residing in states and territories tributary to the Kansas City market are compelled to avail themselves of the facilities which the stock-yards company affords, and to pay such charges as it may see fit to impose. Therefore it is that the proper legislative body has the power to fix a limit to such charges, to the end that they may not become excessive and unreasonable. To such regulations every person and corporation must submit, when their property is of such character, or is so situated and subject to such environments, that many people are compelled to become their patrons. *Munn v. Illinois*, 94 U. S. 113, 130.

2. While much business is transacted at the Kansas City stock yards, consisting in the purchase and sale of live stock shipped to that market from other states than Kansas, which is interstate business, yet it is doubtful whether the stock-yards company itself is engaged in interstate commerce. It neither buys nor sells cattle or other animals. Its business consists in yarding, feeding, watering, and weighing live stock for its customers. It also loads and unloads stock from cars, but in this latter respect it acts merely as employé of the various railroad companies, from whom alone it receives compensation for such services. The claim of the stock-yards company - that it is engaged in interstate commerce derives no additional support from the accidental location of its yards on the boundary line between two states. The inherent character of the business which it transacts, as above described, is not changed by the fact that its yards are located partly in Kansas and partly in Missouri, and that it herds cattle on both sides of the line, and drives them, while in its custody, to and fro across the line, to suit its own convenience, or the convenience of its customers. This shifting of live stock from one side of the state line to the other, within its own yards, and for its own convenience, is not interstate commerce, within the proper meaning of that phrase. Conceding, however, but without deciding, that the business in which the stock-yards company is engaged is so intimately related to interstate business transacted in its yards by other persons that congress might lawfully prescribe a maximum rate of charges for yarding and feeding cattle shipped thereto from other states than Kansas, still the court is of the opinion that this power to fix a limit to such charges is not of such an exclusive character as to prevent the state of Kansas from exercising a similar power, in

the absence of any legislation on the subject by congress. It is not necessary, or even expedient, that such charges should be uniform in the various stock yards throughout the country, because stock can be yarded and fed more cheaply in some localities than in others. Diverse regulations on this particular subject by the different states will create no conflict of authority, and lead to no embarrassments. The subject, therefore, with which the Kansas statute undertakes to deal, is not national in its character, as was the case with the statutes involved in *Wabash, St. L. & P. Ry. Co. v. Illinois*, 118 U. S. 557, 7 Sup. Ct. 4, and in *Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 14 Sup. Ct. 1087; but it is a matter susceptible of local regulation and control, without trenching on the exclusive authority of congress. The statute in question does not impose a tax on interstate commerce, nor exact a license fee from those engaged in such business, nor prescribe conditions subject to which such business shall be carried on, nor interpose obstacles to the free flow of such traffic. Its effect on interstate traffic is purely incidental, and, to the extent that it prevents excessive charges for yarding and feeding cattle in course of transit, it tends to facilitate, rather than to hinder, such traffic. In short, it may be said with reference to the claim that the Kansas statute is void, because it is a regulation of interstate commerce, that such contention in behalf of the complainants must be overruled, on the strength of *Munn v. Illinois*, already cited, and several other cases, notably *Budd v. New York*, 143 U. S. 517, 12 Sup. Ct. 468, and *Brass v. North Dakota*, 153 U. S. 391, 14 Sup. Ct. 857, wherein state statutes limiting the rate to be charged for elevating grain into elevators, and storing and delivering the same, were upheld, as not being in violation of the commerce clause of the federal constitution. The case at bar differs from those last cited, in that the state of Kansas is here attempting to control the conduct of a corporation of its own creation; but, without laying any stress on the latter fact, it is sufficient to say that the cases last referred to and the one at bar are in all essential respects parallel, and that the distinction between them which counsel attempt to draw is more fanciful than real.

3. The important question presented by these cases, and the only question, which is not foreclosed by controlling authority, is whether the maximum rates prescribed by the Kansas statute for yarding and feeding live stock are reasonable, or in their nature confiscatory. If confiscatory, the act, or so much thereof as prescribes rates, is void, by the provisions of the fourteenth amendment of the federal constitution, which prohibits a state from taking property "without due process of law," or denying "to any person within its jurisdiction the equal protection of the laws." *Railroad Commission Cases*, 116 U. S. 307, 331, 6 Sup. Ct. 334, 348, 349, 388, 391, 1191; *Reagan v. Trust Co.*, 154 U. S. 362, 399, 14 Sup. Ct. 1047. A prime factor in determining whether the prescribed rates are reasonable or confiscatory is the valuation which shall be placed on the property of the stock-yards company, which is used for the purpose of yarding and feeding stock. With reference to that subject, it may be said that different methods of estimating the value of property may properly be



employed when it is valued for different purposes. When a valuation is placed on property which has become affected with a public use, for the purpose of ascertaining whether the maximum rate of compensation fixed by law for its use is reasonable or otherwise, it is obvious that the income derived therefrom by the owner before it was subjected to legislative control cannot always be accepted as a proper test of value, because the compensation which the owner charged for its use may have been excessive and unreasonable. Again, when property has been capitalized by issuing stock, neither the market value nor the par value of the stock can be accepted in all cases as a proper criterion of value, because the stock may not represent the money actually invested, and, furthermore, because the property may have been capitalized mainly with reference to its income-producing capacity, on the assumption that it is ordinary private property, which the owner may use as he thinks proper, without being subject to legislative control. On the other hand, however, when property is valued for the purpose last stated, it is clear that the owner thereof is entitled to the benefit of any appreciation in value above the original cost and the cost of improvements, which is due to what may be termed natural causes. If improvements made in the vicinity of the property, the growth of the city or town where it is located, the building of railroads, the development of the surrounding country, and other like causes, give property an increased value, the owner cannot be deprived of such increase by legislative action which prevents him from realizing an income commensurate with the enhanced value of his property. Applying these general principles to the case in hand, the court concludes that neither the sum for which the property of the stock-yards company has been capitalized, to wit, \$7,368,650, nor the market value of its stock, can be accepted in this proceeding as a correct test of its value. In the first place, the outstanding stock represents property of the value of upwards of \$1,000,000, not used for the purpose of yarding and feeding stock, which must be excluded in computing the value of the company's property which will be affected by the statute in question. In the second place, a large percentage of the stock now outstanding does not represent money actually paid in by the shareholders, or property conveyed to the corporation, but represents, rather, an assumed appreciation in the value of the company's property over first cost, and the good will of its business. On one occasion the stock of the company was doubled (that is to say, it was increased from \$1,000,000 to \$2,000,000), without the payment of any money; each stockholder receiving an additional amount of stock equal to the amount which he then held. It is fair to infer that a large amount of stock has been issued by the company, not so much with reference to the actual value of its physical property, as with reference to the income which it could be made to produce, and the dividends it could be made to pay. That this latter consideration has been a potent factor in producing the present volume of stock is a necessary inference from all the testimony. For these reasons the capital stock cannot be taken as truly representing the value of the corporate property in a proceeding where the inquiry as to its value is made for the purpose

of ascertaining whether certain rates prescribed by the legislature for yarding and feeding cattle are reasonable or unreasonable. The fact that the state possesses the power to prescribe a maximum charge for such services necessarily prevents the court from giving as much weight to the possible income-producing capacity of the property in controversy as it might give if the stock-yards company was vested with the right to charge as much for such services as it thought proper. Neither can the opinion of certain experts as to the value of said property be regarded as reliable, much less as conclusive, because such opinions are doubtless based to a considerable extent on the income which the property can be made to yield, and upon the assumption that the owner has the right to determine what price he will charge for the use of his property. Upon the whole, therefore, the court concludes that the value of the property used for stock-yards purposes, as assessed by the master, is not unreasonable, considering the object for which such valuation was made, and that no sufficient reasons have been shown for disturbing the finding of the master on that issue.

4. The value of the property used for stock-yards purposes, as fixed by the master, including the value of certain supplies of feed and other materials which were on hand December 31, 1896, is \$5,388,003. The gross income realized by the stock-yards company during the year 1896, which may be taken as representing its average gross income, was \$1,012,271.22. The total expenditures of the company for all purposes during the same period amounted to \$535,297.14, which would indicate a net income for the year of \$476,984.08. A controversy arises, however, as to the nature of some of the expenditures for that year. It is claimed on the one hand, but denied on the other, that the operating expenses for the year 1896, such as may properly be charged to the profit and loss account, amounted to \$365,712.49, instead of \$535,297.14; the difference between the two amounts, \$169,584.65, consisting of money which was expended in making new and permanent improvements, which added by that amount to the value of the property, and for that reason should not be treated as operating expenses, in computing the net profits. With respect to this contention the court has reached the following conclusion: A very large part of the sum last mentioned (all of it, in fact, except about \$6,000) was expended in building new structures and making permanent improvements, which increased the value of the company's property to the extent of such expenditures, and therefore cannot be regarded as operating expenses, in estimating the net profits. The company itself took that view of the question, by charging them to construction account; and in due season it would doubtless have capitalized the amount of such expenses by issuing stock therefor, as it had previously capitalized other expenses of a similar character. At the same time, as buildings, pens, pavements, and other similar structures deteriorate in value somewhat from year to year, even where they are repaired in the ordinary way, it is eminently proper, in estimating the net profits, to set aside annually out of the gross income a certain sum to cover such depreciation. The testimony does not show with any great degree of accuracy what sum should be thus

set apart annually in addition to the cost of ordinary repairs, but as the sum of \$32,309 appears to have been expended in the year 1896 for ordinary repairs, which sum was charged to the profit and loss account, under that head, the court concludes that the sum of \$50,000 is an adequate amount to cover the annual loss from deterioration, not made good by ordinary repairs. Fifty-six thousand dollars has accordingly been deducted from the sum of \$169,584.65 charged to construction account, and the balance of that sum has been added to the net profits. The result is that the net income for the year 1896 was \$476,984.08 plus \$113,584.65, originally charged to construction account, or, in the aggregate, \$590,568.73. If the rates prescribed by the Kansas statute for yarding and feeding stock had been in force during the year 1896, the income of the stock-yards company would have been reduced that year to the extent of \$300,651.77, leaving a net income of \$289,916.96, on the assumption (which is a very reasonable one) that its expenses would have remained a constant quantity, and that the volume of its business would not have been sensibly increased by the reduction in rates. Its income would thus have been adequate to yield a return of 5.3 per cent. on the value of the property used for stock-yards purposes, as fixed by the master, or 4.6 per cent. on the sum for which the property has been capitalized; first deducting from that sum the value of all property represented by the capital stock which is not used for stock-yards purposes.

5. Conceding, as we must, that the legislation complained of was radical in its nature and effect, that it reduced the company's income about 50 per cent., and that it prevents it from realizing on the capital invested in its plant such a per cent. as is ordinarily realized on capital invested in other mercantile and business enterprises, still the court is not prepared to hold that the statute is confiscatory, and that it deprives the company of its property without due process of law. It is common knowledge that large sums of money are invested in securities which do not yield a return exceeding 5 per cent. on the investment, and it is further manifest that the business of the stock-yards company, as conducted, is not subject to the same risks of loss from bad debts and declining prices which affect many other business enterprises. Moreover, legislative enactments cannot be declared void because the courts entertain doubts of their expediency or validity, or because such enactments tend to lessen the valuation which has theretofore been placed on certain private property. In a great variety of ways, laws which cannot be challenged have an inevitable tendency to affect injuriously the value of property. The power of the state to fix the maximum price that shall be charged for the use of property affected with a public interest necessarily implies the power to lessen its value somewhat, or at least to lessen it as measured by the income which it might be made to produce if free from public control. In the very nature of things, considerable scope must be given to legislative discretion in determining the validity of statutes like the one now in question, since the judiciary have no power to prescribe a schedule of maximum rates, and it is only where there has been a clear abuse of power,—where the rates prescribed by a statute are manifestly unreasonable, and operate to deprive a citi-

zen or corporation of that which justly belongs to them, even as against the public,—that the courts have power to intervene. We are constrained to hold that the case at bar is not of that character.

6. The great importance of the questions involved in these cases will doubtless occasion an appeal to the supreme court of the United States, where they will be finally settled and determined. If, on such appeal, the Kansas statute complained of should be adjudged invalid for any reason, and in the meantime the statutory schedule of rates should be enforced, the stock-yards company would sustain a great and irreparable loss. Under such circumstances, as was said, in substance, by the supreme court in *Hovey v. McDonald*, 109 U. S. 150, 161, 3 Sup. Ct. 136, it is the right and duty of the trial court to maintain, if possible, the status quo pending an appeal, if the questions at issue are involved in doubt; and equity rule 93 was enacted in recognition of that right. The court is of opinion that the cases at bar are of such moment, and the questions at issue so balanced with doubt, as to justify and require an exercise of the power in question. Therefore, although the bills will be dismissed, yet an order will at the same time be entered restoring and continuing in force the injunction which was heretofore granted, for the term of 10 days, and if, in the meantime, an appeal shall be taken, such injunction will be continued in force until the appeal is heard and determined in the supreme court of the United States: provided that, in addition to the ordinary appeal bond, the Kansas City Stock-Yards Company shall make and file in this court its bond in the penal sum of \$200,000, payable to the clerk of this court and his successors in office, for the benefit of whom it may concern, conditioned that, in the event the decree dismissing the bills is affirmed, it will, on demand, pay to the party or parties entitled thereto all overcharges for yarding and feeding live stock at its stock yards in Kansas City, Kan., and Kansas City, Mo., which it may have exacted in violation of sections 4 and 5 of the Kansas statute relative to stock yards, approved March 3, 1897, since an injunction was first awarded herein, to wit, on April ———, 1897, and that it will in like manner pay such overcharges, if any, as it may continue to exact in violation of said statute during the pendency of the appeal; said obligation to become void if the statute in question shall be pronounced invalid by the supreme court.

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**BASS v. METROPOLITAN WEST SIDE EL. R. CO. et al.**

(Circuit Court of Appeals, Seventh Circuit. April 7, 1897.)

No. 405.

**1. EMINENT DOMAIN—TAKING WITHOUT CONDEMNATION—INJUNCTION.**

Injunction is the proper remedy against the appropriation of land by a railroad corporation which has not acquired a right to the proposed use either by purchase or condemnation, although the relief is sought in vindication of a purely legal right.

**2. LANDLORD AND TENANT—ASSIGNMENT OF LEASE TO RAILROAD COMPANY.**

The fact that a lessor of real property consents to an assignment of the lease to a railroad corporation does not imply a consent that the latter may put the property to a use not permitted by the original lease.

### 3. SAME.

Complainant leased lands to A., by a lease which provided that the tenant should erect a building thereon, and that the lessor should, at the end of the term, either pay for the same or give a new lease. The building was erected, and the lease assigned to the defendant railroad company, which, without proceedings under Const. Ill. art. 2, § 13, Id. art. 11, § 14, or Rev. St. Ill. c. 47, § 2, to condemn the property, cut off a corner of the building, and proposed to run its tracks through the space thus cleared. *Held* that, subject to a reasonable opportunity for condemnation proceedings, defendant might be required to restore the building, and refrain from the proposed use.

### 4. SAME—ERECTION OF BUILDING BY LESSEE—LESSOR'S TITLE.

Certain premises were leased, the lessee covenanting to erect a building on the land, and the lessor agreeing to either pay for it at the end of the term or renew the lease, the building at the end of the renewal term to belong to the lessor. *Held*, that the title to the building erected vested at once in the lessor, though subject to all the lessee's rights under the lease.

### 5. SAME—RIGHTS OF LESSEE.

The lessee of a building cannot, by repairing or improving one part thereof, acquire a right to destroy another part.

### 6. SAME—WASTE.

The wrongful removal, by a lessee, of a portion of a building on the demised premises constitutes waste.

## Appeal from the Circuit Court of the United States for the Northern District of Illinois.

This appeal is from a decree dismissing a bill for an injunction against the occupation and use for railroad purposes of real estate in Chicago, between Van Buren and Jackson streets, fronting to the east on Market street, and extending to the Chicago river on the west, described as lot 10 in the subdivision of lots 2, 3, and 4 in block 84, School Section Addition to Chicago. The essential facts, as shown by the bill, answer, and proofs, are these:

In 1888, the appellant, Clara F. Bass, leased the premises to John P. Altgeld for the term of 90 years, at an annual rental of \$2,500 for the first 10 years, and thereafter of 5 per centum of the "fair salable value of the leased premises exclusive of the buildings," to be ascertained by appraisal on July 1, 1898, and every succeeding tenth year, but at no time to be less than \$2,750 per annum, the tenant paying all taxes, rates, charges, and assessments, and maintaining in good repair buildings and improvements. Of the numerous provisions and covenants in the lease, binding upon or for the benefit of the respective parties, their heirs, representatives, or assigns, those especially pertinent to the present discussion are, in substance, the following: The tenant shall forthwith erect on the premises "a good and substantial building of brick, stone, and such other material as is commonly used on the outside and in the inside of first-class buildings, the foundations and walls to be sufficiently strong to support a building eight stories high, and the building to be at least seven full stories in height above the grade of the street, and to cost not less than the sum of \$50,000, according to designs, plans, and specifications, to be approved in writing by the lessor, \* \* \* and in accordance with the building ordinances of the city of Chicago, covering the entire premises aforesaid." The tenant shall keep the building insured for three-fourths of the value, and, in case of destruction or damage by fire, "shall repair the same upon designs, plans, and specifications to be approved by the party of the first part, \* \* \* so that the building shall entirely cover said premises, and shall be at least seven full stories in height above the grade of the street, also of such materials and with such foundations and walls as shall be approved by said party of the first part, \* \* \* to cost not less than \$35,000, exclusive of foundations, and have the same rebuilt and ready for occupancy within eighteen months from such loss and destruction"; and, in case of failure to rebuild, all insurance money shall belong to the lessor. In the event of the determination of the lease before the expiration of the term for breach of any covenant herein, the building, fixtures, and improvements on the premises shall be forfeited to

and become the property of the owner of the fee, "without any compensation therefor" to the tenant. At the end of the term of 90 years the owner of the fee shall either purchase the building, fixtures, and improvements on the premises, paying sixty per cent. of their cash value, as determined by an appraisal provided for, or make a new lease for forty years on the terms of the original lease, except that, in lieu of the clause for the purchase of building, it shall be provided that, if the lease expires by lapse of time or otherwise, the building or buildings, with all improvements and fixtures then on the premises, shall become and be the property of the owner of the fee, without rendering any compensation therefor. The tenant shall at no time permit any part of the premises to be occupied adversely to the interest or title of the lessor. No assignment of the lease shall be made without giving the owner of the fee the option to buy the leasehold interest at the price of the proposed assignment. "In order to secure the payment of all rent due, accruing, or to accrue under this lease, and also all sums advanced or paid for taxes, duties, rates, charges, assessments, or impositions as aforesaid, or due upon any other account whatever, and for which said lessor, her heirs, executors, administrators, or assigns, may be entitled to repayment hereunder, she, he, or they shall have at all times a first and valid lien upon all improvements and tenements, and the materials thereof, which may be at any time upon the said leased premises," "meaning and intending hereby to give the party of the first part, her heirs, executors, administrators, and assigns, a valid and first lien upon any and all buildings, improvements, and other property on said premises belonging to the party of the second part, his heirs, executors, administrators, and assigns, as security for the payment of said rent in the manner aforesaid, anything hereinbefore contained to the contrary notwithstanding." A seven-story brick building was accordingly erected, at a cost of more than \$50,000, and covering the entire lot except a strip, five or six feet wide, next to the river.

In 1894, the appellee, the Metropolitan Elevated Railroad Company, a corporation organized to operate an elevated railroad in Chicago, acquired the premises adjacent to the appellant's lot on the north, extending from Market street to the river, and, having removed existing buildings, constructed thereon an elevated railroad, upon which its trains run, and for some months prior to the filing of the bill had been running, in their passage to and from the western division of the city. In order to connect its road with the loop elevated railroad in process of construction in the city, the Metropolitan Company found it necessary to cut away the northeast corner of the appellant's building above the first story thereof, and, in order to accomplish that end without resort to proceedings for condemnation under the statute of the state, procured an assignment to itself of the leasehold estate; Altgeld having assigned in 1889 to John J. Mitchell, who on August 29, 1895, assigned to the Metropolitan Company. These assignments were made with the consent of the appellant. Upon coming into possession, and before the filing of the bill, the Metropolitan Company proceeded to cut away the northeast corner of the building above the first story, the portion removed being in the form of a prism, with three plane faces extending from the top of the building, the lines of section of the walls being 13.4 feet on the north and 12.4 feet on the east from the northeast corner of the building. A freight elevator which had been in that corner was removed, and re-erected next to the north wall, at a point halfway from Market street to the river. According to the plans in evidence, no supporting columns have been or will be placed upon the land of the appellant, but the portion of the first story not cut down will be crossed by a girder upon which will rest the track connecting the road of the Metropolitan Company on the north side of the premises with the road of the Union Consolidated Elevated Railroad Company in front of the premises on Market street. The Metropolitan Company is insolvent, and its road is in the hands of a receiver, the respondent and appellee Dickson MacAllister.

The prayer of the bill is that the appellee be enjoined from placing the proposed structure across the premises, and from running trains thereon within the lines of the lot; that the receiver be required to perform the covenants of the lease, to restore the building to the condition in which it was before the cutting off of the corner, and thereafter to maintain the same in accordance

with the terms of the lease; and that, in default thereof, the lease be forfeited, and the premises surrendered to the appellant.

It is shown that the Metropolitan Company paid Mitchell for the leasehold \$84,000, and, in addition, expended upon the property, for necessary improvements and repairs, more than \$10,000, and that in its present condition the building is a better security for the payment of rent and the performance of other covenants of the lease than it was before the Metropolitan Company took possession. The constitution of Illinois (article 2, § 13) provides "that private property shall not be taken or damaged for public use without just compensation," which, "when not made by the state, shall be ascertained by a jury, as shall be prescribed by law"; and by article 11, § 14, it is provided: "The right of trial by jury shall be inviolate in all trials of claims for compensation, when, in the exercise of the said right of eminent domain, any incorporated company shall be interested either for or against the exercise of said right." Section 2 of an act "to provide for the exercise of the right of eminent domain" (Rev. St. Ill. c. 47) requires the railroad company which proposes to take property to file in court "a petition, setting forth, by reference, his or their authority, in the premises, the purpose for which said property is sought to be taken or damaged, a description of the property, the names of all persons interested therein as owners or otherwise, as appearing of record, if known, or if not known stating that fact, and praying such judge to cause the compensation to be paid to the owner to be assessed. \* \* \* Persons interested, whose names are unknown, may be made parties defendant by the description of the unknown owners." By section 11, "any person not made a party may become such by filing his cross-petition, setting forth that he is the owner or has an interest in the property, and which will be taken or damaged by the proposed work; and the right of such last named petitioner shall thereupon be fully considered and determined." The opinion of the court below is in the record, but has not been reported.

A. W. Green, Henry S. Robbins, and Lockwood Honore, for appellant.

John P. Wilson and W. W. Gurley, for appellees.

Before WOODS and JENKINS, Circuit Judges, and GROSSCUP, District Judge.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

It is not disputed that injunction is the proper remedy against the appropriation of land for the use of a public corporation which has not acquired a right to the proposed use either by purchase or by condemnation; and, contrary to the general rule that equitable relief is granted only when equitable considerations require it, the injunction in such cases may be, and perhaps more frequently than otherwise is, sought in vindication of a purely legal right; and, if the technical right and a threatened infraction of it be established, the relief will be granted without inquiry into the general equities of the case. By this we do not mean that a specific equity, like an estoppel, may not be a defense to such a suit; but, if a complete defense be not shown, the court will not refuse the relief on grounds of equitable discretion, as it might do in a suit for specific performance or rescission or other cause involving no special constitutional or statutory right of such a nature as to be capable of vindication or enforcement only by injunction. "In cases of this character," said the supreme court of Illinois in *Cobb v. Coal Co.*, 68 Ill. 233, "courts of equity have acted on broader principles [than in ordinary cases], and have adopted as a rule that an injunction will be granted to prevent a railway company from ex-

ceeding the power granted in their charter. \* \* \* The courts do not require when the effort is manifested by a railway company to wrongfully appropriate private property, or force their structures to places not authorized, that there should be a want of remedy at law." And in *Lewis on Eminent Domain* (section 632), it is said, in substance, that the jurisdiction of equity in such cases may be placed upon the broad grounds that when the power of eminent domain has been delegated to public officers or others who are threatening to make an appropriation of private property to public uses in excess of the power granted, or without complying with the conditions on which the right to make the appropriation is given, equity will prevent the threatened wrong, "without regard to the question of irreparable damages or the existence of legal remedies which may afford a money compensation." The controlling inquiry in the present case, therefore, is whether the Metropolitan Company, which, it is not denied, has been in rightful possession, has appropriated or is about to appropriate any part of the leased premises to a corporate use which is not justified by the lease.

It is not to be doubted that, by consenting to the transfer of the leasehold to the railroad company, the appellant consented to any use of the property which was permitted to the original lessee; but it is not to be inferred that she thereby consented, as it is contended she did, to the particular use proposed, since there were various other railroad purposes which might have been in contemplation, and which in no sense would have been inconsistent with any condition or covenant of the lease. Of the elaborate and forceful argument made here on the part of the appellees the primary proposition is that "the railroad company, being the owner of the leasehold estate and of the buildings upon the premises in question, and in possession of the same, has the right to devote all or any portion of the premises to railroad purposes without resorting to proceedings under the eminent domain act to acquire the interest of the lessor." As corollary or subordinate propositions, it is asserted that the appellant has not been damaged by the changes made in the building; that the bill of complaint is a bill for specific performance, on which relief need not be granted as a matter of absolute right; that neither the railroad company nor its receiver has violated any covenant of the lease; and that the alterations made in the building and the proposed construction and use of railroad tracks do not constitute waste. In the first of these propositions is the explicit assertion, on which the entire argument mainly depends, that the railroad company owns the building erected upon the leased premises; and the same view finds expression in the opinion of the court below, where, after reference to some of the provisions in the lease, it is said, "In other words, the building now on the premises is subject to a lien for the rents to become due." While it is true that the intention to give the appellant a lien upon the building, as well as "upon all improvements and tenements, and the materials thereof at any time upon said leased premises," and on "other property" of the tenant on the premises, is plainly declared, and it is also stipulated that at the end of the term the owner of the fee shall purchase the building or extend the term of the lease,



it is clear upon the whole instrument that in no event was a removal from the premises of the building, which the lessee undertook to erect and keep in repair, contemplated. On no conceivable contingency can there arise under the contract a right on the part of the lessee to remove the building, even were it a physical possibility to do so. In contemplation of law, the building was intended to be, and accordingly in the process of construction it became, a part of the realty. "The well-settled rule is that such erections as this become a part of the land, as each stone and brick are added to the structure." *Kutter v. Smith*, 2 Wall. 491; *Elwes v. Maw*, 3 East, 38; *Tift v. Horton*, 53 N. Y. 380; *Sanders v. Village of Yonkers*, 63 N. Y. 491; *Ford v. Cobb*, 20 N. Y. 344; *Deane v. Hutchinson*, 40 N. J. Eq. 83, 2 Atl. 292; *Fortman v. Goepper*, 14 Ohio St. 558; *Sword v. Low*, 122 Ill. 487, 13 N. E. 826; *Dooley v. Crist*, 25 Ill. 453; *Corrigan v. City of Chicago*, 144 Ill. 537, 33 N. E. 746. See, also, *Hawes v. Favor*, 161 Ill. 440, 43 N. E. 1076, cited by the appellees. In legal effect, the contract was that the lessee should erect upon the premises for the lessor a building, and maintain it in good repair to the end of the term of the lease, and that, in consideration therefor (the rent, taxes, and other charges meanwhile having been discharged) the lessor should then pay to the lessee the specified percentage of the appraised cash value of the building, or, at her option, extend the term of the lease. Though in form the lessor is bound to purchase the building, the evident intention is simply that, in one or the other mode prescribed, she shall make compensation for the erection of the structure, and for keeping it in repair during the term of the lease. As a covenant running with the land, this is doubtless a charge upon the entire property, including the building, and it is difficult to conceive that the building became subject at once to a lien in favor of the lessee and also in favor of the lessor. Against this construction of the lease, it is urged that the declaration of a lien on the building is made meaningless; but it is to be observed that, without a stipulation therefor, the landlord could have no lien on fixtures or other movable property of the tenant; and, since it is not always easy to determine certainly what is or is not removable as a fixture, it was not necessarily ill advised or unnecessary to include the building in the stipulation for a lien.

The proposition being established that the title to the building, like that to the land, is in the appellant, it results that the rights of the parties in other respects must be determined on that basis; that is to say, by the same rules as if the building in its original form of construction, with its corner intact, had been upon the lot when the lease was executed. The contract required that the structure should cover the entire lot, and should cost not less than a stated sum, but it was always competent for the parties to waive any term of the agreement; and when, with the consent of the lessor, and by choice of the lessee, a building was constructed at a larger cost than was stipulated, and upon foundations which did not include a part of the lot next to the river, the rights and obligations of the parties became the same as if the actual construction and cost had been specifically required by the lease. And so, if, by the original construction, the northeast corner had been of the shape caused by cutting away the stories above the

first, that, being assented to, would have become the structure of the contract; and the question before us would have been, as suggested in the opinion below, whether, without the consent of the appellant, the railroad company, by virtue of its rights as assignee of the leasehold estate, could lay its girder and track and run its cars as it proposes to do. The repairs made on the building by the railroad company, after it took possession, were for the most part necessary, and therefore came within the covenant to repair; but if they had been entirely voluntary, and if other improvements were made, whereby the premises have an increased value, the building, nevertheless, remained the property of the appellant. The railroad company did not, by repairing or improving one part, acquire a right to destroy another part; and it is not material to the question of relief by injunction that the floor space of the part removed is small and insignificant in comparison with the space that remains. With all repairs and improvements, the building, as it stood at the instant when the cutting away of the corner was commenced, belonged to the appellant. The title to the space taken and the reversionary right to the use of it were hers, and, as we conclude, it was not the privilege of the railroad company, without her consent, to remove any part of the structure in order to occupy the space with its tracks, the right to do so not having been acquired by condemnation.

The removal of the corner, for whatever purpose done, it seems clear, on the authorities cited, was an act of waste, which before its commission might have been enjoined. *Brock v. Dole*, 66 Wis. 142, 28 N. W. 334; *Phelan v. Boylan*, 25 Wis. 679; *Hunt v. Browne*, *Sausse & S.* 178; *Davenport v. Magoon*, 13 Or. 3, 4 Pac. 299; *Kidd v. Dennison*, 6 Barb. 9; *Agate v. Lowenbein*, 57 N. Y. 604; *Stetson v. Day*, 51 Me. 434; *Cannon v. Barry*, 59 Miss. 289; 6 Wait, Act. & Def. 238, 239; 28 Am. & Eng. Enc. Law, 870. But whether, in any case where the question is solely one of waste already committed, and no appropriation of property to corporate use is intended, the court would interfere to compel reconstruction or a repair of the waste is not the present question. If it were, possibly it would be proper to give weight to such equitable considerations as that the appellant's security is not to be impaired, and to other like suggestions which have been urged; but when, as here, waste has been committed by removing a substantial part of a building which was intended to be a permanent structure, for the purpose of making way perpetually or indefinitely for the track of a railroad, the work of removal is not to be considered by itself, but as a step in the execution of a scheme to take property for a corporate use without making compensation, which, as already stated, the court will enjoin, though the right invaded be a purely legal or technical one. Only in that way can the policy of the enactments against the taking of private property for corporate uses without compensation be fully vindicated; and without an order for the restoration of the building to its original form, or, in default thereof, a forfeiture of the lease, the relief would not be adequate or complete.

It is, of course, true, as said below, that the leasehold estate is in the entire lot, and that the tenant has possession of all the space

above it, as well what is not actually filled by the building as what is; but, whatever might be thought of the case if the space in question had been open at the start, the tenant, it is clear, had no right to take down the upper stories of the building in order to create the unfilled space; and therefore, as we conceive, it is not true, as was further stated, that, while the term of the lease continues, nothing is invaded but the interest of the tenant. There has been already a destruction of property which constitutes a taking in violation of the law of eminent domain as distinctly as would the digging out and removal of earth from the corner of the lot; and, besides, the reversionary interest has been directly affected, and will be further affected if the proposed location of the girder and track of the railroad be not forbidden. The demand of the appellant for present relief against the wrong done and intended is not met by the suggestion that, "if the leasehold estate should be extinguished, of course the railroad company would be a trespasser, if it did not remove its girder." The railroad company might abandon possession, leaving to the landlord the expense both of removing the girder and of reconstructing the torn down corner, with recourse for the outlay upon no responsible party; but, more likely, the trespasser would surrender possession, if at all, only at the end of a litigation, to the expenses and contingencies of which the appellant or her successor in interest ought not, by judicial sanction, to be subjected. The proposed occupation of the premises is shown to be necessary in order to overcome engineering difficulties which otherwise are practically insuperable, but, if it were only a matter of convenience, it would be equally evident that the occupation is intended to be, and will be, perpetual, as, doubtless, the public interest will require that it shall be. If, as was stated at the hearing, the charter of the present railroad company is limited to fifty years, that signifies only that from time to time, when necessary, new companies will be organized, to which, in succession, the road and its equipment will be transferred. As against the lessor, such an occupation of her property is wrongful from the beginning. The possessory right is in the lessee, and for that reason, it may be, the railroad company, until the lease shall have ended by lapse of time or by forfeiture, cannot be dealt with as a trespasser; but, that being so, it is the more important that the remedy here invoked should not be denied. If the lease were for a short term, one year or ten, instead of ninety years, it would be evident that the railroad company has exceeded its privileges as tenant, and has invaded, appropriated, and injured present property rights of the landlord and reversionary interests, which, without consent or proceedings to condemn, it had no right to take or injure. The bill, it is plain, is not one for specific performance merely. It is not a valid objection to our conclusion that it may be difficult, or even impossible by any certain rule, to estimate the compensation which, in a proceeding to condemn, should be awarded the appellant. The decree below is reversed, and the cause remanded for further proceedings. In order to obviate destruction or serious injury to property, the court may grant reasonable time for proceedings to condemn.

## McDUFFEE et al. v. BOSTON &amp; M. R. CO.

(Circuit Court, D. Vermont. October 13, 1897.)

## 1. SECURITY FOR COSTS—POOR SUITORS—AFFIDAVIT OF POVERTY.

Under the provision of 27 Stat. 252 (2 Supp. Rev. St. p. 41), that, after suit brought, "the plaintiff may answer, and avoid a demand for fees, or security for costs, by filing" an affidavit that, because of his poverty, he is unable to pay or give security, etc., it is the filing of the affidavit, and not the truth of it, that constitutes an "answer" to the defendant's demand.

## 2. SAME—INFANTS SUING BY NEXT FRIEND.

It seems that the statute requires the personal affidavit of each plaintiff who is sui juris, but, where some of them are infants, the affidavit of their next friend, who represents them, will suffice.

## 3. SAME—TIME OF FILING AFFIDAVIT.

Though the affidavit is not filed until after the granting, upon notice to plaintiff, of an order for a cost bond, it is not too late, for the order itself is a "demand" which the plaintiff may thus "answer and avoid."

This was an action at law by Delia M. McDuffee and others against the Boston & Maine Railroad Company. The case was heard upon a motion made by plaintiffs to set aside an order requiring them to give a cost bond.

Chas. A. Prouty, for plaintiffs.

John Young, for defendant.

WHEELER, District Judge. The defendant, on notice, procured an order for a cost bond to be filed by November 15th next. An act of July 20, 1892, provides that any citizen of the United States entitled to sue in any court of the United States may do so "without being required to prepay fees or costs, or give security therefor before or after bringing suit or action upon filing in said court a statement under oath in writing that because of his poverty he is unable to pay the costs of said suit or action which he is about to commence, or give security for the same, and that he believes he is entitled to the redress he seeks by such suit or action," and that, after suit brought, "the plaintiff may answer and avoid a demand for fees, or security for costs, by filing a like affidavit." 27 Stat. 252 (2 Supp. Rev. St. p. 41). The plaintiffs are a widow and infant children, and have, since the order, filed the widow's affidavit setting forth the circumstances, and that they are unable, by reason of their poverty, to give the cost bond required by the order; and the defendant has filed proof tending to the contrary. The statute does not, however, provide that the affidavit shall not, if untrue, be an answer to a demand for security for costs in an action pending, but only that the court "may dismiss any such cause so brought under this act, if it be made to appear that the allegation of poverty is untrue," and that willful false swearing in the affidavit shall be punishable as perjury. The filing of the affidavit, and not the truth of it, is what the statute makes an answer to the demand. And, if the affidavit might be avoided by being disproved, the defendant's evidence merely shows that she has a house and lot worth \$1,800, subject to mortgages of \$1,300, which, without proof of her other circumstances, might not be sufficient to overcome the affidavit. The statute seems to require the

personal affidavit of plaintiffs, and of each who is sui juris; but these infants are not, and they are so represented by their mother as next friend that her affidavit is sufficient. As this affidavit was not filed in answer to the motion before that was heard, but after the order, a question is made as to whether it is in due season. If the demand of the statute was no more than a motion, it would not be; but the word is broader, and the order is itself a demand, as well as the motion, although more imperative; and so the statute seems to cover this, with all other, demands. The present motion is to set aside the order, but the effect given to the affidavit by the statute is to answer, not to set aside; and the effect here is not to set aside the order, but to answer it. Order of cost bond answered.

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CALIFORNIA SAV. BANK OF SAN DIEGO v. AMERICAN SURETY CO.  
OF NEW YORK.

(Circuit Court, S. D. California. October 18, 1897.)

No. 706.

1. INDEMNITY BONDS—PLEADING—PROOFS OF LOSS.

An action was brought on two bonds, by which defendant was obligated to reimburse any loss sustained by plaintiff, through the fraud or dishonesty of its employes therein named, "within three months next after notice, accompanied by satisfactory proof of loss, \* \* \* has been given to" plaintiff. The complaint did not, in terms, allege the giving of proof of loss, but did allege that "plaintiff duly kept and performed all the conditions of said bond on its part." The statute of California (Code Civ. Proc. § 457) provides that, in pleading the performance of conditions precedent in a contract, "it may be stated generally that the party duly performed all the conditions on his part." On demurrer, *held*, that this statute did not relieve plaintiff of the necessity of alleging facts showing that three months had elapsed after proof of loss, and before the action was brought.

2. SAME.

The complaint also alleged that the sum demanded "is now due." *Held* a mere conclusion of law.

3. SAME.

The complaint alleged that plaintiff gave notice of the loss in 1895, and that defendant had in fact "been fully advised and informed of and concerning the aforesaid breaches \* \* \* ever since the month of May, 1892." *Held*, that this fact did not dispense with the necessity of furnishing proof of loss, as a condition precedent to plaintiff's right of action.

4. SAME—TIME OF DISCOVERY OF LOSS.

The obligation of defendant, as expressed in the bonds, was to make good "all and any pecuniary loss sustained by the employer, \* \* \* and discovered within six months from the death or dismissal or retirement of the employe from the service of the employer." *Held*, that an allegation that the loss was discovered within such six months was essential to the statement of a cause of action.

McDonald & McDonald and D. C. Collier, for plaintiff.  
Allen & Flint, for defendant.

WELLBORN, District Judge. This action is upon two bonds, each of which obligates the defendant, subject to certain provisions, to reimburse any loss sustained by plaintiff through the fraud or dishonesty of the employes therein named; the employe named in one bond being

John W. Collins, plaintiff's vice president, and in the other Frederick T. Hill, plaintiff's cashier. The amounts sued for are \$18,000 on one of the bonds (that of Collins), and \$15,000 on the other, making a total of \$33,000. There are three counts in the complaint. The first and second counts are based, respectively, on said bonds, while the third count is virtually a union of the causes of action set forth in the two preceding counts. A demurrer on numerous grounds has been interposed to each count. As the three counts are identical, except as to amounts, and names of employes, it will only be necessary to particularly notice the first one.

Among other objections, it is urged that said count does not show that three months elapsed after notice and proof of loss before the commencement of the action. The clause of the bond material here, and wherein defendant is referred to as the "company," and plaintiff as the "employer," is as follows:

"It is hereby declared and agreed that, subject to the provisions herein contained, the company shall, within three months next after notice, accompanied by satisfactory proof of loss, as hereinafter mentioned, has been given to the company, make good and reimburse to the employer all and any pecuniary loss," etc.

After alleging four distinct breaches of the bond, the complaint proceeds as follows:

"That the plaintiff duly kept and performed all the conditions of said bond on its part, and on the 16th day of December, 1895, notified the defendant, in writing, at its office in the said city of New York, of each and all of the above-stated breaches of said bond by said Collins, including the date and manner thereof, and the resultant loss to the plaintiff by and from said breaches, and demanded from the defendant payment of the full penalty of said bond. But to pay the same or any part thereof the defendant then and there failed, neglected, and refused, and has ever since neglected and refused. And the plaintiff avers that although it did not present its aforesaid claim to the defendant for payment until the 16th day of December, 1895, that the defendant nevertheless was and has been fully advised and informed of and concerning the aforesaid breaches of said bond by said Collins, and the loss thereby occasioned to the plaintiff, ever since the month of May, 1892."

It will be observed that, while there is a specific allegation that notice of the loss was given and demand for payment made on December 16, 1895, there is no such allegation as to proof of loss. Plaintiff, however, insists that the performance of the last-named condition, as to furnishing proof of loss, including the lapse of three months thereafter before commencement of action, is sufficiently pleaded by the general allegation "that the plaintiff duly kept and performed all the conditions of said bond on its part," etc.; citing section 457, Code Civ. Proc. Cal., which is as follows:

"Sec. 457. In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part, and if such allegation be controverted, the party pleading must establish on the trial the facts showing such performance."

The precise question here involved has been before the supreme court of California in at least two cases, and in both decided adversely to plaintiff's contention. *Doyle v. Insurance Co.*, 44 Cal. 264; *Cowan v. Insurance Co.*, 78 Cal. 181, 20 Pac. 408. The pertinent clauses of the syllabus in the former case are as follows:

"Complaint on Policy of Insurance. In an action on an insurance policy, by the terms of which the loss is to be estimated and paid sixty days after due notice and proof of the same made by the assured, an allegation in the complaint that the plaintiff performed all the conditions on his part, in the policy, to be performed, and gave the defendant due notice and proof of the fire and loss, and demanded payment, does not show that sixty days had elapsed after proof and notice before bringing suit, and the complaint does not state a cause of action.

"Policy of Insurance. When a policy of insurance provides that the loss shall be estimated when it accrues, and be paid sixty days after due notice and proof of the same made by the assured, the company is not bound to pay until sixty days after such notice and proof."

From the opinion of the court I quote, as being directly in point and conclusive here, the following:

"By the terms of the policy it is provided as follows: 'The amount of loss or damage to be estimated according to the actual cash value of property at the time of the loss, and to be paid sixty days after due notice and proof of the same, made by the assured,' etc. It is objected that it does not appear from the allegations of the complaint that when the action was commenced this period of sixty days had elapsed. In answer to this point the respondent relies upon the following averments in the complaint: 'That the plaintiff duly performed all the conditions on her part, in the said policy of insurance, to be performed; that she gave to defendant due notice and proof of the fire and loss aforesaid, and demanded payment of the said sum of six hundred dollars; that no part of the same has been paid; and that the whole of said sum is now due, for which she demands judgment,' etc. The allegation that the sum 'is now due' may be laid out of the case, inasmuch as that is a conclusion of law, merely. Nor does the averment that the plaintiff duly performed all the conditions on her part, in the said policy of insurance, to be performed, and that she had given due notice and proof of the loss, aid the complaint in this respect. Under the terms of the policy, the doing of these things would not give her an immediate right of action against the defendant for the payment of the sum demanded, for the defendant was not bound to pay until the lapse of sixty days thereafter. In a complaint filed on the very next day after the notice and proof had been given, it might have been alleged with truth that all these things had been done; and yet it will not be pretended that she would at that time have had a cause of action against the defendant, or that the latter was then in default because payment had not been made. The delay of the sixty days after notice, to which, under the terms of the policy, the defendant is entitled, is a substantial right secured by the stipulation of the contract, not merely to enable it to prepare to pay, but also to investigate the circumstances under which the loss occurred, with a view of determining whether or not the loss had been of such a character as involved an obligation upon its part to pay at all."

In a later case, wherein the whole of the foregoing extract is quoted approvingly, and wherein there was a general allegation that plaintiff did certain things required of her, "and otherwise performed all the conditions of said policy on her part to be performed," the second paragraph of the syllabus is as follows:

"It is essential, in an action on a fire insurance policy which provides for payment within sixty days after proof and ascertainment of loss, to show in the complaint that such period of sixty days had expired before suit. An allegation that the plaintiff had duly performed all conditions on his part will not aid the complaint, as respects the lapse of the requisite period."

In the body of the opinion, the question before the court is stated and disposed of thus:

"The second objection to the complaint is that it does not appear that the proof of loss was furnished to the defendant sixty days before the commencement of this action. This question was presented to this court in *Doyle v.*

Insurance Co., 44 Cal. 264, and it was there held that a complaint with a similar allegation was fatally defective. \* \* \* We are of opinion that the objection to the complaint just above discussed is well taken, and that the demurrer to it should have been sustained."

See, also, *McCormack v. Insurance Co.*, 78 Cal. 468, 21 Pac. 14.

The facts, as alleged in the complaint (which on demurrer are assumed to be true), that the defendant had been ever since 1892 fully advised and informed of the breaches of said bond, and the resulting loss to plaintiff, did not, whatever may have been their effect otherwise, dispense with the furnishing of proof of loss, as a condition precedent to plaintiff's right of action. The bond plainly provides that any loss sustained by the employer shall be payable within three months next after notice, "accompanied by satisfactory proof of such loss." In order to state a cause of action upon said bond, the complaint must unquestionably allege, among other things, that the requisite proof of loss was furnished the defendant at least three months before the commencement of the action. As I have already shown, no such allegation has been made, either specifically or in general terms.

There is another objection to the complaint, which manifestly is well taken. The obligation of the defendant, as expressed in the bond, was to make good "all and any pecuniary loss sustained by the employer, \* \* \* and occurring during the continuance of this bond, and discovered during said continuance, or within six months thereafter, and within six months from the death or dismissal or retirement of the employé from the service of the employer." The allegation, hereinbefore quoted, that "the defendant nevertheless was and has been fully advised and informed of and concerning the aforesaid breaches of said bond by said Collins, and the loss thereby occasioned to the plaintiff, ever since the month of May, 1892," is probably tantamount to alleging that the loss was discovered in May, 1892, which was during the continuance of the bond, but certainly does not show—nor is there any other allegation in the complaint which does show—that the discovery was within six months from the death or dismissal or retirement of the employé. In the two particulars just indicated, I hold that the complaint is defective, without, however, passing upon any of the other objections thereto. Demurrer sustained, with leave to plaintiff to amend in 10 days if it shall be so advised.

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DOYLE v. BOSTON & A. R. CO.

(Circuit Court of Appeals, First Circuit. October 6, 1897.)

No. 144.

1. ISSUE OF NEGLIGENCE—BURDEN OF PROOF—INSTRUCTION—CONTRIBUTORY NEGLIGENCE.

Where the real issue, as made before the jury, was the negligence of the defendant, it was not error for the court to charge that the burden of proof of the entire case was on the plaintiff, and to refuse to charge that the burden of showing plaintiff's want of care was on defendant.



2. **NEGLIGENT STARTING OF TRAIN—NOTICE TO PASSENGER—INSTRUCTIONS, AND REFUSAL.**

The question of the conductor's negligence in starting the train and giving plaintiff notice having been submitted to the jury in a charge sufficiently clear and explicit, it was not error to refuse to instruct the jury that, if the conductor shouted "All aboard," it was proper for them to consider whether or not plaintiff might not reasonably suppose the train would not start until he had an opportunity to board it.

3. **NEGLIGENCE OF EMPLOYEES—DEFECTIVE PLATFORM AND LIGHTS—EFFECT OF INSTRUCTION.**

In an action for personal injuries alleged to result from the negligent starting of a train, and failure to provide suitable platform and lights, the question of negligence arising from defective platform and lights, having been submitted to the jury, was not withdrawn from their consideration by a charge that "this case must be treated precisely as though this suit had been brought directly against the conductor and engineer, if the accident happened through the fault of the conductor and engineer."

4. **INSTRUCTIONS—EXPRESSION OF OPINION BY JUDGE.**

Where other questions were involved, but the gist of plaintiff's case, on the pleadings and evidence, was the negligent starting of a train, it was not error for the court to so state to the jury, where he clearly informed them that they were the judges of the fact, no matter how strongly he might express his personal views thereon.

In Error to the Circuit Court of the United States for the District of Massachusetts.

Richard M. Saltonstall and E. Eugene Bolles, for plaintiff in error.

Samuel Hoar and George P. Furber, for defendant in error.

Before COLT, Circuit Judge, and WEBB and BROWN, District Judges.

COLT, Circuit Judge. This was an action by a passenger against a railroad corporation for personal injuries. The injuries were received at a station known as Riverside, on the evening of August 19, 1893, while the plaintiff was in the act of boarding the defendant's train. The verdict was for the defendant, and the plaintiff tendered a bill of exceptions, and sued out this writ of error. Before coming to the consideration of the errors assigned, it may be observed that they are generally open to the criticism of not giving all that the court below said in its charge to the jury upon the particular point to which exception was taken. It is not a sufficient ground for error to take a single sentence or passage from the charge, disconnected from the general context, or from what precedes or follows. In determining whether the court below was right or wrong, we must examine the whole context, in order to find out what was in fact the ruling. The numerous errors assigned may be considered under several general heads:

1. The court refused to instruct the jury that the burden of proof was upon the defendant to show that the plaintiff was not in the exercise of due care at the time of receiving the injury complained of, and that the defendant must show this by a fair preponderance of the evidence, or the plaintiff is entitled to recover, so far as his own negligence is concerned; but the court did instruct the jury as follows:

"The plaintiff is to prove his entire case, as I shall submit it to you, by a preponderance of evidence." "I do not withdraw what I said to you,—that the burden of the proof of this entire case, as I submit it to you, is on the plaintiff."

As the case was submitted, if no question of care on the part of the plaintiff was left for the consideration of the jury, the plaintiff was not injured. The declaration contained two counts. In both counts the injury was alleged to have been caused by the defendant's carelessly starting the train while the plaintiff was about to board it. The second count further declared that the defendant was negligent in not providing suitable platforms, lights, and other facilities for passengers alighting from and taking trains at this station. The evidence in the case was directed mainly to the point whether the defendant was negligent in starting the train. Upon the pleadings and proofs, we think the court below properly held that the question did not arise whether the plaintiff was in the exercise of ordinary care at the time of receiving the injury. The only real issue before the jury was the negligence of the defendant, and upon this issue the burden of proof was upon the plaintiff. The language of the court, therefore, was proper and unobjectionable. This instruction was favorable to the plaintiff, because it eliminated from the consideration of the jury one ground of defense, namely, that, assuming the defendant was negligent, the plaintiff's right of recovery could still be defeated by proving that he was not in the exercise of ordinary care at the time of receiving his injury. But in fact, as appears in the charge printed in the record, but not noticed in the bill of exceptions, the court did instruct the jury on the question of the plaintiff's negligence, and the rule of this court as to the burden of proof on this issue, as follows:

"I do not recollect any point at which the question of the plaintiff's care comes up, but, if there is any point where it comes up as a ground of defense, the burden is on the defense; and I instruct you now, as requested by the plaintiff, that 'the burden of proof is not upon the plaintiff to show that he himself was in the exercise of due care at the time of receiving the injury, but, if the defendant claims the plaintiff's neglect contributed to the injury, the burden of proof is on the defendant to show that fact.'"

If either party had cause to complain that the consideration of the plaintiff's negligence was taken from the jury, it was the defendant. In its answer such negligence was alleged as a ground of defense, and upon the whole evidence the defendant might well have insisted that the jury should pass upon it. If the verdict had been for the plaintiff, it would have been a serious question whether the defendant ought not to have a new trial.

2. The court refused to instruct the jury as follows:

"If the conductor, prior to starting the train, shouted 'All aboard,' it is proper for you to consider this fact in considering whether or not the plaintiff, if he was then in or upon the premises where passengers might properly wait, might not reasonably suppose that the train would not start until he had an opportunity to board it forthwith after hearing said warning."

While the judge refused this request in the form in which it was stated, he did leave the question to the jury whether the conductor, under the circumstances, was negligent in starting the train, and whether he gave the plaintiff sufficient notice before starting. We think the charge of the judge on this point was sufficiently clear and explicit, and that he properly refused to give the instruction in the terms in which it was prayed for.

3. It is urged that the court did not properly submit to the jury, as a ground of action, the alleged negligence of the defendant by reason of defective platforms and lights, contained in the second count of the declaration, but did charge as follows:

"The burden of this case, as I will show you, is upon the proposition that the train started with a jerk." "As the case stands, if the train had not started with a jerk there would be no case." "The second count also contains what I will read to you from the first, 'Just as the plaintiff was taking the train, it started,' and which I say is the pith of the case."

We think the court was entirely justified in the use of this language in the connection in which it was used in the charge. The real point in the case was the negligence of the defendant in starting the train. This is conceded in the plaintiff's brief, in the following words:

"The gist of the plaintiff's claim, upon the pleadings and evidence, was that the train was carelessly started."

But in fact the court did submit to the jury the question of defective platforms and lights, contained in the second count. The judge said:

"There are two counts, which differ in certain particulars. The second count contains allegations touching the condition of the platform, and touching the condition of the lights. I do not know that there is any evidence here that the condition of the platform, if it was in an incumbered condition, contributed to this accident. The matter of lights is one of those things about which the court is unable to form any proper conception. It is one eminently suitable for you to determine. \* \* \* The first count only alleges that the train started, and that that was the cause of the accident. The other count charges the condition of the platform, the want of light, and the starting of the train,—all three. Now, gentlemen, under the second count the plaintiff is not bound to prove all three; he may prove one, two, or three of those allegations, provided you are satisfied they contributed to the accident."

4. It is urged that the court erred in charging the jury, in substance, that the fault of the railroad company was the fault of the conductor and the engineer, and that "this case must be treated precisely as though this suit had been brought directly against the conductor and the engineer, instead of against the railroad company." But the qualifying words of the court, "if the accident happened through the fault of the conductor and engineer," are omitted in the assignment of errors. In this, as in others of the errors assigned, where the whole context is examined the charge of the judge is found to be unobjectionable. As this proposition was in fact stated to the jury, it cannot be said that the court took away from their consideration the question of negligence arising from defective platforms and lights, for which neither the conductor nor the engineer was liable. Nor did this passage in the charge contain an erroneous statement of law. It simply referred to the rule in this class of cases that the fault is the fault of the servant alone, and that on grounds of public policy the master is held responsible for the fault of his servant.

5. The comments of the court on the evidence are assigned as error. We find nothing in those statements which was unfair to the plaintiff. Further, it appears that all questions of fact were finally left to the jury. In the comments on the evidence set out in the twentieth assignment of error the court said, "You [the jury] will consider, it is a matter for you to determine," etc.; and in the comments referred to

in the twenty-first assignment the court said: "You are to determine whether that is true." "You are to judge whether or not the conduct or did not give this man ample time." The judge charged the jury generally on this subject as follows:

"So, gentlemen, it may be, in the course of the charge, I shall direct you upon certain questions of fact as well as upon certain questions of law, that you ought to find so and so, and, if I do, I will make it clear at the time that I intend so to direct you, and you must follow my directions; but unless I say to you, on a certain proposition of fact, that you must find the facts so and so, you are to understand you are the judges of the fact, no matter how strongly, as I go along, I may express my personal views upon certain questions."

The expression of an opinion by the judge in submitting the case to the jury, when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury, cannot be reviewed on a writ of error. *Railroad Co. v. Putnam*, 118 U. S. 545, 553, 7 Sup. Ct. 1. Judgment of the circuit court affirmed.

# CHILTON v. TOWN OF GRATTON.

(Circuit Court, D. Nebraska. September 30, 1897.)

## 1. TOWNSHIP BONDS—VALIDITY—INNOCENT PURCHASERS.

The question whether the petitioners for an issue of township bonds were freeholders of the township, as required by the statute, is one which cannot be questioned by the township, as against innocent holders of the bonds, after the same has been determined by the county board, the bonds issued, and the avails thereof received.

## 2. SAME—BONDS OF TOWNSHIP CONTAINING SECOND-CLASS CITY.

Under the statutes of Nebraska, the powers and jurisdiction of a second-class city, and of a township in which it may be located, are entirely separate and distinct, and therefore the township may issue bonds based on the combined assessed valuation.

## 3. SAME—CONSTITUTIONAL LIMITATION—OVERISSUE OF BONDS.

The Nebraska constitutional limitation on municipalities is not as to the bonded indebtedness for all purposes, but upon the amount to be issued for works of internal improvement, which do not include a county court house.

## 4. SAME—STATUTORY LIMITATION—DETERMINATION VESTED IN BOARD.

When limitations as to amount of indebtedness are imposed by statute, and not by the constitution, the legislature may create a board with authority to determine the questions of fact upon which the amount of limitation depends, and its finding will be conclusive in favor of bona fide purchasers.

## 5. SAME—NOTICE FROM RECORDS.

When the limit of an issue of bonds is to be ascertained from records or data which are peculiarly within the knowledge and control of the officers of the municipality, or they have better access to the information than other persons, and can ascertain the amount with more certainty than strangers, then the bonds will be held valid in the hands of bona fide holders.

## 6. SAME—COMPLIANCE WITH CONDITIONS—RECITALS IN BONDS.

Purchasers of railway aid bonds are not required to ascertain what conditions as to time of completing the road were imposed by the proposition voted on, where such conditions were not shown on the face of the bond, and the bonds recite a compliance with the law.

## 7. SAME—PROCEEDING TO ENJOIN TAX TO PAY BONDS—BONDHOLDERS NOT PARTIES.

Holders of municipal bonds, who were not made parties to a suit brought by taxpayers to enjoin the proper officers from levying and collecting a tax

to pay them, are in no manner affected by a judgment granting the injunction.

This is an action to recover upon interest coupons due on certain railroad bonds issued by the defendant township and owned by plaintiff, Henry P. Chilton. The material facts are, in substance, as follows:

The defendant township is one of the subdivisions of Holt county, Neb., said county having adopted township organization in the year 1887, under the provisions of the statute providing therefor. In the year 1885, one of the political subdivisions of the county was Center precinct, which embraced, with other territory, that which comprises Gratton township. In the year 1885 said Center precinct voted and issued its bonds in the sum of \$10,000 to aid in the building of a court house in said county. In the year 1886 said Center precinct was divided, a portion of the territory thereof being detached and formed into a new precinct named "Shields Precinct." At the time of the adoption of township organization in 1887, the territory then comprising said Center precinct was organized into Gratton township and Shields precinct into Shields township. The proceedings of the county board relative to the division of Center precinct, the formation of Shields precinct, the territory embraced in each, the adoption of township organization, and the organization of Center precinct into Gratton township, were all made a matter of record in recorded proceedings of said county board. On the 23d day of December, 1889, there was filed with the board of supervisors of said county a petition signed by 53 persons praying for the submission to the electors of Gratton township of a proposition to issue bonds of said township in the sum of \$36,000 to aid in the construction of the Nebraska & Western Railway. Only 35 of the persons signing the said petition were freeholders of Gratton township, and 48 of the signers were voters and residents of the city of O'Neill. The persons who circulated the said petition for signers represented to the signers thereof, and to the voters of Gratton township, that the railway company would build said line of railway from Sioux City, Iowa, through to the city of Ogden, in the territory of Utah, traversing and passing through Holt county and Gratton township from east to west, and that the work would be carried on continuously until said line of railway should be completed between the termini above named. In the said petition the only condition and provision relative to the termini was as follows: "The proceeds of said bonds to be used to aid in the construction of a line of railway passing into the county of Holt from the east, and through the said township to the city of O'Neill, in said county, such proceeds to be given to the Nebraska & Western Railway when it shall complete a line of said railway and have cars running thereon to the city of O'Neill on or before August 1, 1890." At the meeting of the board of supervisors of said Holt county held on said 23d day of December, 1889, a finding was made by said board, and entered of record, that said petition was signed by more than 50 freeholders of Gratton township, and an election was called in said county, to be held on the 30th day of January, 1890, at which election the proposition for issuing said bonds was submitted. The provision and condition relative to the termini, and time in which the road was to be completed, and proceeds of the bonds to be given to the railway company, was the same as stated in said petition. At the election there were 418 votes cast in favor of issuing said bonds and 10 votes against. Three hundred and fifty-five of said votes were cast by persons residing within the corporate limits of the city of O'Neill, and 103 by persons residing within Gratton township, outside of the city of O'Neill. Said line of railway is and was constructed through the city of O'Neill to the west line of the corporate limits of said city, and into Gratton township, and extends easterly from said city to and across the south line of Gratton township. The western terminus of said line of railway is and has been a point six miles east of the west line of Gratton township. Said railway was not constructed wholly through said township, but was into said township to the city of O'Neill, there having been built  $5\frac{1}{20}$  miles of said railway in said Gratton township. That prior to and since the 1st day of August, 1890, said rail-

way was built to the city of O'Neill, and freight and passenger trains have been continuously operated thereon since August 1, 1890. The city of O'Neill is a municipal corporation organized under the laws of the state of Nebraska, is wholly within the territorial limits of Gratton township, the territory within the limits of said city being a portion only of the territory within the township. At the time of the voting and the issuance of the bonds in question, the said city of O'Neill was a city of the second class, and had a population of 1,300 people. The assessed value of the taxable property of Gratton township for the year 1889, which was the last assessment-preceding the election at which the proposition to vote said \$36,000 railway bonds was voted upon, was \$436,941, of which amount \$227,438 was the assessed value of property within the corporate limits of the city of O'Neill, and \$209,503 was of property within the township outside of said city. For the year 1890, the assessed value was \$415,238, of which amount \$219,591 thereof was the assessed value of the property within the limits of the city, and \$195,647 the assessed value outside of said city. The assessed value of the property of Shields township for the year 1889 was \$77,742, and for the year 1890, \$75,426. The said \$10,000 court-house bonds of Center precinct were duly registered and certified to by the auditor and secretary of state, and were at the time the \$36,000 railway bonds were voted and issued unpaid, and in the hands of bona fide owners. The \$36,000 railway bonds of Gratton township were duly registered and certified to by the auditor and secretary of state, and plaintiff is the bona fide owner and holder of a portion thereof. Each court-house bond recited on its face that it was one of a series of 10 of the denomination of \$1,000 each. The bonds of Gratton township, among other things, contain the following recital: "This bond is issued for the purpose of aiding the Nebraska and Western Railway Company in the construction of a railroad through said Gratton township; said railroad to pass into the county of Holt from the east through the said Gratton township, and have cars running thereon to the city of O'Neill on or before August 1st, 1890; and is one of a series of thirty-six (36) bonds of one thousand dollars each, and numbered from one to thirty-six, inclusive; and said bonds are issued under and by authority of the state of Nebraska, found in chapter 45, on pages 540, 541, and 542 of the Compiled and Annotated Statutes of the State of Nebraska of the Year 1889, and the other laws of the state of Nebraska in relation thereto. The question of issuing this bond and the others of said series amounting to thirty-six thousand dollars was upon petition, as required by law, submitted by the board of supervisors of said county of Holt to a vote of the legal voters of said township in the manner provided by law, at an election held on the 30th day of January, 1890, at which said election there were 418 votes 'for' and 10 votes 'against' issuing said bonds; there being more than two-thirds of the votes cast at said election in favor of said proposition; and the board of supervisors, being vested by law with authority for that purpose, having found that all the requirements of the law necessary to authorize the issue and delivery of said bonds had been fully complied with, and that said bonds were voted according to the laws of the state of Nebraska, ordered that they be issued and delivered accordingly, and that they be and continue a subsisting debt against said township until they are paid and discharged." No notice was published in any newspaper of the adoption of the proposition to issue said bonds. And the interest coupons of said bonds prior to April 1, 1895, were paid by defendant. In November, 1890, an action was commenced in the district court of Holt county, Neb., by Wilson Hoxie and others, taxpayers of Gratton township, against Barrett Scott, county treasurer, and John C. Hayes, tax collector, of Gratton township, praying for an injunction enjoining the collection of taxes assessed and levied within said township, for the purpose of paying the interest on said bonds, and part of the principal thereof. Such proceedings were had in said action that a judgment was entered by said court for defendants, which judgment was reversed on appeal by the supreme court (45 Neb. 199, 63 N. W. 387), and the case remanded to the district court, where, in September, 1895, a decree was entered in said action, perpetually enjoining the collection of the tax to pay the principal or interest upon said bonds, which decree is unappealed from and unreversed.

M. F. Harrington and G. W. SeEVERS, for plaintiff.

H. E. Murphy, William B. Sterling, and B. T. White, for defendant.

MUNGER, District Judge (after stating the foregoing facts). The sections of the statute under which the bonds in question were issued, and material in the consideration of this case, are as follows (sections 14, 15, c. 45, p. 696, Comp. St. 1897):

"3518. Section 14. (Election.) Any precinct, township or village (less than a city of the second class) organized according to law, is hereby authorized to issue bonds in aid of works of internal improvement, highways, bridges, railroads, court house, jails in any part of the county, and the drainage of swamps and wet lands, to an extent not exceeding ten per cent. of the assessed value of the taxable property at the last assessment within such township, precinct, or village, in the manner hereinafter described, namely: First:—A petition signed by not less than fifty freeholders of the precinct, township or village shall be presented to the county commissioners or board authorized by law to attend to the business of the county, within which such precinct, township or village is situated. Said petition shall set forth the nature of the work contemplated, the amount of the bonds sought to be voted, the rate of interest, which shall in no event exceed eight per cent. per annum, and the date when the principal and interest shall become due; and the said petitioners shall give bonds to be approved by the county commissioners, for the payment of the expenses of the election, in the event that the proposition shall fail to receive a two-thirds of the majority of the votes cast at the election. Second:—Upon the reception of such petition the county commissioners shall give notice and call an election in the precinct, township or village, as the case may be. Said notice, call and election shall be governed by the law regulating the election for voting bonds by a county. Laws 1885, c. 58.

"3519. Section 15. (Issuance of Bonds.) If two-thirds of the votes cast at such election shall be in favor of the proposition, the county commissioners or board shall, without delay, cause to be prepared and issued, the bonds in accordance with the petition and notice of election; said bonds shall be signed by the chairman of the board or other person authorized to sign county bonds, and attested by the clerk of the county under the seal of the county. Said bonds shall state for what purpose issued; the amount, and when payable, interest and when payable, and the number of each bond. The county clerk shall enter upon the records, of the board, the petition, bond, notice, and call for the election, canvass of vote, the number, amount and interest, and date at which each bond issued shall become payable; and the county clerk shall cause such bond to be registered in the office of the secretary of state and state auditor, as required by law."

The county attorney, in his argument and brief, urges that, as less than 50 of the petitioners praying for the calling of the election to vote upon the proposition to issue the bonds were freeholders of the township, the county board were without jurisdiction, and for that reason the bonds are void, even in the hands of a bona fide holder. In support of this proposition he cites the following Nebraska cases: *State v. School Dist.*, 10 Neb. 544, 7 N. W. 315; *State v. School Dist.*, 13 Neb. 82, 12 N. W. 812; *Orchard v. School Dist.*, 14 Neb. 378, 15 N. W. 730; *State v. Babcock*, 21 Neb. 187, 31 N. W. 682; *Wullenwaber v. Dunigan*, 30 Neb. 877, 47 N. W. 420; *Fullerton v. School Dist.*, 41 Neb. 593, 59 N. W. 896; *Hoxie v. Scott*, 45 Neb. 199, 63 N. W. 387. I do not think these cases support his contention. In *State v. School Dist.*, 10 Neb. 544, 7 N. W. 315, the facts clearly established that there were but three legal voters within the district; that the district was fraudulently organized by residents of an adjoining state, and the bonds issued without any notice of an election.

In *State v. School Dist.*, 13 Neb. 82, 12 N. W. 812, a peremptory writ of mandamus was issued, requiring the officers of the district to report the amount of the bonds to the county clerk, that the county board might levy the necessary taxes to pay the same. The law required that a written request, to be signed by at least five legal voters, be had, before a special meeting of the district could be called to vote the bonds. An attempt was made to show that of the signers there were not five who were legal voters of the district. Maxwell, J., speaking for the court, said:

"When the proceedings have been conducted in good faith, and a request, properly signed, has been acted upon by the officer or officers upon whom the law imposes the duty of calling such meeting, and the meeting has been held, and the object of the request indorsed by the legal voters of the district, we will not, in a collateral proceeding, inquire whether all the persons signing said request had resided in the district a sufficient length of time to entitle them to vote therein or not. If they had not, any taxpayer of the district could enjoin the issuing of bonds, because unauthorized; but, after the meeting has been held in pursuance of the notice, the bonds issued and sold, and the district has received the avails, it is too late to raise the objection."

*Orchard v. School Dist.*, 14 Neb. 378, 15 N. W. 730, was an action upon a bond issued by the school district. The defense was that the same was issued without authority. The request having been signed by only four legal voters of the district, the bond was held valid in the hands of an innocent purchaser. *State v. Babcock*, 21 Neb. 187, 31 N. W. 682, was an application for a peremptory writ of mandamus to compel the auditor of public accounts to certify certain bonds issued by Dannebrog precinct. No question of the right of a purchaser was involved. *Wullenwaber v. Dunigan*, 30 Neb. 877, 47 N. W. 420, was an action to enjoin the issue of bonds. *Fullerton v. School Dist.*, 41 Neb. 593, 59 N. W. 896, was an action to restrain the defendant from registering, issuing, and selling certain bonds of the school district for the reason that the request for the election was not signed by the requisite number of legal voters. The court, after reviewing the foregoing cases, says:

"In a series of cases the court has refused to permit an inquiry into the qualifications of signers of petitions after the bonds had been issued and passed into the hands of innocent purchasers; but these cases are all based upon the distinction between the position of a taxpayer seeking relief promptly and one who has stood by until the rights of innocent purchasers have accrued."

*Hoxie v. Scott*, 45 Neb. 199, 63 N. W. 387, is a case referred to in the statement of facts, in which an injunction was granted against the tax levied to pay the interest and part of the principal of these bonds. In the opinion, the court says:

"We shall not assume to pass upon the rights of holders of the bonds as bona fide purchasers, because these parties are not in court. The proposition upon which this appeal must be determined must be considered as though there has been no sale of the bonds by the railroad company."

These decisions of the state court, in my opinion, not only do not support the doctrine contended for that the want of a sufficient petition renders the bonds void in the hands of an innocent purchaser, but rather sustain the contrary, when the rights of bona fide purchasers are considered. As stated by Irvine, C., in *Fullerton v. School Dist.*:



"It is therefore apparent that the court in all the cases referred to has considered the question of the sufficiency of the petition a judicial question open to inquiry in a proper collateral proceeding, but has held parties precluded from the inquiry upon a reasonable doctrine of estoppel when they have acquiesced in the proceedings until the rights of third persons have accrued."

The uniform holding of the supreme court of the United States is that, where the municipality is authorized by legislative enactment to issue negotiable bonds upon the performance of precedent conditions, and such bonds are issued containing recitals that they are issued in accordance with the provisions of such statute, the bona fide purchaser has a right to presume that all the prerequisites of the law to a valid issue have been complied with, where it may be gathered from the statute that the officers issuing such bonds were empowered to decide whether there has been a compliance with the precedent conditions. *Knox Co. v. Aspinwall*, 21 How. 539; *Moran v. Miami Co.*, 2 Black, 732; *Mercer Co. v. Hackett*, 1 Wall. 83; *Supervisors v. Schenck*, 5 Wall. 784; *Town of Venice v. Murdock*, 92 U. S. 494; *Moultrie Co. v. Savings Bank*, Id. 631; *Warren Co. v. Marcy*, 97 U. S. 96; *Northern Bank of Toledo v. Porter Tp. Trustees*, 110 U. S. 608, 4 Sup. Ct. 254. That the question as to whether the petitioners were freeholders of Gratton township was one to be passed upon and determined by the county board, there can be no doubt. *Marcy v. Oswego Tp.*, 92 U. S. 637; *Evansville v. Dennett*, 161 U. S. 434, 16 Sup. Ct. 613; *Moulton v. Evansville*, 25 Fed. 382, and cases *supra*.

It is further urged that the city of O'Neill, although included in the limits of Gratton township, cannot be considered as a portion of said township in determining whether the issue of bonds was in excess of the amount allowed by the statute based upon the assessed valuation of the property within the township. This claim is urged upon the well-recognized principle that "there cannot be at the same time, within the same territory, two distinct municipal corporations exercising the same power and jurisdiction." An examination of the statutes of Nebraska relative to townships will, I think, convince any one that the powers and jurisdiction of cities of the second class (like O'Neill) and townships are entirely separate, distinct, and unlike in all respects, and hence the rule has no application to this case. All the counsel for defendant unite in the claim that the proportionate share of the court-house bonds issued by Center precinct, collectible from the taxable property of Gratton township, was, at the time of voting and issuing the bonds in question, an indebtedness of Gratton township, and for that reason the \$36,000 of railroad bonds were and are invalid as an overissue. That the court-house bonds are to be paid by Shields and Gratton townships (the territory of which comprised Center precinct) in proportion to the taxable property of each, there can be no doubt; and if the proportion which Gratton Township was liable for, based on the last assessment prior to the issuing of the \$36,000 of bonds, was an indebtedness of Gratton township, within the terms of the statute, then the issue of \$36,000 was in excess of the amount permitted by law, and invalid unless the plaintiff is accorded the usual rights of a bona fide holder of com-

mercial paper. It is, however, urged that plaintiff cannot be regarded as a bona fide holder to the extent that defendant is estopped by recitals from pleading the invalidity of the bonds by reason of the excessive issue; the contention being that, where the existence of facts which are to be considered in determining the authority to issue such bonds are to be found and determined from public records other than those which the county board are required to make as steps in the proceedings relating to the issue, then all purchasers are bound to take notice of the facts shown by such public records. In this case it is said that the public records disclose that the territory comprising Gratton township and Shields township was formerly Center precinct, and that the public records show that the court-house bonds had been issued and registered by the secretary and auditor of state; that the outstanding issue of bonds being thus shown, all persons dealing in them were bound to take notice of the fact, and that the rule of law enunciated in the cases of *Dixon Co. v. Field*, 111 U. S. 83, 4 Sup. Ct. 315; *Lake Co. v. Graham*, 130 U. S. 674, 9 Sup. Ct. 654; *Nesbit v. Independent Dist.*, 144 U. S. 617, 12 Sup. Ct. 746; and *Sutliff v. Commissioners*, 147 U. S. 234, 13 Sup. Ct. 318,—supports this view. These cases cited were ones in which the issue was in excess of the constitutional limitation. In the present case the issue of bonds under consideration was not in excess of 10 per cent. of the assessed valuation of the taxable property of the township. It is only by adding to the amount of these bonds the proportion of the court-house bonds payable by Gratton township that an excessive issue, if any, is found. Such sum, however, does not violate any provision of the state constitution. The constitutional limitation on municipalities in Nebraska is not as to the total bonded indebtedness for all purposes, but is a limitation upon the aggregate amount which may be issued for works of internal improvement. *De Clerq v. Hager*, 12 Neb. 185, 10 N. W. 697; *State v. Babcock*, 19 Neb. 223, 230, 27 N. W. 94, 98. A court house is not a work of internal improvement, within the meaning of the constitutional provision. *Dawson Co. v. McNamar*, 10 Neb. 276, 4 N. W. 991. The only limitation of law by which the amount of the prior issue for court-house purposes becomes material for consideration in this case is that found in the statute or legislative enactment before referred to. The rule which applies to a constitutional limitation is not usually applicable when the limitation is only statutory. When the limitations are imposed by the constitution itself, it may not be within the power of a legislature to dispense with them by the creation of a ministerial commission whose findings shall be taken in lieu of the facts; but, when the limitations are imposed by statute only, the legislature, being the source of limitation, may create a board authorized to determine the question, and its findings will be conclusive in favor of bona fide purchasers. *Simonton, Mun. Bonds*, §§ 221-225; *Lake Co. v. Graham*, *supra*; *Sherman Co. v. Simons*, 109 U. S. 735, 3 Sup. Ct. 502. That the municipal officers issuing these bonds were required to ascertain as a condition precedent to their issue whether the amount thereof, together with prior unpaid issues, exceeded in the aggregate the statutory limit, I have no doubt. Were the pur-

chaser to examine the records of bond issues, he would find none issued by Gratton township. But it is said in argument that he was bound by the facts shown by all records of a public nature; that he was bound to know that by the statute a county in Nebraska, when first organized, must be divided into precincts; that township organization can only be effected after precinct organization; that, as the law requires a record to be kept (and such record was kept) showing the names and boundaries of precincts and townships, he was bound to know that the territory comprising Gratton township was once a portion of Center precinct; and that, bound by this knowledge, he had notice that the bonds were issued in excess of the statutory limit. To this I cannot assent, but regard the proper rule to be that, when the limit of issue is to be ascertained from records or data which are peculiarly within the knowledge and control of the officers of the municipality, or they have better access to the information than other persons, and can ascertain the amount with more certainty than strangers, then the bonds will be held valid in the hands of a bona fide holder. *Simonton, Mun. Bonds*, § 224; *West Plains Tp. v. Sage*, 16 C. C. A. 553, 69 Fed. 943; *Mutual Ben. Life Ins. Co. v. City of Elizabeth*, 42 N. J. Law, 235. The fact of a change in the boundaries of Center precinct having been made, that upon adoption of township organization the territory comprising Center precinct became Gratton township, were facts peculiarly within the knowledge of the officers acting for the township, and, they having better access to the record information than purchasers of the bonds, I conclude that the defendant cannot have the benefit of this plea of excessive issue as against the plaintiff, who is a bona fide holder of the bonds. This conclusion renders it unnecessary to determine whether a part of the court-house bonds alluded to was an indebtedness of Gratton township within the meaning of the statute, imposing the limitation upon bond issues.

It is further urged that the bonds are void, even in the hands of plaintiff, for the reason that they were delivered in violation of a condition imposed in the proposition adopted by the voters of the township, which condition, as recited on the face of the bonds, was as follows:

"This bond is issued for the purpose of aiding the Nebraska and Western Railway Company in the construction of a railroad through said Gratton township; said railroad to pass into the county of Holt from the east, through the said Gratton township, and having cars running thereon to the city of O'Neill on or before August 1st, 1890."

It is claimed that the provision requiring the construction of the railroad through the township of Gratton, and having cars running thereon to the city of O'Neill by August 1, 1890, was a precedent condition to be fully performed before the authority existed for the delivery of the bonds; that, while the road was constructed, and cars running thereon to the city of O'Neill, by the time stated, the road had not been constructed through, but only about five miles into, said township, leaving six miles yet to be constructed before it would pass through the township. The fact of the nonconstruction through the entire breadth of the township was a physical one, of which pur-

chasers must take notice; and, further, that the recitals in the bonds are only to the effect that the provisions of the enabling act have been complied with; that they do not import a compliance with the conditions imposed by the proposition voted upon. It may be conceded that the building of the road into the township and having cars running thereon to the city of O'Neill was not a full performance of the condition requiring the road to be constructed through the township; but was such condition one precedent to the authority to issue the bonds? I think not. The enabling act or statute under which the bonds were issued provides for municipalities aiding railroads and other improvements therein mentioned. It imposes no condition that the bonds shall not be issued until after the completion of the improvement to be aided, and by no rule of construction can it be said that the intent of the act was rather to reimburse the party constructing the improvement for the cost, in whole or in part, by requiring that the object for which the aid should be voted be fully secured before the bonds could issue. *Kenicott v. Supervisors*, 16 Wall. 452-466. But, while the enabling statute did not impose any such condition, it was proper for the municipality in voting its aid to do so.

I do not think the provision as recited in the bond requiring the road to be built through the township a condition necessary to be performed before the bonds could be legally issued. A statute of the state of Illinois, authorizing towns to aid in the construction of railroads by subscribing for stock and issuing bonds therefor, provided that the town might, in the proposition, impose any conditions desired, and that the bonds should not be valid and binding until the conditions should have been complied with. In an action brought to recover on bonds issued by virtue of a proposition containing a provision that the railroad should be constructed through the town, and a depot erected therein (neither of which was done), the court, in the case of *Town of Eagle v. Kohn*, 84 Ill. 292-294, while holding the bonds void because of the declaratory provision of the statute, says (speaking with reference to such conditions under statutes which did not declare the bonds invalid):

"We do not think it is to be regarded that the conditions named were prerequisite to the making of the subscription and issuing of the bonds, and that they were to be complied with before the subscription could be made, or the bonds issued; but only that the subscription and the bonds were to be subject to the condition. There would be no want of power in making the subscription and issue of the bonds. As between the town and the railroad company, noncompliance with the condition would be a good defense against the railroad company."

This, in my judgment, is a correct view of the effect of the conditions imposed in the present case, as shown by recital in bonds. I have no doubt that it was not only competent for Gratton township to have provided that the bonds may have been issued in installments as the work progressed, or issued before the work was done; the township might also have provided (and did provide) in the proposition that the bonds should not be issued until the road was fully constructed. The condition, as contained in the proposition, was:

"The proceeds of said bonds to be used in aid of the construction of a line of railroad passing into the county of Holt from the east and through the said township and to the city of O'Neill, in said county; such proceeds to be given to the Nebraska and Western Railway Company when it shall complete a line of said railroad and have cars running thereon to the city of O'Neill on or before August 1st, 1890."

But this is not the proposition as recited on the face of the bonds, and purchasers are not required to ascertain what conditions were contained in the proposition voted upon where such conditions are not shown on the face of the bonds, and the bonds, as in this case, recite a compliance with the law. *Oregon v. Jennings*, 119 U. S. 74, 7 Sup. Ct. 124. If the purchaser were to examine the proposition in this case, he would not be notified that the bonds were not to be issued and sold, but only that the proceeds of the bonds should not be delivered to the railway company until the road was constructed as provided. The fact that it was the proceeds of the bonds which were to be withheld would imply a prior sale. The provision for constructing the road through the township as recited in the bond, we think, was only declaratory of the enterprise which was to be aided. Even if the condition for building the road through the township as contained in the proposition and recited in the bonds be conceded to be a condition precedent to the issue, this would not render them void for want of power to issue. *Burroughs*, Pub. Sec. p. 506, writing with reference to such condition, says:

"The illegality which constitutes the want of power in this class of cases arises not merely from the fact that certain acts are conditions precedent to the issue, but from the declaration of the statute that they shall not be valid until the acts are done, or that they shall be void if the acts specified are not performed. It is the imperative command of the statute that stamps its impress of invalidity on the bonds."

In *Simonton, Mun. Bonds*, § 283, it is said:

"It may be stated generally that such bonds, in the hands of a bona fide holder, without notice of the nonperformance of the conditions, are valid; and against him the fact of nonperformance cannot be set up as a defense, unless the prior condition was one which was required to be performed by the constitution of the state, or the statute expressly declared the bonds should be void, unless the conditions were fulfilled, in which latter case the bonds will be invalid. The bonds, however, in order to protect the innocent holder, when the prior conditions have not been performed, or their performance waived, must contain such recitals,—usually that they are issued pursuant to the enabling act, reciting it, that assures the holder that all prior conditions have been performed."

In our opinion, the cases of *Mercer Co. v. Provident Life & Trust Co.*, 19 C. C. A. 44, 72 Fed. 623, and *Swan v. City of Arkansas City*, 61 Fed. 478, referred to by counsel for defendant, are not in conflict with this view. We think the recitals on the face of the bonds of such a nature as to preclude the township from interposing the defense that the condition relative to the construction of the road through the township has not been complied with.

The defense that agents of the railroad company represented to the voters and petitioners that the road would be built as a trans-continental line, through the state into the coal fields of Wyoming to Ogden, Utah, which has not been done, was not urged on the argument, nor in the briefs of counsel. The bonds being negotiable secu-

rities, and the plaintiff a bona fide holder without notice, it does not require any citation of authorities to show that the defense is not available. The plaintiff not being a party to the proceeding brought to enjoin the collection of the tax levied to pay the bonds, the judgment in that case in no manner affected his rights.

For the foregoing reasons, the several defenses pleaded are unavailing, and judgment should be entered for plaintiff for the amount due on the several coupons set forth in the petition.

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UNITED STATES v. BUNTING et al.

(District Court, E. D. Pennsylvania. September 21, 1897.)

CONSPIRACY TO DEFRAUD THE UNITED STATES—INDICTMENT.

An applicant for a government clerkship filed a sworn application in the form required for an examination by the civil service commission, and was afterwards notified by postal card to appear for examination at a time stated. By previous arrangement, another person, impersonating the applicant, presented himself for examination, and filled out a paper known as the "Declaration Sheet," which contained questions concerning the applicant, and signed the applicant's name thereto. Held, that these two persons were indictable, under Rev. St. §§ 5440, 5418, which denounce respectively the offense of conspiring to commit any offense against the United States or to defraud the United States, and the offense of falsely making, altering, or forging various enumerated papers, including affidavits or other writings, for the purpose of defrauding the United States.

The defendants in this case were charged with conspiracy together to defraud the United States in making and presenting a false writing. The indictment was framed under Rev. St. U. S. § 5440, as amended by Act May 17, 1879 (21 Stat. 4), which in its amended form is as follows:

"If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years or to both fine and imprisonment in the discretion of the court."

The fraud upon the United States was alleged under Rev. St. U. S. § 5418, which provides as follows:

"Every person who falsely makes, alters, forges, or counterfeits any bid, proposal, guarantee, official bond, public record, affidavit, or other writing, for the purpose of defrauding the United States, or utters or publishes as true any such false, forged, altered, or counterfeited bid, proposal, guarantee, official bond, public record, affidavit, or other writing, for such purpose, knowing the same to be false, forged, altered, or counterfeited, or transmits to or presents at the office of any officer of the United States any such false, forged, altered, or counterfeited bid, proposal, guarantee, official bond, public record, affidavit, or other writing, knowing the same to be false, forged, altered, or counterfeited, for such purpose, shall be imprisoned at hard labor for a period not more than ten years, or be fined not more than one thousand dollars, or be punished by both such fine and imprisonment."

From the facts as set forth in the indictment and as developed at the trial it appeared that the defendant Bunting was an applicant for a position as clerk in the post-office service, and on July 22, 1897, filed an application for examination before the United States civil

service commissioners at an examination which was to be held at Philadelphia. This application blank was in the usual form, containing questions relative to the name, date and place of birth, citizenship, residence, occupation, etc., of the applicant, which the applicant was required to fill out and file with the secretary of the local board before taking the examination. The application which was filled out by the defendant Bunting was sworn to by him, and lodged in due form with the proper official on July 23, 1897. On the 29th of July, 1897, the secretary of the board notified the defendant Bunting by postal card to appear before the board on August 5th, for the purpose of examination. At this time the defendant Delaney presented himself at the room in which the examination was conducted, gaining admission by means of the postal card theretofore mailed to Bunting, none but those possessed of such cards being admitted to the room. After gaining access to the room by this means the defendant Delaney was handed a paper known as the "Declaration Sheet," which paper contained questions concerning the applicant, the correct answers to which could only be made by the person who made the application or by some one fully cognizant with its contents. The answers to the questions on the declaration sheet were then filled in by Delaney who signed at the end thereof the name of the defendant Bunting. When this paper was handed to the secretary, Delaney was recognized and placed under arrest. Bunting was subsequently arrested, and both were indicted. The defendants pleaded guilty to the indictment.

James M. Beck, U. S. Atty., and Michael F. McCullen, Asst. U. S. Atty.

John P. Gibbs, for defendant Delaney.

John V. Ripperger, for defendant Bunting.

BUTLER, District Judge (orally). When this case first came before me, I was under the impression that the defendants were indicted under the old law, charged with conspiracy to defraud the United States, and as it was not shown that either of them had defrauded the government of money or other property, I was in doubt whether the statute covered the charge. Since that time, however, I have carefully examined the bills of indictment as well as the sections of the Revised Statutes under which the defendants are charged, and am of opinion that the offense comes within their terms.

Section 5418 literally as well as in spirit covers the case. The offense charged is a grave one; an attempt to prejudice the rights of the United States in the administration of the civil service statutes. Had the defendants been successful one of them would have obtained a privilege which would have placed him in a favored class and have entitled him to an advantage over others in the appointment to office.

The privilege is a valuable one, and the fraud of the defendants was therefore in prejudice of the government.

The sections under which the defendants are indicted are broad and sweeping and the offense I think is within their provisions.

## In re CHRISTIAN.

(Circuit Court, W. D. Arkansas. October 3, 1897.)

**1. CRIMINAL LAW—DISCHARGE FOR VOID SENTENCE—REMOVAL TO DISTRICT OF TRIAL FOR RESENTENCE.**

The petitioner was indicted and convicted in the Central district of the Indian Territory, and sentenced to imprisonment at Detroit, Mich. While the marshal of that district was en route with the prisoner to the prison at Detroit, he sued out a writ of habeas corpus before the circuit court of the United States for the Western district of Arkansas, and was discharged because the sentence pronounced against him was void. Upon being rearrested under section 1014 of the Revised Statutes of the United States, he sued out a second writ of habeas corpus before the same court. *Held*, that the proceeding under section 1014 of the Revised Statutes of the United States was irregular and unauthorized, and the defendant is discharged without prejudice to the United States to take any lawful measures to have the petitioner sentenced according to law upon the verdict of guilty against him.

**2. SAME—PROCEDURE.**

*Held*, further, that the proper proceeding for the removal of the prisoner to the Central district of the Indian Territory was for the United States court for that district, under section 716 of the Revised Statutes of the United States, to issue its warrant, addressed to the marshal of the Western district of Arkansas, to arrest the defendant and deliver him to the marshal of the Central district of the Indian Territory to abide the action of that court.

(Syllabus by the Judge.)

Winchester & Martin and Tom W. Neal, for petitioner  
W. J. Horton, U. S. Dist. Atty.

ROGERS, District Judge. The petitioner heretofore sued out from this court a writ of habeas corpus against J. P. Grady, United States marshal for the Central district of the Indian Territory. On the hearing he was discharged, but without prejudice to the right of the United States to take any lawful measures to have the petitioner sentenced in accordance with law upon the verdict of guilty against him, or to correct the judgment, if the same was, by misprision of the clerk, erroneously entered. 82 Fed. 199. Immediately upon his release the United States attorney for the Central district of the Indian Territory caused to be filed before Stephen Wheeler, United States commissioner in this district, a copy of an indictment found and duly returned by the grand jury of the Central district of the Indian Territory, and filed in the United States court at Antlers, in said district and territory, whereupon said commissioner issued a warrant for the arrest of said petitioner, and committed him to jail, under section 1014 of the Revised Statutes of the United States, to be held for trial at Antlers, in the Indian Territory. Immediately upon his commitment to the United States jail at this place by S. F. Stahl, the marshal of the Western district of Arkansas, petitioner sued out of this court this writ of habeas corpus, returnable forthwith, against the said marshal of the Western district of Arkansas. The petitioner alleges that he is unlawfully held by S. F. Stahl, in the jurisdiction of this court, by virtue of a warrant issued by Stephen Wheeler, a United States commissioner; that at the May term of 1897 of the United States court



for the Central district of the Indian Territory, at Antlers, he was indicted for perjury, and was tried and convicted, and sentenced by said court "to be imprisoned in the Detroit house of correction, at Detroit, Michigan, and to pay a fine of one dollar and costs of this action"; that the proceedings under which the warrant of arrest was issued, and under which he is held, are based on the said indictment upon which he has been tried, convicted, and sentenced, and that the warrant under which he is held is illegal, for the reason that he has been tried, convicted, and sentenced on the indictment on which the warrant was issued; and that his detention is in violation of the laws and constitution of the United States. Upon service being made upon the marshal, he made return as follows: That "he detains the said petitioner, William S. Christian, under and by virtue of the warrant alleged in the petition, and sets out a copy thereof." He further states that in the United States court for the Central district of the Indian Territory, sitting at Antlers, at the May term, 1897, and on the 17th day of May, 1897, an indictment was returned against the said petitioner, charging him with perjury, and sets out a copy of the indictment; that on the 19th day of said May he was tried and convicted as charged, and thereupon was remanded to the custody of the marshal to await final sentence (and sets out a certified transcript of the proceedings and orders made in that court); that on the 20th of May, 1897, the court sentenced petitioner to be imprisoned in the house of correction at Detroit, Mich., for three years, and to pay a fine to the United States of one dollar, together with the costs of prosecution (and sets out a copy of said sentence); that thereafter a mittimus on said sentence was issued out of said court, commanding the marshal of said district to receive, safely keep, and convey the said Christian to the house of correction as aforesaid; that said petitioner afterwards applied to this court for a writ of habeas corpus to obtain his discharge from the custody of the said marshal under said mittimus, alleging the sentence and mittimus to be void; that this court made an order discharging the said petitioner from the custody of said marshal under said mittimus, and recited in said order that the discharge would be without prejudice to the right of the United States to take any lawful measures to have the petitioner sentenced according to law upon the verdict against him (and sets out a copy of that order). He further states that on the ——— day of June, 1897, there was filed before said Stephen Wheeler, United States circuit court commissioner for the Western district of Arkansas, a certified copy of said indictment upon which said warrant was issued, and thereupon a motion for a warrant of removal of the said petitioner to the said Central district of the Indian Territory for further proceedings in the said United States court for said Central district of the Indian Territory upon said indictment was filed and pending in this court. The respondent further shows: That on the 19th day of June, 1897, there was issued out of the United States court for the Central district of the Indian Territory a temporary commitment for the said Christian upon said order so made as aforesaid by said court on the 19th day of May, 1897, remanding the said petitioner to the custody of said marshal for said Central district to await final sentence upon said verdict, a certified copy of which was attached thereto, and that further,

on the said 19th day of June, 1893, there was issued out of said court for said Central district a bench warrant for the arrest of the said William S. Christian (and attached a copy of said bench warrant). That on the 13th of July, 1897, and before the filing of said return of the marshal, the United States district attorney for the Central district of the Indian Territory filed a motion in this court in which he states that at the May term, 1897, of said court for the Central district of the Indian Territory, sitting at Antlers, petitioner was duly tried by a jury upon an indictment for the crime of perjury, which indictment had been previously found in said court, said court having competent jurisdiction of said offense and of the person of said petitioner, and, upon a trial upon said indictment, was found guilty as alleged; that at the same term of said court he was sentenced by the court to imprisonment in the Detroit house of correction, at Detroit, Mich., for the term of three years, and to pay a fine of one dollar, and all costs of said cause; that on the ——— day of June, 1897, said petitioner filed his petition for a writ of habeas corpus before this court, which said writ was by the court granted, and said prisoner discharged from the custody of said J. P. Grady, United States marshal for the Central district of the Indian Territory, but without prejudice to the right of the United States to have the petitioner sentenced in accordance with law upon the verdict against him, all of which more fully appears in the record and proceedings herein. And he prayed in his motion that this court make an order remanding the petitioner to the custody of the marshal of the Western district of Arkansas, and for his removal to the Central district of the Indian Territory, to be dealt with by the United States court for the Central district of the Indian Territory in conformity with law upon the verdict against him. Upon the trial of the cause before the court the petitioner introduced the receipt of the clerk of the United States court for the Central district of the Indian Territory for one dollar, in payment of the fine assessed against him on the 20th of May, 1897; and a complete transcript of the record of the United States court for the Central district of the Indian Territory in the perjury case referred to was offered in evidence, and also the record of the previous habeas corpus case. There is really no dispute about the facts in this case, and they sufficiently appear, from what has already been stated supra, more fully than is ordinarily necessary.

Petitioner now insists that section 1014 of the Revised Statutes of the United States applies only to persons who are removed from one jurisdiction to another *for trial*, and that, he having already been *tried*, the commissioner had no power to commit him under that section of the statute, and that this court has no authority of law to make an order for his removal to the Central district of the Indian Territory to await the sentence of said court upon the verdict heretofore rendered against him. On the other hand, the United States insists that whether there is authority, under section 1014 of the Revised Statutes of the United States, for his removal to the Indian Territory, or not, petitioner now being before the court on habeas corpus, under section 761 of the Revised Statutes of the United States, and the court being advised of the fact that he has been convicted of the crime of perjury

in another jurisdiction, and has not been sentenced as the law directs, it should, under the latter section, make an order requiring the marshal of this district to surrender petitioner to the proper authorities in the Indian Territory to await the judgment of that court. Both questions have been exhaustively argued and carefully considered.

For a hundred years the United States have had the power to apprehend and punish offenders against their laws. It is indeed remarkable that at this day the method of apprehending and removing persons who have been convicted of crime, and subsequently escape, either before or after sentence, into another district, to the district where they have been tried and convicted, should still be in doubt; but a careful research has not disclosed a single reported case decisive of the question by any court. Cases have been found and action had by the department of justice and the judges, but no court has decided it, so far as I know. In *Fanshawe v. Tracy*, 4 Biss. 497, Fed. Cas. No. 4,643, Judge Drummond says, in discussing the nature of contempt:

"It [contempt] is not a crime, in one sense, but it partakes of the nature and character of a crime; and I do not see why, if a man is imprisoned for a contempt of a court of the United States, and breaks jail and escapes into another state, he cannot be arrested and returned to his imprisonment under the authority of the United States."

The questions, however, are: How arrested? By whom? On what showing shall the warrant issue, and under what statute, and by whom shall it be issued, and who shall execute it? I find the above passage cited in *Corbin v. Boies*, 34 Fed. 699. I have had no access to 4 Biss. 497, Fed. Cas. No. 4,643, but I take it that Judge Drummond has not answered the questions suggested. It is quite probable that they were not before him. In 2 Moore, Extrad. §§ 535-541, inclusive, will be found an interesting discussion of the general subject of removal of offenders against the laws of the United States from the district where found to the district where the offense was committed, for trial; but no adjudicated case is found, decisive of the questions stated supra. It will be remembered that Christian is not a fugitive from justice. The United States brought him, under a void sentence, into this state and district, en route to the penitentiary. He has remained here because he was held by this court pending the proceedings on habeas corpus. This, therefore, is not a case under the extradition laws, even if it could be held that they apply to persons offending against the laws of the United States while remaining in the United States. 2 Moore, Extrad. § 540. Nor is the petitioner to be removed for trial, for he has already been tried and convicted, and an unauthorized sentence imposed upon him. The practice under section 1014 of the Revised Statutes of the United States seems settled. 2 Moore, Extrad. p. 858, § 540; *Horner v. U. S.*, 143 U. S. 207, 12 Sup. Ct. 407. I have not found any case where that section has been held to be authority for removing a party for any other purpose than for trial. In the Case of *Oaksmith*, 11 Op. Attys. Gen. U. S. 127, Mr. J. Hubley Ashton, acting attorney general, held that, under that section, *Oaksmith*, who had been convicted and sentenced in the district court of Massachusetts, and had escaped, could be removed to Massachusetts. He cites no authority to support the opinion, and does not discuss the

question. It does not appear that his opinion was followed in that case, nor has it been adopted by any one else, so far as I can find. I do not consider the opinion on that precise point sound. 2 Moore, Extrad. § 504 et seq. I am of the opinion that section 1014 of the Revised Statutes of the United States was never intended to apply to a case like this, and that the action had before Commissioner Wheeler was irregular and unauthorized.

The other question presented, as to what course the court should pursue under section 761, Rev. St. U. S., remains. Section 761 is as follows:

"The court, or justice, or judge, shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."

Under this section a great many cases have arisen. I have, however, been unable to find any case where a court or judge has, under similar facts to those stated *supra*, ever made any order removing a party from the district where the writ was issued to the district where the offense was committed. Medley, Petitioner, 134 U. S. 173, 10 Sup. Ct. 384, was a case of this sort. Medley was convicted of murder in Colorado by a court of competent jurisdiction, but sentenced under a law enacted after the commission of the crime, which changed materially the punishment. Medley sued out a writ of habeas corpus before the supreme court of the United States. The court held the law under which he was sentenced *ex post facto*, and, as applied to that case, unconstitutional. Mr. Justice Miller, delivering the opinion of the court, said:

"If this were a writ of error to the supreme court of Colorado, as Kring's Case was a writ of error to the supreme court of Missouri, our duty would be plain, namely, to reverse the judgment for the error found in it, and remand the case to the state court for further proceedings. If such were the case before us, our duty would be to reverse the judgment and remand the case to the court below to deal with the prisoner, in the face of the fact that a verdict of guilty, which was valid and legal, remains unenforced. But, under the writ of habeas corpus, we cannot do anything else than discharge the prisoner from the wrongful confinement in the penitentiary under the statute of Colorado invalid as to this case. The language of the act of congress, however, seems to have contemplated some emergency of the kind now before us. Section 761 of the Revised Statutes declares that the court or justice or judge (before whom the prisoner may be brought by the writ of habeas corpus) shall proceed in a summary way to determine the facts of the case, by hearing the testimony and argument, and thereupon to dispose of the party as law and justice require. What disposition shall we now make of the prisoner, who is entitled to his discharge from the custody of the warden of the penitentiary under the order and judgment of the court, because, within the language of section 753, he is in custody in violation of the constitution of the United States, but who is, nevertheless, guilty, as the record before us shows, of the crime of murder in the first degree? We do not think that we are authorized to remand the prisoner to the custody of the sheriff of the proper county, to be proceeded against, in the court of Colorado which condemned him, in such a manner as they may think proper, because it is apparent that while the statute under which he is now held in custody is *ex post facto* law, in regard to his offense, it repeals the former law, under which he might otherwise have been punished, and we are not advised whether that court possesses any power to deal further with the prisoner or not. Such a question is not before us, because it has not been acted upon by the court below, and it is neither our inclination nor our duty to decide what the court may

or what it may not do in regard to the case as it stands. Upon the whole, after due deliberation, we have come to the conclusion that the attorney general of the state of Colorado shall be notified by the warden of the penitentiary of the precise time when he will release the prisoner from his custody under the present sentence and warrant, at least ten days beforehand, and after doing this, and at that time, he shall discharge the prisoner from his custody; and such will be the order of this court."

In this case Christian has paid the fine imposed upon him, and, to that extent, satisfied the judgment. I cannot tell, under this state of case, whether the court which tried him has power to resentence him; and happily, under this decision in the Medley Case, I am relieved of deciding that question, as that court has never determined it. That case is very much like this, except that Medley was in the jurisdiction where he was tried, and there was no necessity for an order for his removal.

Coleman v. Tennessee, 97 U. S. 511, is another case affording some light. Coleman had been tried and convicted of murder by a military court-martial in Tennessee. In some way the military authorities lost control of him, and he was indicted for the same murder in the criminal court of Knox county, Tenn., for which he had been convicted by the military court-martial. He pleaded in that court his former conviction before a military court-martial. His plea was held bad. He pleaded "Not guilty," and was tried and convicted again for the same murder, and sentenced to death. He appealed to the supreme court of Tennessee. Pending the appeal he sued out a writ of habeas corpus before the circuit court of the United States for the Eastern district of Tennessee. That court ordered his release. A copy of the judgment of the circuit court was presented to the supreme court of Tennessee, and a motion made to discharge Coleman. The supreme court of Tennessee denied the motion. The case was then carried to the supreme court of the United States, and there the judgment of the supreme court of Tennessee was reversed. The court, through Mr. Justice Field, delivering the opinion, said:

"It follows from the views expressed that the judgment of the supreme court of Tennessee must be reversed, and the cause remanded, with directions to discharge the defendant from custody by the sheriff of Knox county on the indictment and conviction for murder in the state court. But as the defendant was guilty of murder, as clearly appears, not only by the evidence in the record in this case, but in the record of the proceedings of the court-martial, —a murder committed, too, under circumstances of great atrocity,—and as he was convicted of the crime by that court, and sentenced to death, and it appears by his plea that said judgment was duly approved, and still remains without any action having been taken upon it, he may be delivered up to the military authorities of the United States, to be dealt with as required by law."

See, also, *In re Bonner*, 151 U. S. 243, 14 Sup. Ct. 323.

But in this case it sufficiently appears that the petitioner was in the same district where the offense was committed, and there was no occasion for any order of removal. I am inclined, however, to the opinion that, under section 761 of the Revised Statutes of the United States, this court might make an order of removal. It is not, however, clear. I prefer to rest the question on another section of the statute, which I think is clear. I refer to section 716 of the Revised Statutes of the United States, which is as follows:

"The supreme court and the circuit and district courts shall have power to issue writs of scire facias. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

Under this statute, I think the judge of the Central district of the Indian Territory has the power to issue his warrant, addressed to the marshal of the Western district of Arkansas, to arrest Christian, and to send an officer here to take him back to that court, to be dealt with as law and justice may require. This view is sustained by the Case of Oaksmith, 11 Op. Attys. Gen. U. S. 127; Randolph's Case, 2 Op. Attys. Gen. U. S. 564; 2 Moore, Extrad. § 540; Stanton Case, Id. § 541. This last case is precisely in point, and I copy the section, which is as follows:

"Escape of Federal Convict under Sentence. I am indebted to John Ruhm, Esquire, United States district attorney of the Middle district of Tennessee, for the following interesting case: In the summer of 1889 one A. A. Stanton, who had been convicted of an offense against the revenue laws, and sentenced to undergo a term of imprisonment in the jail of Williamson county, in that district, escaped from prison, and fled to Texas. Upon the application of Mr. Ruhm, Judge Key, of the Middle district of Tennessee, issued a *capias* to the United States marshal of the Northern district of Texas, at Dallas, for the fugitive's arrest and return. When the marshal received the *capias* he consulted the United States district attorney at Dallas, who advised that he could not execute it, on the ground that, after passing sentence, the power of the trial court over the prisoner ceased, and could not again be exerted save through the medium of a writ of *habeas corpus*, or some such remedial writ; the execution of the sentence and the place of confinement being matters of executive control, subject to such limitations as were prescribed by statute. He deemed, however, the recitals in the *capias* as sufficient to justify the making of a complaint *de novo*; and, on a warrant issued by a United States commissioner upon such a complaint, Stanton was arrested and committed to await the orders of the attorney general. On the 28th of August, 1889, Mr. Ruhm addressed a communication on the subject to the attorney general, with a comprehensive argument, which is given below. Prior to this the marshal of the Middle district of Tennessee, by direction of the attorney general, sent a deputy to Texas to identify Stanton and bring him back to Tennessee, but the marshal at Dallas refused to deliver him up in the absence of a warrant of removal from the judge of the Northern district of Texas. Early in September, 1889, however, the *capias* was executed. The Texas marshal to whom it was directed arrested Stanton upon it, and he was brought back to Tennessee, without any warrant of removal from the Texas court, by the deputy marshal sent to receive him, who returned the *capias* to the clerk of the court in the Middle district."

It was the argument of Mr. Ruhm which finally satisfied me of the law of this case, and, for the benefit of those who may not have access to Moore on Extradition, I append it in a footnote to this opinion.

It may be said that section 716 only applies to district and circuit courts of the United States, and that the judge of the United States court for the Central district of the Indian Territory is not such a judge. Granted. But by the second section of the act of congress providing for the appointment of additional judges of the United States courts in the Indian Territory, etc., approved March 1, 1895, the judges in that territory are given—

"The same authority in the judicial districts, to issue writs of *habeas corpus* and prohibition, injunction, mandamus, certiorari, and other remedial and final process as is now by law vested in the judges of the United States court in the Indian Territory, or in the circuit and district courts of the United States."

Section 16 of the act of congress approved March 1, 1889 (it being an act to establish a United States court in the Indian Territory, etc.), is as follows:

"That the judge of the court herein established shall have the same authority to issue writs of habeas corpus, injunctions, mandamus, and other remedial process, as exists in the circuit courts of the United States."

Either of these statutes, certainly the two, both of which are in force, obviate the objection suggested.

I conclude that the safe course to pursue is to hold the prisoner until due and ample notice can be given to the United States district attorney for the Central district of the Indian Territory, that he may apply for a warrant and send an officer for Christian, and that, if he fails within a reasonable time to do so, Christian be discharged. Petitioner has asked for bail. I do not think this court should grant bail, but that the question should be presented to the court in which he was convicted.

It is ordered that the clerk of this court notify the United States attorney for the Central district of the Indian Territory that the petitioner; William Christian, will be discharged, but without prejudice to the right of the United States to take any lawful measures to have the petitioner sentenced in accordance with law upon the verdict of guilty against him.

#### NOTE.

This argument contains the reasons presented by Mr. Ruhm to Judge Key for the issuance of the *capias*, and is as follows: "Section 1014 of the United States Revised Statutes provides for the arrest of an offender against the laws of the United States in a district other than the one in which the offense was committed, and for extradition to the trial district. But this section is confined to the case of those who are charged with crime before they shall have been tried and convicted. 'They shall be sent to the district where the trial is to be had.' There is no act of congress making the escape of a prisoner convicted by a United States court an offense; and there is, moreover, no statute expressly authorizing or prescribing the mode of procedure for extradition in cases where a convicted prisoner escapes into another district. Section 5409 provides for the punishment of the marshal, deputy, or other person who voluntarily suffers a prisoner in his custody by virtue of process issued under the laws of the United States to escape. By section 5539 a prisoner convicted of an offense against the United States, and held in jail or penitentiary of a state, shall, in all respects, be subject to the same discipline and treatment as convicts sentenced by the courts of the state, and shall, while so confined, be exclusively under the control of officers having charge of the same under the laws of such state. Sections 5576 and 5577, Mill. & V. Code Tenn. 1884, make the escape of a prisoner confined in jail or penitentiary after conviction an offense against the state of Tennessee, and provide for its punishment. See, also, section 5575. Now, in the absence of an act of congress making the escape of a convict an offense against the United States, I do not see how, under section 1014, which alone refers to cases before trial and conviction, Stanton can be arrested upon a warrant *de novo* in Texas for having escaped from jail in Tennessee after having been convicted by the United States court in Tennessee. On the other hand, if section 5539, placing a convicted prisoner 'exclusively under the control of the officers of the state under the laws of the state,' can be construed to mean that when a convicted United States prisoner escapes from jail or penitentiary, and flees into another jurisdiction, he will have to be pursued by the state authorities under the extradition laws, we would be met by the anomalous condition that United States courts are powerless in such cases, and that the machinery of requisitions by and to the executives of the respective states would have to be put in motion on behalf of the United States. Of

course, it may be that this course might be resorted to, because we have noticed that the Tennessee statute makes the escape of a convicted prisoner an offense, and the act of congress places the prisoner under the 'exclusive control of the state officers under the laws of the state,' and there is ample provision in the laws of extradition to secure the arrest of a prisoner in that manner. But to merely state the proposition is enough to refute the idea that such a course was ever contemplated. It certainly never was considered that the United States courts should depend upon the state authorities, where one of their convicted prisoners escapes and flees into another district. In the absence of any other legislation, taking my position to be correct that section 1014 does not apply, it would indeed be a troublesome question to deal with. But upon examination we find an act of congress, embraced in section 716, Rev. St. U. S., which provides as follows: 'Courts have power to issue all writs not especially provided for by statute, which may be necessary for the exercise of their respective jurisdiction and agreeably to the usages and principles of law.' I submit that the power to cause the pursuit and capture of escaped convicts is 'necessary for the exercise of the jurisdiction of the United States courts,' and that the *capias* directed to be issued in this case was 'agreeably to the usages and principles of law,' there being no other writ or mode of procedure 'especially provided for by statute.' In this connection I would also call attention to *Case of Oaksmith*, 11 Op. Attys. Gen. U. S. 127: 'Either judge of a federal court has authority to issue a warrant for the arrest of a criminal, and under such a warrant he may be arrested in any part of the United States.' See, also, *Randolph's Case*, 2 Op. Attys. Gen. U. S. 564 (Taney, attorney general). Upon these considerations, and in the absence of any further or other authority or rule of law or practice, I submit that the *capias* for the arrest of Stanton was properly issued and directed to the marshal in Texas. If section 716 should be held not applicable, and if my construction of section 1014 is correct, then indeed this would be a curious *casus omissus* in legislation."

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### UNITED STATES v. MURPHY.

(District Court, D. Delaware. September 25, 1897.)

#### 1. DISTRICT COURTS—VACANCY IN OFFICE OF JUDGE—DESIGNATION OF OTHER JUDGE.

During the continuance of a vacancy in the office of judge of a district court for a district the limits of which are co-extensive with those of the state, no other judge has authority to discharge the functions of that tribunal, and all judicial action must remain in abeyance until the vacancy be filled, unless a judge shall have been designated and appointed pursuant to law to exercise in such district during the vacancy the powers and duties attached to the office of district judge for that district.

#### 2. SAME.

Whether or not the statutes of the United States authorize the designation and appointment of a judge for that purpose is undecided. *McDowell v. U. S.*, 16 Sup. Ct. 111, 159 U. S. 596.

#### 3. SAME—CONSTRUCTION OF STATUTE—STATUS OF PROCEEDINGS DURING VACANCY.

Section 602 of the Revised Statutes, providing that "when the office of judge of any district court is vacant all process, pleadings, and proceedings pending before such court shall be continued of course until the next stated term after the appointment and qualification of his successor, except," etc., is a remedial statute and should be liberally construed for the advancement of justice; and to this end a fair and reasonable interpretation and construction of its terms and provisions should be resorted to, in aid of its general purpose.

#### 4. SAME.

The general purpose of the section is that the administration of justice by a district court shall not, through a vacancy in the office of judge, be defeated or unduly impeded; that causes, civil and criminal, shall, notwithstanding the vacancy, be preserved in their full force and vitality, to be



effectively proceeded in when there is a judge authorized to discharge the functions of the court; that all acts and steps calling for or serving as the basis of judicial action, which otherwise must or should earlier be done or taken in court in the progress of a cause, shall or may be done or taken therein after the termination of the vacancy.

5. SAME—PROCESS—BAIL IN CRIMINAL CASES.

A recognizance taken by a United States commissioner for appearance and answer in a criminal cause is "process" within the meaning of the section; that term including, *inter alia*, all the means provided by law for compelling one arrested and held on a criminal charge to appear in court, there to be judicially dealt with.

6. SAME.

The words "proceedings pending before such court" are broad enough to include such a recognizance after it has been respited in open court until a day certain.

7. SAME—LIABILITY OF SURETIES.

While it is true that the liability of a mere surety is strictissimi juris, that he has a right to stand upon the terms of his contract, and that its terms are not to be extended by implication, the terms of his contract are not, in a legal sense, necessarily confined to the expressed words clothed in their common-law meaning; for any statute existing when the undertaking was entered into, and applicable to its scope and operation, is incorporated into and becomes a part of the contract, and the obligations created by the statute in its application to the contract have precisely the same legal effect as if expressed therein, and constitute in law a portion of its terms.

8. SAME.

Whatever may be the relevancy of the doctrine of strict construction in favor of sureties to the solution of ulterior questions, a statute having been found to apply to a contract, it has no proper application to the provisions of section 602, for the purpose of ascertaining whether that section applies to a recognizance with surety.

9. SAME—FORFEITURE OF RECOGNIZANCE.

The recognizance in question having been taken for the appearance of the defendant in the district court for the district of Delaware January 12, 1897, and having on that day been respited until March 9 last, and a vacancy through death having occurred in the office of district judge for that district February 8 last, which vacancy continued until May 21 last, and no judge having been assigned to discharge the functions of the said court during the vacancy, and June 8 last being the first day of the "next stated term after the appointment and qualification" of the present incumbent of that office, the recognizance continued in force until that day; and, the defendant having been duly called in open court on that day, and failing to appear, the recognizance was properly declared forfeited.

This was an indictment against Edward Murphy for an alleged violation of the neutrality laws. The case was heard on a motion to set aside the forfeiture of the recognizance for defendant's appearance and answer.

Lewis C. Vandegrift, for the United States.

Herbert H. Ward and Andrew C. Gray, for defendant.

BRADFORD, District Judge. The defendant, Murphy, having been charged with a violation of section 5286 of the Revised Statutes of the United States, embodying certain provisions of the neutrality laws, was arrested by virtue of a warrant issued by a United States commissioner. Afterwards, October 10, 1896, he, with Ralph De Soto as surety, entered into a recognizance in the sum of \$1,500 for appearance and answer in this court. The condition of the recognizance, aside from the specification of the offense charged, reads as follows:

"The condition of this recognizance is such that, if the said Edward Murphy shall personally appear before the district court of the United States in and for the district of Delaware aforesaid, at Wilmington, on Tuesday, the 12th day of January, 1897, at 10 o'clock a. m., and then and there to answer the charge of \* \* \*, and then and there abide the judgment of the said court, and not depart without leave thereof, then this obligation to be void; otherwise to remain in full force and virtue."

A regular term of this court began on Tuesday, January 12, 1897, and on that day the grand jury found an indictment against the defendant for the alleged offence. On the same day he pleaded not guilty to the indictment, and, a petit jury being in attendance, the district attorney asked that the trial of the case immediately proceed. Application was made on behalf of the defendant for a continuance until the next regular April term. This application was denied by the court, but, on motion of the defendant's counsel, Tuesday, March 9 last, was appointed for the trial, and the recognizance was respited until that day; the defendant and his surety consenting thereto in open court. The recognizance had been filed in this court before it was so respited. Hon. Leonard E. Wales departed this life February 8 last, being, at the time of his death, United States district judge for the district of Delaware, creating a vacancy in the office of judge of this court, which was not filled until his successor, the present incumbent, qualified and assumed office, May 21 last. The next regular or stated term of this court after the appointment and qualification of the present incumbent began Tuesday, June 8 last. On that day a petit jury was in attendance and the case against Murphy was called for trial. Thereupon his counsel moved for a continuance until the next following September term. This motion was resisted on the part of the government, and denied by the court, no sufficient ground having been laid. The defendant not being present, he and his surety, at the request of the district attorney, were called in the usual manner and, the defendant not appearing, the recognizance was ordered and declared forfeited. A motion was subsequently made on behalf of the defendant and his surety to set aside the forfeiture of the recognizance, and on that motion full argument was heard. No evidence of any kind was adduced or offered either in support of or in opposition to the motion, other than a paper filed by counsel for the recognizers, purporting to be a physician's certificate, certified to by a commercial agent of the United States in Jamaica, under his official seal, and reading as follows:

"Port Antonio, Jamaica, June 2nd, 1897.

"I certify that Captain Murphy of the S. S. Bermuda, now in Port Antonio, Jamaica, is ill & unable to journey to America.

"Fred G. Grosett, M. D.,

"L. R. C. P. & S. Edin.

"I, J. W. Walton, U. S. commercial agent at Port Antonio, Jamaica, do hereby certify that F. G. Grosett is a duly licensed and practicing physician in Port Antonio, and that the above is his true signature.

U. S. Commercial  
Agency,  
Port Antonio,  
Jamaica.

"J. W. Walton,  
"U. S. Coml. Agent."

Counsel for the recognizors contend that, as the recognizance was originally for the appearance of the defendant on a day certain, namely, January 12, 1897, and not for his appearance from day to day or from term to term, and as it was respited until another day certain, namely, March 9, 1897, the defendant, after such respite, was bound for his appearance only on the latter day, and, if there was a default, it occurred on that day and not subsequently, and to take advantage of any such default, he should have then been duly called to appear and his failure to appear noted upon the record and the recognizance then declared forfeited, and, this not having been done, he and his surety were discharged from all liability thereafter, and the subsequent declaration of the forfeiture of the recognizance June 8 last was consequently unauthorized and of no effect; and, further, that, even if the recognizance was in force June 8, the defendant's illness was a sufficient excuse for his failure to appear on that day. It is claimed, on the other hand, by the district attorney: first, that the recognizance was continued in force until June 8 by virtue of section 602 of the Revised Statutes of the United States; secondly, that, if that section did not apply, the defendant was bound by the recognizance to appear whenever the court should first be in readiness to proceed with the case; and, thirdly, that no sufficient evidence was adduced to excuse his nonappearance or to justify a remission, in whole or in part, of the penalty incurred through the forfeiture.

With respect to the alleged illness of the defendant and his inability to appear on the day of the forfeiture, it is enough to say that, if the motion now under consideration were an application under section 1020 of the Revised Statutes for the remission of the penalty, the certificate filed, standing alone, would not warrant such remission. It certainly cannot avail the recognizors on this motion. Section 602 is as follows:

"When the office of judge of any district court is vacant, all process, pleadings, and proceedings pending before such court shall be continued of course until the next stated term after the appointment and qualification of his successor; except when such first-mentioned term is held as provided in the next section."

The exception relates to such a vacancy in any district in a state containing two or more districts, and has no application to the case before this court. During the continuance of a vacancy in the office of judge of a district court for a district, the limits of which are co-extensive with those of the state, no other judge has authority to discharge the functions of that tribunal, and all judicial action must remain in abeyance until the vacancy be filled, unless a judge shall have been designated and appointed pursuant to law to exercise in such district, during the vacancy, the powers and duties attached to the office of district judge for that district. Whether or not the law authorizes the designation and appointment of a judge for that purpose is a point left in doubt by the supreme court of the United States. *McDowell v. U. S.*, 159 U. S. 596, 16 Sup. Ct. 111. But it is unnecessary to pass upon this question, as no judge was designated and appointed to discharge the functions of this court during the vacancy.

It is claimed on behalf of the recognizors that the above section applies only to civil causes. But the language employed is general and nowhere suggests such a restricted application. Its meaning cannot be so limited without doing violence to its terms. Nor can any principle of public policy be conceived of which requires the section so to be construed. The delay or failure of justice is, to say the least, as great an evil in criminal as in civil causes. The section refers to "all process, pleadings, and proceedings pending before" the court. If this provision applies to a recognizance for appearance and answer, so much of it as has such application becomes in law incorporated into the condition and operates in the same manner and with the same force as if expressly set forth therein. In *Von Hoffman v. City of Quincy*, 4 Wall. 535, 550, the court said:

"It is also settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge, and enforcement."

In *Walker v. Whitehead*, 16 Wall. 314, 317, this doctrine is stated as one of the "axioms in our jurisprudence." Those who enter into contracts are presumed to do so with knowledge of existing law applicable thereto and determining their scope and operation, and with intent to be bound by such law. This principle affects sureties as well as principals in any undertaking. A recognizance, if section 602 applies to it at all, will be continued in force against both surety and principal.

It is urged on behalf of De Soto that section 602 cannot operate as against a surety in a recognizance for appearance and answer on a day certain, without extending the undertaking of the surety or imposing on him a burden which he did not assume upon becoming a party to the contract, and, therefore, that the section does not apply; and, further, that in no event can the section be held applicable, unless its applicability is beyond all doubt, or, to use the language of counsel, unless it be "absolutely clear that the effect was the one which the legislature meant should follow from contracting," and that, if the statute "does not cover the case of suretyship without the possibility of doubt,—you might almost say without the necessity of judicial construction,—if it does not so cover that it is evident to the mind of the layman, it should not be read into the contract." Assent cannot be given to either of these propositions. The application of the section to a recognizance executed after its enactment would not, in any legal sense, either extend the undertaking of the recognizors or impose on them any burden which they did not assume as recognizors. Where a public statute prescribes and defines the scope and effect of a proposed contract, whatever may be its terms, by the execution of the contract the law so applicable to it is, as has been shown, adopted as part of it, and its operation under that law is no extension of or addition to it. It cannot be otherwise. If section 602 expressly and particularly provided that the recognizance should, in the event of a vacancy, be continued in force as against both surety and principal "until the next stated term after the appointment and qualification" of a new judge,

sarely no room would be left for argument on this point. So, if that section, upon proper construction, shall be found to have the same meaning conveyed by the express and particular provision above suggested, the same result must follow. The question, then, resolves itself into one of interpretation or construction.

It is not necessary that the applicability of section 602 to a recognizance with surety should be beyond all possibility of doubt. It is believed that no approved authority can be found to support this contention. Such a requirement would be unreasonable and productive of gross incongruity. Certainly no such rule can apply to the case of a recognizance without surety. Any rule of construction which, as applied to that section, might require the continuance of a recognizance without surety, and deny the continuance of a recognizance with surety, is unsound. If it does not apply to a recognizance without surety, what would be its practical operation in the case of a recognizance with surety? Would different rules of construction be applied to the section as between the principal and the surety in the same recognizance? If so, the section might, while continuing the recognizance as to the principal, be inoperative as to the surety, and leave the government without the security of bail. Or would the same rule of construction be applied as between principal and surety? If so, the section might be held to be inoperative as against the accused in one case, while continuing the recognizance of the accused in another and similar case, for the sole reason that the accused in the one case had furnished a surety, and in the other had not. Any rule permitting such glaring inequalities in the administration of criminal justice cannot be tolerated. It is true, as urged in argument, that the liability of a mere surety is *strictissimi juris*; that he has a right to stand upon the terms of his contract; and that its terms are not to be extended by implication. But the terms of the contract, as here referred to, are not, in a legal sense, necessarily confined to the expressed words clothed in their common-law meaning. To ascertain the terms of the contract, any statute existing when the undertaking was entered into and applicable to its scope and operation must be considered in connection with the language employed in the contract. For, as was said by the court in *McCracken v. Hayward*, 2 How. 608, 614, "no agreement or contract can create more binding obligations than those fastened by the law, which the law creates and attaches to contracts." Such obligations have precisely the same legal effect as if expressed in the contract. They form a portion of its terms. Whatever may be the relevancy of the doctrine of strict construction in favor of sureties to the solution of ulterior questions, the statute having been found to apply to a contract, it has no proper application to the provisions of section 602 for the purpose of ascertaining whether that section applies to a recognizance with surety. Such a contention seems to involve the inconsistency of assuming that the section operates in case of such a recognizance, in order to show that it cannot so operate; for, unless it enters into and forms part of the contract of the surety, the doctrine of strict construction is irrelevant.

Section 602 is a remedial statute, and should be liberally construed for the advancement of justice. Whether or not a recognizance for

appearance and answer in a criminal cause comes within its purview must be determined by a fair and reasonable interpretation and construction of the terms and provisions of the section, in aid of its general purpose. Endlich, in his *Interpretation of Statutes* (§ 107), says of remedial acts:

"The object of this kind of statutes being to cure a weakness in the old law, to supply an omission, to enforce a right, or to redress a wrong, it is but reasonable to suppose that the legislature intended to do so as effectually, broadly and completely, as the language used, when understood in its most extensive signification, would indicate."

This doctrine is too well settled to admit of dispute. It is recognized as a canon of the law. The general purpose of section 602 is plain. It is that the administration of justice by a district court shall not, through a vacancy in the office of judge, be defeated or unduly impeded; that causes, civil and criminal, shall, notwithstanding the vacancy, be preserved in their full force and vitality, to be effectively proceeded in when there is a judge authorized to discharge the functions of the court; that all acts and steps, calling for or serving as the basis of judicial action, which otherwise must or should earlier be done or taken in court in the progress of a cause, shall or may be done or taken therein after the termination of the vacancy. It cannot reasonably be supposed that congress, in enacting section 602, in fact intended that it should not apply to a recognizance in a criminal cause. It is not to be assumed that it was the purpose of the lawmaking body to sacrifice substance and retain the shadow; to throw away the kernel and preserve the shell; to continue the writs, pleadings, and other proceedings in a criminal prosecution until after the termination of the vacancy, and at the same time to render them ineffectual by permitting the escape of the accused through the expiration, during the vacancy, of the recognizance, the giving of which was exacted as the condition of his discharge from custody. Such an intention would be irreconcilable with the spirit and broad purpose of the statute. The question, then, is whether the terms and provisions of the section, properly interpreted and construed, are comprehensive enough to include a recognizance for appearance and answer in a criminal cause. As the term "pleadings" is inapplicable, if the recognizance be within the section it must come under "process" or "proceedings." The legal meaning of the word "process" varies according to the context, subject-matter, and spirit of the statute in which it occurs. The process of the court, in its narrowest sense, means the writs and mandates of the court, under the seal thereof. In this sense it is used in sections 911 and 912 of the Revised Statutes, in the former of which it is provided that "all writs and processes issuing from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof"; and, in the latter, that "all process issued from the courts of the United States shall bear teste from the day of such issue." In its largest sense, process is equivalent to procedure, including all the steps and proceedings in a cause from its commencement to its conclusion. In *Wayman v. Southard*, 10 Wheat. 1, 27, Chief Justice Marshall, in delivering the opinion of the

court, spoke of the words "modes of process," as contained in section 2 of the act of congress of September 29, 1789, as follows:

"To 'the forms of writs and executions' the law adds the words 'modes of process.' These words must have been intended to comprehend something more than 'the forms of writs and executions.' We have not a right to consider them as mere tautology. They have a meaning and ought to be allowed an operation more extensive than the preceding words. The term is applicable to writs and executions, but it is also applicable to every step taken in a cause. It indicates the progressive course of the business from its commencement to its termination; and 'modes of process' may be considered as equivalent to modes or manner of proceeding."

Section 587 of the Revised Statutes provides that the circuit court "shall proceed to hear and determine the suits and processes" certified into it from the district court, and refers to "all suits and processes, civil and criminal, depending in said district court, and undetermined." Again, in section 588 provision is made for the hearing and determination by the circuit court of the "suits, pleas, and processes, civil and criminal," "begun" in the district court. The term "process" is used in section 602 in neither its narrowest nor its broadest sense. While not including the whole cause, there can be little or no doubt that it was intended to embrace, among other things, all the means provided by law for compelling one, arrested and held on a criminal charge, to appear in court, there to be judicially dealt with. The section does not in terms restrict "process" to process of the court, and in the absence of such restriction it cannot be so limited by construction. Otherwise, a distinction without any reason to support it would exist between imprisonment under a bench warrant and imprisonment under a commitment by a commissioner. It is true that the word "pending" occurs in the section. In so far as it may apply to process, it is not to be taken in the strict sense, contended for in argument, of pending in court. Such a construction would largely defeat the manifest purpose of the section. A reasonable meaning can be assigned to the term without doing violence to the rules of construction, which will be in harmony with the general scope of the enactment. In *People v. Lacombe*, 99 N. Y. 43, 49, 1 N. E. 599, the court used the following language, peculiarly applicable to the construction of the section under consideration:

"A strict and literal interpretation is not always to be adhered to; and, where the case is brought within the intention of the makers of the statute, it is within the statute, although by a technical interpretation it is not within its letter. It is the spirit and purpose of a statute which are to be regarded in its interpretation; and if these find fair expression in the statute it should be so construed as to carry out the legislative intent, even although such construction is contrary to the literal meaning of some provisions of the statute."

"Process pending before" the court must be held to include process, in the sense last above mentioned, of which the object has not been fully accomplished,—process which is still in fieri,—process, which, if continued in force, will result either in securing the appearance of the accused to meet the demands of justice or in fastening upon the recognizors liability for his default. Imprisonment under a commitment by a commissioner to answer a criminal charge clearly is process within the meaning of the section. It is only a means of com-

pling appearance in court. If the accused, instead of going to jail, enters into a recognizance with surety for his appearance and answer, he does not thereby make satisfaction for any crime committed by him, or bar a prosecution therefor. Like imprisonment, it is but a means to secure his appearance. In *Ex parte Milburn*, 9 Pet. 704, 710, the court said:

"A recognizance of bail, in a criminal case, is taken to secure the due attendance of the party accused to answer the indictment, and to submit to a trial, and the judgment of the court thereon. It is not designed as a satisfaction for the offence, when it is forfeited and paid; but as a means of compelling the party to submit to the trial and punishment which the law ordains for his offence."

Indeed, the giving of bail by the accused for his appearance in a criminal cause is a substitution of custody at the hands of his surety for imprisonment by the jailer. In *Taylor v. Taintor*, 16 Wall. 366, 371, the court said:

"When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge; and if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another state; may arrest him on the Sabbath; and, if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is needed. It is likened to the re-arrest by the sheriff of an escaping prisoner. In 6 Mod. 231, it is said: 'The bail have their principal on a string, and may pull the string whenever they please, and render him in their discharge.' The rights of the bail in civil and criminal cases are the same."

An instructive case in this connection is *Amis v. Smith*, 16 Pet. 303. It furnishes a strong analogy. In that case it was held that a bond with security, as provided for by a statute of Mississippi, conditioned for the forthcoming, on the day appointed for the sale, of personal property levied on by virtue of final process in a civil cause, was part of the final process and as such adopted, by section 3 of the act of congress of May 19, 1828, in a civil cause in a district court of the United States exercising circuit court powers in Mississippi. There, personal property was discharged from the custody of the marshal on an undertaking that it should be delivered to him on the day appointed for the sale. Here, a person charged with a criminal offence is released from arrest on an undertaking that he shall appear and answer in court. There, the object of the forthcoming bond was that the property should be delivered to the marshal to be dealt with according to law. Here, the object of the recognizance is that the accused shall deliver himself or be delivered to the court to be dealt with according to law. There, the forthcoming bond was substituted for the custody of the property by the marshal. Here, the recognizance is substituted for imprisonment of the accused by the jailer. The court said:

"If the forthcoming bond is applicable at all to the proceedings of the courts of the United States, it must be in the character of final process. \* \* \* We think this section of the act of 1828, adopted the forthcoming bond in Mississippi as part of the final process of that state, at the passage of the act. And we understand by the phrase, 'final process,' all the writs of execution then in use in the state courts of Mississippi which were properly applicable to the courts of



the United States; and we understand the phrase, 'the proceedings thereupon,' to mean, the exercise of all the duties of the ministerial officers of the states, prescribed by the laws of the state, for the purpose of obtaining the fruits of judgments. And among these duties, is to be found one prescribed to the sheriff, directing him to restore personal property levied on by him, to the defendant, upon his executing a forthcoming bond according to law, and the further duty to return it to the court forfeited, if the defendant fail to deliver the property on the day of sale, according to the condition of the bond. These are certainly proceedings upon an execution, and therefore the forthcoming bond must be regarded as part of the final process. It aids materially in securing the payment of the money to satisfy the judgment, and it is part of the process by which the plaintiff is enabled to obtain the payment of the money secured to him by the judgment. But is this forthcoming bond a judgment as well as process? \* \* \* The proceeding which produced this bond was purely ministerial; the judicial mind was in no way employed in its production. It does not, then, possess the attributes of a judgment, and ought, therefore to be treated in this court as final process, or, at least, as part of the final process. \* \* \* Regarding the forthcoming bond as part of the process of execution, a refusal to quash the bond is not a judgment of the court, and much less is it a final judgment; and, therefore, no writ of error lies in such a case."

Attention was drawn in the argument to section 587 of the Revised Statutes, which provides that, where suits and processes, with the proceedings thereon, are certified from a district court into a circuit court on account of disability of the district judge, "all bonds and recognizances taken for, or returnable to, such district court, shall be held to be taken for, and returnable to, said circuit court, and shall have the same effect therein as they could have had in the district court to which they were taken," and it was urged on behalf of the recognizers that, as provision was made for recognizances in express terms in that section, they would have been expressly referred to in section 602 if the latter section had been intended to apply to them; and that, as no such express reference is contained therein, the section cannot be held applicable to them. But no such inference can justly be drawn from section 587. Its purpose with respect to recognizances was, under the circumstances therein set forth, to make them operative in a court other than that for which they were taken or to which they were returnable according to their express terms. Such a provision was probably necessary to accomplish the intended result. Under section 602, however, a recognizance taken for or returnable to a district court is not diverted from it, but, in case of a vacancy, is simply continued in force, and may well be included in the express provision for the continuance of process.

In view of the foregoing considerations, the recognizance entered into by the defendant and his surety must be held to be process within the meaning of section 602, and as such, by operation of law, continued in force until the last regular June term of this court. The fact that the recognizance was respited can in no wise affect the result.

It may further be observed that the words "proceedings pending before such court" are in themselves broad enough to include the recognizance in question. It was filed in court and thereafter respited until March 9, the defendant and his surety both consenting thereto in open court. The legal effect of this proceeding was to alter

the condition of the recognizance by enlarging the time for the appearance of the defendant. Thus, the recognizers in open court undertook that the defendant should appear in court on the day to which the recognizance was respited. On that day the vacancy existed. The recognizance, as respited, was a proceeding pending before the court during the vacancy. In *Com. v. Cayton*, 2 Dana, 138, it was held by the court of appeals of Kentucky that a recognizance for appearance in a criminal cause was "a matter depending in court," and that a statute of that state on the subject was broad enough to include it. The court said:

"By his recognizance, rightly understood, Cayton undertook to appear in court on the first day of the first court that should be held; and, therefore, not having been exonerated by the nonattendance of the judge at the first term, it was his duty to appear on the day on which the motion was made by the attorney for the commonwealth; for that was the first day of the first court succeeding the date of his recognizance. But, if there could be any serious doubt as to the correctness of this interpretation of the condition of the recognizance, the ninth section of the act of 1798, Dig. 370, should be deemed sufficient to show that, by operation of law, the time for appearance was postponed. The recognizance was '*a matter depending in court.*'"

Therefore, if it should be assumed that the recognizance was not continued in force as "process," it retained its vitality by virtue of section 602 as a part of the "proceedings pending before such court." Examination has failed to disclose the existence of any statute which, under the circumstances of this case, in any manner controlled or modified the proper operation of that section upon the recognizance in question. Even were it conceded that the statutes of the United States authorized the assignment of a judge to exercise the powers and duties of this court during the vacancy,—a point by no means clear,—the result would be the same. No judge was assigned. The recognizance, therefore, was continued in force until the next stated term after the appointment and qualification of the present incumbent, and, the defendant having failed to appear in this court on the first day of that term, it was then and there duly and legally ordered and declared forfeited.

The conclusions reached render it unnecessary to the decision of the motion before the court to pass upon the question whether in the absence of section 602 the recognizance would have been in force on the first day of the last June term. It may be remarked that the operation of that section in the case of a recognizance adds but little to the liability which would attach to a surety therein where a vacancy does not exist; for, the recognizance remaining in force, the surety has the right at any time before a default to relieve himself of all liability by the surrender of his principal. The motion to set aside the forfeiture is denied.

## DOW et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. September 13, 1897.)

No. 922.

## 1. VIOLATION OF NATIONAL BANK LAWS—MISAPPLICATION OF FUNDS—FICTITIOUS CHECKS.

An indictment under Rev. St. § 5209, against officers of a national bank and a depositor, charged willful misapplication of the funds of the bank, with intent to injure and defraud the bank. On the trial it appeared that the depositor made and deposited fictitious checks, which were credited to his account. *Held*, that it was necessary to show that some portion of the funds were withdrawn from the possession or control of the bank, or a conversion in some form was made thereof, so that the bank would be deprived of the benefit thereof.

## 2. SAME—INSTRUCTIONS—STATE STATUTES.

In such a case, a statement by the court to the jury that under a state statute it is made a misdemeanor to draw a check on a bank where there are no funds to meet it, tends to mislead the jury, and constitutes error.

## 3. SAME—OVERDRAFTS.

The mere fact of payment by the officers of a national bank of a check which creates an overdraft does not necessarily constitute a fraudulent misapplication of the funds of the bank.

## 4. SAME—EVIDENCE.

Under such an indictment, where the issues involve the intent with which certain acts were done, the trial court is justified in giving a reasonably wide latitude to the introduction of evidence tending to show the relations of the parties, the mode in which the business was carried on, and the knowledge which the officers had of the character of the operations carried on by the depositor.

## 5. SAME—FALSE ENTRIES—OVERDRAFTS.

If, in an indictment under Rev. St. § 5209, it is the purpose of the government to charge the making of false entries in the books of the bank because of the receiving and crediting of checks drawn thereon by parties who had no funds there, the indictment should set forth a description of the checks, with an averment of the reasons why they were to be deemed false or valueless.

## 6. SAME.

If an overdraft is made and allowed under circumstances justifying it, or even under circumstances making it a fraud upon the bank, the entry of the transaction just as it occurred on the books of the bank is not a false entry, under Rev. St. § 5209.

## In Error to the District Court of the United States for the District of Colorado.

From the record in this case it appears that in 1893, and for some years previous thereto, Charles H. Dow was the president and Sidney B. McClurken was the receiving teller of the Commercial National Bank of Denver, Colo., and Orlando E. Miller was the president of the Miller Hernia Treatment Company, the headquarters of this company being in the city of Denver. On the 18th day of July, 1893, the named bank closed its doors, and its affairs were placed in the hands of a receiver, appointed by the comptroller of the currency. Upon an examination of its books, it appeared that Miller and the Hernia Treatment Company were indebted to the bank in the sum of \$125,000, or nearly so; the capital stock of the bank being \$250,000. According to the testimony of O. E. Miller, he began doing business with the Commercial National Bank in 1891, and it follows, therefore, that in the space of two years, he had drawn from the bank the sum of \$125,000 in excess of any payments made to the bank during this period. The general mode in which the business was carried on is described in the testimony of Miller, from which it appears that during several months preceding the closing of

the bank it was his daily custom to make deposits of checks signed in the name of other parties, but not in fact drawn against funds in the bank, and also to deposit checks drawn upon other banks located in Denver; or, to use the language of Miller, when giving his testimony: "In November and December, when Eastern bills began to press, and our collections were slow, I would pay or cause to be paid off through the Commercial or some of these banks, particularly the Commercial, these outside claims, and would carry it along in a kite. During November I wanted some three or four thousand dollars that had gone beyond what we had money to deposit. Then in December it commenced to enlarge, and I borrowed money from the various brokers here, who had loaned me money before. I would carry along these amounts in a kite until it would get from five to ten thousand, then borrow the money from some of the brokers, and take the kite up. Then, after a while, their loans would fall in, and I would have to pay them. Then an Eastern demand would come in, and I would give a check on the Commercial. When that reached the Commercial, I would check on the American in order to gain time; next day give the American a check on the First, the next day a check on the People's to the First, and then give a check to the People's on the Commercial, taking four or five days in rounding up that check; and as the claims came in they kept adding to the kite, and kept growing larger and larger until it reached its highest point on the 12th of May. On that day I owed the Commercial National something like \$125,000, including the amount they paid through the clearing house on that date, which was \$50,000." The evidence also shows that Miller was in the habit of depositing almost daily checks drawn by third parties, largely on the Commercial National, which, however, were not drawn against funds actually in the bank, but the same were credited up in the Miller account, which in this way was caused to show a large amount to the credit of that account, when in fact no such sum belonged to the Miller Company; and against this fictitious balance certified checks were given to Miller, and, being by him transferred to third parties, the bank was obliged to pay them.

At the May term, 1893, of the district court for the district of Colorado, three indictments, based upon the provisions of section 5209 of the Revised Statutes of the United States, were returned by the grand jury of that district against Dow, McClurken, and Miller, two of which, being numbered 1,273 and 1,301, charged the defendants with the illegal misapplication of the funds of the Commercial Bank, and the other, numbered 1,302, charged the making of false entries on the books of the bank. In the several counts—five in number—of the indictment numbered 1,273, Dow is charged as the principal, and the other two as aiders and abettors; and in indictment numbered 1,301, containing four counts, Dow and McClurken are charged as principals, and Miller as an abettor; and in the third indictment, numbered 1,302, containing four counts, McClurken is charged as principal, and the other two as abettors. By order of the court, indictments Nos. 1,301 and 1,302 were consolidated with No. 1,273, and the government was required to file a bill of particulars with respect to the items relied on in support of the allegations contained in the several counts charging a misapplication of the funds of the bank. At the November term, 1896, of the district court in Colorado, the consolidated indictments came on for trial before the court and jury, and a general verdict of guilty was returned by the jury, and subsequently sentences of imprisonment were entered against each of the parties hereinbefore named, and thereupon they united in suing out a writ of error, bringing the case to this court, and they now rely, for a reversal of the judgments entered, upon alleged errors in the admission and rejection of evidence, and in the instructions of the court upon the law of the case.

Charles Hartzell, George P. Steele, and Alexander McArthur, for plaintiffs in error Chas. H. Dow and Sidney B. McClurken.

E. L. Wells, M. F. Taylor, and John G. Taylor, for plaintiff in error Orlando E. Miller.

Greeley W. Whitford, U. S. Dist. Atty., and Henry V. Johnson, Special Asst. U. S. Dist. Atty.

Before SANBORN and THAYER, Circuit Judges, and SHIRAS, District Judge.

SHIRAS, District Judge, after stating the case as above, delivered the opinion of the court.

The principal point relied on by plaintiffs in error in support of their contention that the trial court erred in the view of the law taken by it with respect to the counts charging a misapplication of the funds of the Commercial Bank is based upon those portions of the charge wherein it was said that:

"From the first hour that he (Dow) knew of this account,—knew that the checks drawn by Mr. Miller were false and fictitious,—if he allowed them to be accepted in his bank, he thereby confessed his guilt, under this statute, of misapplying the funds of the bank. I say to you, gentlemen, that every check presented by Mr. Miller, whether upon this bank or any other bank, with knowledge on the part of Dow and McClurken, and with their assent, upon which he received credit in the bank, was a direct and flagrant misapplication of the funds of the bank in defiance of this law."

The statute thus referred to, being section 5209 of the Revised Statutes, was before the supreme court for construction in the cases of *U. S. v. Britton*, 107 U. S. 655, 2 Sup. Ct. 512, and *U. S. v. Northway*, 120 U. S. 327, 7 Sup. Ct. 580, and it was therein held "to be of the essence of the criminality of the misapplication that there should be a conversion of the funds to the use of the defendant, or some person other than the association, with intent to injure and defraud the association, or some other body corporate or natural person." In the several counts in the indictments charging a misapplication of the funds of the Commercial National Bank it is averred that the misapplication was made with the intent to injure and defraud the association, meaning the national bank, and it is clear, under the ruling of the supreme court in the cases just cited, that the charges of misapplication contained in these indictments could not be made out unless it appeared that the funds of the bank had been depleted, withdrawn, or diminished in some form by reason of the action of Dow, aided and abetted by McClurken and Miller. The jury were instructed that the fact that Miller received credit in his account on the books of the bank for checks drawn on that bank or on other banks constituted a flagrant misapplication of the funds of the Commercial Bank, within the meaning of section 5209; yet it is apparent that merely giving credit to Miller on the books of the bank for the amount of the checks did not lessen the funds held by the bank, nor in fact defraud the association, in any form. To complete a misapplication of the funds of the bank, it was necessary that some portion thereof should be withdrawn from the possession or control of the bank, or a conversion in some form should be made thereof, so that the bank would be deprived of the benefit thereof. It is not necessary in all cases that the money should be actually withdrawn from the bank. Thus if, by connivance between a bank official and a customer of the bank, the latter is allowed to draw checks on the bank, when the drawer has not the funds to meet the checks, and the same are given by the drawer to third parties in payment of claims due them, and the third parties, instead of getting the cash on the checks, have them cred-

ited up to their accounts in the bank, this completes the misapplication of the funds of the bank, because the bank has become bound for the payment of the sums thus credited to the third parties; and the result is just the same as though the holders of the checks had obtained the money thereon, and had subsequently deposited it to their credit. In such cases the funds of the bank would be lessened, and thereby the criminal misapplication might be completed. If, however, the customer presents the checks himself, and has the same credited on his account, the crime of misapplication is not completed thereby, because the bank is not under legal obligation to pay out any of the amounts wrongfully credited to the customer, and may refuse to pay checks drawn against the inflated account, and may at any time charge back against the customer the amounts of the checks upon which nothing was in fact realized by the bank. To complete the criminal misapplication of the bank funds in the supposed case, some sum must be paid by the bank to the customer, or to third parties on his order, or must be credited to third parties under such circumstances that the bank becomes bound for the payment thereof. If the jury had been instructed that, if the evidence showed that Dow, as president of the bank, had knowingly permitted Miller's account with the bank to be inflated by crediting him with large amounts of false or fictitious checks, or checks drawn by parties who had no funds in the bank against which to draw, and Dow had furnished Miller with certified checks on the Commercial Bank, or had otherwise permitted him to draw large sums from the bank, so that in fact the funds of the bank had been depleted or withdrawn, and this was done under circumstances showing an intent on part of Dow to defraud the bank by thus allowing its funds to be depleted, a case of misapplication of the funds, within the meaning of the statute, had been made out, no just exception could have been taken thereto. The positive instruction, however, that merely crediting up on Miller's account the checks in question amounted to a misapplication of the funds of the bank, within the meaning of the statute, was clearly contrary to the construction placed on the statute by the supreme court, and we are compelled, therefore, to sustain the exceptions taken to the several parts of the charge, wherein it was stated that the reception and crediting of the checks on Miller's account constituted a violation of the statute; and, as these parts of the charge were directed to the very gravamen of the counts charging a misapplication of the funds, the error therein was material, and necessitates the granting of a new trial in the case.

Exceptions were also taken to that portion of the charge wherein the court called the attention of the jury to the fact that by the provisions of a statute of the state of Colorado it was made a misdemeanor for any one to draw a check or checks on a bank in which he had no funds to meet the check or checks. The criminality of the acts done by Dow were to be measured by the provisions of the statute of the United States, and, unless these acts came within the prohibition of the federal law, a verdict of guilty could not be rendered in this case on the ground that the provisions of the statute of Colorado were violated by the defendants. It is doubtless true that

the trial court referred to the Colorado statute merely as an illustration of the general proposition laid down in the instruction to the effect that drawing checks on a bank wherein the drawer has no funds is an attempt to obtain money by deceit and false pretenses. The danger, however, is in the fact the jury might infer therefrom that, as the drawing a check on a bank wherein there were no funds to meet it was forbidden by the statute of Colorado, the drawing of such a check and the crediting it to the account of the drawer constituted an actual misapplication of the funds of the bank, within the meaning of section 5209, which would be clearly contrary to the ruling of the supreme court in the cases already cited. The reference to the state statute is therefore open to the criticism that it was liable to mislead the jury. Furthermore, in the instruction excepted to, the court stated that:

"If there were no statute on the subject, the drawing of a check upon a bank where there are no funds is an attempt to get money by false pretenses. It is an attempt to get money by deceit. It is swindling; that is what it amounts to,—it is swindling. And if the check is in any manner paid, the man who does it is a swindler; and if it is done with the knowledge of the bank officers, and they assent to it, and recognize the checks when drawn, they are in the same category. They also participate in the fraud."

From this broad statement upon the subject, given without restrictions or qualifications, the jury might well understand that in all cases the drawing of a check, when at the time the drawer had no funds to meet it, would be a fraud on part of the drawer, and the recognition of the check by the bank officials, by crediting it to the account of the holder, would constitute a criminal misapplication of the funds of the bank, yet it is apparent that in many cases such acts would not be justly open to the charge of fraud, and in no case could they constitute a criminal misapplication of the funds of the bank, unless the funds of the bank had been lessened thereby. In nearly all cases wherein overdrafts occur, checks are drawn on the bank when in fact the drawer at the time has no funds on deposit to meet the check; and yet not all overdrafts are frauds, nor do the officers of the bank necessarily become participants in a fraud simply because they give recognition to checks drawn by their customers which are in fact overdrafts, because drawn upon the bank when the drawer had not funds therein to meet the checks. Of course, frauds and criminal misapplications of bank funds by the officials thereof may be committed by the recognition or payment of checks drawn on the bank when there are not funds to meet the same; but the criminal wrong, including the intent, must appear from all the facts surrounding the transaction, and cannot be inferred, as a matter of law, from the mere fact that when the check was drawn there were not funds on deposit to meet the check; and the charge given the jury in this case on this subject must be held misleading and erroneous because it is so broadly stated as to justify the jury in believing that the mere drawing of a check creating an overdraft is a fraud on part of the drawer, and the payment thereof by the bank officers of necessity constitutes a fraudulent misapplication of the funds of the bank.

Error is also assigned on the action of the court in admitting evidence tending to show the condition of the accounts of the Miller Hernia Company with the Commercial National Bank, and various transactions in which the defendants were participants at times previous to May 16, 1893, on the ground that the period of limitation prescribed by the act of congress adopted April 13, 1876 (19 Stat. 32), to wit, three years, would bar the application of the indictments to acts happening at dates more than three years before the finding of the indictments. The jury were expressly instructed that they were confined to the consideration of the items or transactions named in the bill of particulars, all of which are within the statutory period; and, as the limitation does not apply to evidence submitted in support of the charges in an indictment, it is clear the exception is not well taken on this ground, nor for the further reason urged that the evidence was not directed to the particular items covered by the indictments. The issues involved the intent with which certain acts were done, and the trial court was justified in giving a reasonably wide latitude to the introduction of evidence tending to show the relations of the parties, the mode in which the business was carried on, and the knowledge which the officers of the bank had of the character of the operations carried on by Miller, and which resulted so disastrously to the bank. *Coffin v. U. S.*, 162 U. S. 664, 673, 16 Sup. Ct. 943.

Exceptions were also taken on the trial, and error is now alleged upon the construction placed by the court on counts 3 and 4 of indictment No. 1,302, wherein it is charged that McClurken made certain false entries in the books of the bank, it being charged in the third count that under date of June 22, 1893, McClurken, as receiving teller, had entered in his cash book that the cash items received on that day amounted to \$26,011.75, whereas in fact they amounted to only \$11.75; and in the fourth count it is charged that McClurken, as receiving teller, made an entry showing that on the 27th day of June, 1893, the cash items received amounted to \$27,469.05, whereas in fact there had been received in cash items the sum of \$469.05 only. The evidence showed that on each of the named days checks and cash to the amount of the entry were received by the teller, but a large part of the checks were drawn upon the Commercial National Bank by Miller and other parties, having at the time no funds in the bank, and the court charged the jury that McClurken, as receiving teller, could know, "and it was his duty to know, whether they were good checks or not. So that, if you believe from the evidence that he accepted as any part of this amount the false and fictitious checks, and gave credit upon them in this entry upon his books, I say to you that that entry is false and fictitious within the meaning of the law." It is the settled rule that indictments should be free from ambiguity, and be so expressed as to leave no doubt in the mind of the court and of the accused of the exact offense intended to be charged, and the general character of the facts upon which the government bases the case; for, unless this is done, the accused is not advised of the matters which he is required to meet in defending himself. *U. S. v. Carl*, 105 U. S. 611; *U. S. v. Cruikshank*, 92 U. S. 542; *U. S. v. Hess*, 124 U. S. 483, 8 Sup. Ct. 571; *Evans v. U. S.*, 153 U. S. 584, 14 Sup.



Ct. 934, 939. If it was the purpose of the government to charge the making of false entries in the books of the bank, for the reason that the receiving teller received and credited checks drawn on the bank by parties who had no funds in the bank, the correct rule of pleading would require the setting forth in the indictment of a description of the checks which it was claimed were fictitious or fraudulent, with an averment of the reasons why they were deemed to be false or valueless, in order that the accused might know that the character of the checks was attacked. In the third and fourth counts of indictment No. 1,302 the direct charge is that the entries of cash showed certain amounts, whereas in fact the cash items were very much less. The language used in these counts, taken in its ordinary meaning, charges that the falseness of the entry consists in largely overstating the total amount of cash items, whereas the court instructed the jury, in effect, that, even though checks and cash to the full amount of the entry made were in fact delivered to the receiving teller, and by him entered on the cash book, yet the entry would be false, if any portion of the checks so delivered turned out not to be good, thus making an issue with respect to the character of the checks, which is not made in the averments of the indictment. But, if it be admitted that it was open to the government to claim that the false entries charged in counts 3 and 4 could be sustained by evidence showing the depositing with the receiving teller of checks false or fictitious, nevertheless the instructions of the court upon this view of the case cannot be sustained, because the court expressly instructed the jury that McClurken, as receiving teller, "was bound to know the accounts of depositors, and whether the checks were good or not; and, if he received any of them which overdrew the account of the depositor, and gave credit upon that check to some other person, thereby he made a false entry in his books." In effect it was ruled that the reception and crediting to a third party of a check which created an overdraft was the making of a false entry on the books of the bank. If an overdraft was permitted or arranged for, the entry of the transaction could not be a false entry, for it would only be making an entry as evidence of a transaction which had in fact taken place. The statute law, and that based upon the common custom of bankers, do not forbid overdrafts absolutely and under all circumstances. Certainly, if an overdraft is made and allowed under circumstances justifying it, it cannot be said that the entry on the books of the bank of the checks constituting the overdraft is a false entry; and, on the other hand, if an overdraft is in fact made and allowed, under circumstances which make the transaction a fraud upon the bank, the entry of the transaction just as it occurred is not a false entry. The portions of the charge to the jury relating to the making of false entries in the books of the bank come within the criticism found in the ruling of the supreme court in *Coffin v. U. S.*, 156 U. S. 432, 15 Sup. Ct. 394, wherein it is said:

"Whilst we consider the charges asked were in some respects unsound, yet the exception reserved to the charge actually given by the court was well taken, because therein the questions of misapplication and of false entries were interblended in such a way that it is difficult to understand exactly what was intended. We think the language used must have tended to con-

fuse the jury, and leave upon their minds the impression that, if the transaction represented by the entry actually occurred, but amounted to a misapplication, then its entry exactly as it occurred constituted a false entry; in other words, that an entry would be false, though it faithfully described an actual occurrence, unless the transaction which it represented involved full and fair value for the bank. The thought thus conveyed implied that the truthful entry of a fraudulent transaction constitutes a false entry within the meaning of the statute. We think it is clear that the making of a false entry is a concrete offense, which is not committed where the transaction entered actually took place, and is entered exactly as it occurred."

For these reasons the judgment and sentences entered by the trial court must be reversed, and the case is remanded to the district court of Colorado, with instructions to grant a new trial.

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HART & HEGEMAN MANUF'G CO. v. ANCHOR ELECTRIC CO. et al.

(Circuit Court, D. Massachusetts. August 20, 1897.)

No. 696.

1. PATENTS—CONSTRUCTION OF CLAIMS—MECHANICAL EQUIVALENTS.

In a patent which avowedly relates merely to improvements in details for the purpose of securing simplicity and economy in construction and efficiency and certainty in operation, the patentee cannot broaden his patent so as to cover equivalents of all kinds by a statement that other changes may readily be devised and still embody the general features of his invention.

2. SAME—COMMERCIAL SUCCESS.

The rule stated in *De Loria v. Whitney*, 11 C. C. A. 355, 63 Fed. 611, that the fact that a patent has been the source of great commercial success, and has laid the foundation of a prosperous business, may be evidence of novelty, utility, and patentability, but can rarely, if ever, assist in determining the proper construction of the patent.

3. SAME—INFRINGEMENT—CLAIM FOR MECHANICAL DETAILS.

The rule applies, that, where the claim is a narrow one, concerned with mere mechanical details, a change in such details is a substantial, and not merely a colorable, change.

4. SAME—ELECTRIC SWITCHES.

The Hart reissue, No. 11,395 (original No. 459,706), for an electric snap switch, construed narrowly, and *held* not infringed.

This was a bill in equity by the Hart & Hegeman Manufacturing Company against the Anchor Electric Company and others for alleged infringement of reissue patent No. 11,395, dated February 13, 1893, to Jerrold W. Hart, for improvements in switches for making and breaking electric circuits supplying electric lights and similar electrical apparatus. The original patent was granted September 15, 1891, and numbered 459,706.

Chas. E. Mitchell, Bartlett & Brownell, and Chas. L. Burdett, for complainant.

Edward P. Payson, for defendants.

PUTNAM, Circuit Judge. This patent purports to be for new and useful improvements in electric snap switches. It contains but one claim, which is as follows:

"The herein-described snap switch, consisting of a stop plate having stop shoulders, a central hub, and operating handle, an eccentric moving with said hub, a switch plate, a spring plate, a spring, and a catch operated by said ec-

centric for releasing and stopping the switch plate, substantially as described, and for the purpose specified."

All we find in the specification showing the nature of the invention is in the following language:

"My invention relates to improvements in electric snap switches, and the objects of my improvements are simplicity and economy in construction, and general efficiency and certainty in operation."

We find nothing in the specification pointing out any new function, or any specific advance on the state of the art, and no indication of anything except simplicity and economy in construction, and general efficiency and certainty in operation, all of which may come from mere improvements in details. Neither do we find anything indicating wherein the pith of the alleged improvement consists, unless it be in the following language: After describing different constructions, by one of which the catch on the first movement of the handle and eccentric is moved radially inward, instead of outward, the specification says, "In both of the constructions shown the catch is moved radially outward and inward by the positive movement of the eccentric." This would seem to indicate that the eccentric, or the peculiar form of the eccentric, was the central point of the complainant's alleged improvements; but in the very next paragraph of the specification occurs the expression, "this eccentric or crankpin," indicating that the eccentric is only generic, and not necessarily involved in the pith of his claim. Near the close of the specification, after describing the working of the device, the patentee emphasizes it by saying, "The construction is simple, efficient, and certain in operation." He nevertheless concludes as follows:

"Having indicated certain changes in the application of this eccentric or crank pin for engaging and disengaging the catch, it is evident that other changes may be readily devised, and still embody the general feature of my switch."

An attempt like this to cover equivalents of all kinds may well be supported by the courts when they can see that the pith of the invention means such an advance in the state of the art as justifies them in so doing; but, from all that appears on the face of this patent, this attempt of the patentee thus to broaden out his patent may be entirely unauthorized and ineffectual. Such a statement does not assist to construe a patent unless it is first determined whether the patent relates to a substantial advance in the state of the art, or concerns only improvements in mere details. In the determination of this latter question lies the turning point of this case. In order that the complainant's patent may be thoroughly apprehended, we abstract from the specification a statement of its operation, omitting references to the drawings, as follows:

"By turning the handle, the central hub and parts rigidly connected therewith move with it, carrying the eccentric and spring pin, thereby compressing the spring and also moving the switch plate laterally, thereby carrying the catch radially outward to withdraw it from one of the stop shoulders of the stop plate. As the central hub is moved onward the catch is wholly withdrawn from the stop shoulder of the stop plate, so as to release the switch plate and permit it to snap around under the full force of the spring, its movement being arrested as the catch comes in contact with the succeeding stop shoulder on the stop plate. When the switch plate thus moves nearly one-quarter of a revolution on its axis, the central hub is relatively stationary, so that the eccentric

becomes for the time being the axis of the switch plate, and consequently the catch is drawn radially inward towards the central hub as the switch plate advances, and is stopped by the succeeding stop shoulder. By turning the handle again the parts will operate as before, and the switch plate will be stopped at the next quarter of a revolution on the succeeding stop shoulder, whereby the moving contact pieces are brought into or out of contact with the stationary contact pieces, as in ordinary switches of this class."

Turning now from the patent itself to the propositions which have been submitted to us by the complainant in its proofs and at the hearing before us, we are unable to deduce from them any facts or propositions broadening out the nature of the invention. The common arguments that the patent has been the source of great commercial success, and has laid the foundation of a prosperous business, do not assist us, not merely for the reasons generally stated as meeting such propositions, but because, at the most, propositions of that class tend only to support novelty, utility, and patentability, all of which, for the purposes of this case, we think must be conceded. They rarely, if ever, assist in determining the proper construction of a patent. *De Loria v. Whitney*, 11 C. C. A. 355, 63 Fed. 611, 621. It has been fully explained to us that the practical necessities for a useful switch of this character are that it shall move with a snap, and be arranged to be properly locked, so that the movement and the locking shall not depend on the will or skill of the operator, and, moreover, that it is preferable that it should always revolve in the same direction. But the witnesses for the complainant, in speaking of these desirable and necessary qualities, make no claim that they were first found in the switch at issue, or even that they were first combined in that switch. The complainant's specification, in one of the extracts which we have made from it, contains the words, "the general feature of my switch." The complainant's expert, on being asked on cross-examination what these words refer to, answered as follows:

"I think it means the general combination of the parts shown and described, or, in other words, substantially the switch pointed out and referred to in the claim. I presume the word was originally written in the plural, and by a clerical error the 's' was omitted, because no one feature of the switch, considered separately, is particularly pointed out in contradistinction to any other feature, and furthermore the word 'general,' in connection with a machine, would not be likely to be used as to any one part."

Again the same expert stated as follows:

"In another answer I understand Mr. Freeman to say that the only novelty of the switch of the Hart reissue resides in the specific details of construction of the various parts. I do not agree with him in this conclusion, as in my opinion the novelty of the switch of the Hart reissue resides in the combination of parts, or, rather, resides in the switch as a whole, when consisting substantially of the parts shown and described in the patent combined together, without the necessary addition of other elements to produce the switch described."

It thus appears that the complainant's principal witness fails to point out any particular function with reference to which the complainant's device is an advance on the state of the art, and enhances the impression, which is derived from the patent itself, that what the patentee did concerns only improvements in mere detail. The file wrapper shows an interference declared by the patent office as against certain claims which originally accompanied the application,

and a consequent determination of the office against those claims, by virtue of which they were rejected, which increases in the mind of the court the impression as to the nature of this patent formed by reason of the matters already stated. In addition to this, the forms of snap switches and of other snap movements accomplished by the aid of springs, stops, and catches, with or without eccentrics or crank pins, are so innumerable, and have established a common ground so extensive, that the presumption against finding in any device of that character a substantial advance on the state of the art is too strong to be overcome by anything except a clear and explicit case. If there is anything of that nature in the case at bar which the court has overlooked, the complainant must attribute it to a lack of a frank and open statement of it on the face of the patent. Therefore, on the questions of the nature and extent of the invention, and of the consequent rules to be applied in construing the claim in issue, the case is quite analogous to *Masten v. Hunt*, 51 Fed. 216, affirmed by the court of appeals for this circuit in *Masten v. Hunt*, 5 C. C. A. 42, 55 Fed. 78; and the rule of construction to be adopted is that so often stated by the courts, and repeated by the court of appeals in this circuit in *Ball & Socket Fastener Co. v. Ball Glove-Fastening Co.*, 7 C. C. A. 498, 505, 58 Fed. 818, 825, as follows:

"As the claim comes down to the merest mechanical details, a change in such details is not a colorable departure, but a substantial one, so far as this patent is concerned."

The respondents manufacture a device clearly described and explicitly covered by a patent issued to one Marshall, of a subsequent date to that held by the complainant. In view of the nature of this latter patent, which in no way assumes to cover a mere improvement on the device of the complainant, the same presumption appears to exist in favor of its validity as exists in favor of the validity of that in suit. It would not, however, be safe for the court to proceed on this presumption alone. The principle of action of the respondents' device is undoubtedly substantially the same as that of the complainant's; and the respondents' also has every element specified in the complainant's claim, or its well-known equivalent, except the spring plate. The respondents use a spiral spring, while the complainant uses a flat one. These, of course, are ordinarily regarded as equivalents for each other. Moreover, if the court was able to ascertain that the complainant's device was of a broad character, indicating a substantial advance in the art, it might be justified in holding that, although the spring plate is omitted in the respondents' device, yet inasmuch as, taken as a whole, it has what is equivalent to the complainant's device as a whole, including the substance of it, the complainant's patent should therefore be construed liberally and broadly, so that infringement might properly be found. But, looking at the complainant's patent in the light in which we are compelled to look at it, as already explained, the question arises whether there is an equivalent in the respondents' device for the spring plate stated as an element in the complainant's claim. The complainant's expert maintains that there is such an equivalent. In regard to the spring plate, he says that its function is to unite one end of the spring with

the central shaft or hub, so that the spring may exert a pressure tending to rotate the shaft. All this is found in the respondents' structure,—that is to say, one end of the spring is united with the central shaft in such a way as to exert pressure tending to rotate it; but there is no theory of the definition of words by virtue of which the function of the spring plate can be held to be what is so stated by the respondents' witness. The natural interpretation of the term "spring plate," in this connection, is a plate which holds up the spring. That is the function which is performed by it here, and there is no rule for any technical interpretation of the term, so far as we are aware, or which is pointed out to us, which gives it any other signification. It is true that the function of the spring itself in the respondents' device is the same, and it operates substantially in the same way, as in the complainant's device; but by directly connecting one end of the spring with the central shaft, which is practical, by reason of its being a spiral spring, as we have already said, the spring plate is dispensed with by the respondents. Therefore, on carefully analyzing the testimony of the complainant's expert, it is to the effect only that several parts of the respondents' device, taken together, are the equivalent of several parts of the complainant's device, taken together, which does not meet the case. The ordinary rule is that, with a claim of this character, where, for aught that appears, the invention is narrow, every element expressly specified as such must be met by an equivalent element in the alleged infringing device; and it is not sufficient that a less number of elements in the infringing device is the equivalent, taken together, of a larger number of elements in the patented device, also taken together. Complainant's device, and also its patent, use, as we have already said, a flat spring, with no expressed suggestion that a spiral spring could be substituted for it. The relations of the flat spring are all carefully explained in the drawings and specification. Consequently, the spring plate, with an upright stud inserted in it, to which stud one end of the flat spring can be conveniently secured, is carefully described as one of the parts of the device. The specification also states that this spring plate is provided with a slot, through which passes another stud, against which the opposite end of the spring acts; and it especially points out that the spring lies between this and another plate, which is called the "cap plate." Therefore it is plain that the spring plate of the complainant's device is not indicated merely in a general way as standing for anything which can be substituted for use with a spiral spring, but it is specifically and elaborately worked out and explained, as showing what the patentee regarded as necessary to enable him to accomplish "simplicity and economy in construction, and general efficiency and certainty in operation." In the respondents' device, by reason of the use of the spiral spring, this spring plate, with its hub and slot, is unnecessary, and therefore properly dispensed with. Whether or not it involves the same degree of simplicity, economy, and compactness, we have no occasion to determine. It is enough that we think the respondents' omission of the spring plate as unnecessary to their form of construction, and the other consequent changes in several particulars, relieve

the respondents from the charge of infringement. If the complainant has any remedy, it is not in the courts, but in convincing the purchasing public that the device of the respondents is, on account of the changes to which we have referred, less simple, economical, and compact than its own. Let the respondents file a draft decree dismissing the bill with costs; said draft decree to be filed on or before the 11th day of September next; corrections thereof to be filed on or before the 18th day of September next.

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BEACH v. HOBBS et al.

(Circuit Court, D. Massachusetts. August 23, 1897.)

No. 256.

1. FEDERAL COURTS—COMITY—EFFECT OF PRIOR DECISIONS BY CIRCUIT COURT OF APPEALS.

A decision by the circuit court of appeals in any circuit, so long as it remains unappealed from, and so long as the supreme court has issued no writ of certiorari to re-examine it, is to be regarded as having more effect in other federal courts than that ordinarily given to those of the highest state tribunals, or other courts of merely concurrent jurisdiction. This is especially true with reference to a patent for an invention, when the state of the proofs remains substantially the same. Yet, when the respondents are not the same, they are entitled to have the facts of their case carefully scrutinized, with a view of determining whether or not they present a different case from that adjudicated in the prior litigation.

2. PATENTS—VALIDITY—BOX MACHINES.

The Beach reissue, No. 11,167 (original No. 447,225), for improvements in machines for attaching stays to the corners of boxes, construed, and held valid as to claims 1, 2, 3, and 6; and claim 6 held infringed, and the first three claims held not infringed.

3. SAME—COMBINATIONS—AGGREGATIONS.

In determining whether a combination claim covers a true combination or a mere aggregation, the law looks only at practical, and not at theoretical, definitions and considerations; and, in a machine for attaching stays to the corners of boxes, the fact that the final result is achieved by feeding mechanism, cutting mechanism, and pasting mechanism, which perform their functions as steps towards the completed result, does not make the machine a mere aggregation.

4. SAME—VALIDITY OF REISSUES—DECISION OF PATENT OFFICE.

Where a reissue is sought on the ground of merely inadvertent errors rendering the patent inoperative, the decision of the commissioner upon mere questions of fact raised by the applicant's allegations as to inoperativeness and inadvertence will not be re-examined by the courts in passing upon the validity of the reissue.

5. SAME—DURATION OF RIGHT—EXPIRATION OF FOREIGN PATENT.

Under Rev. St. § 4887, a United States patent does not expire because of the expiration of a foreign patent for the same invention, when the foreign patent was taken out by another, without the inventor's authority, and in defiance of his rights.

6. SAME—LIMITATION OF CLAIMS.

In a patent for a machine for attaching stays to the corners of boxes, the patentee described feeding mechanism, cutting mechanism, and pasting mechanism, and the claims covering the combination of these parts with other devices ended with the words "substantially as described." While the claims were pending, the commissioner, in a communication to the applicant, required that the words "substantially as described" should be used to limit the word "mechanism" wherever it occurred in the claim. The patentee replied that this was unnecessary, because it was perfectly clear that the words "substantially as described," occurring at the end of each

claim, referred to each and every part mentioned in the claim. *Held*, that the claims were correctly construed by the patent office.

On Rehearing.

7. REHEARINGS IN EQUITY.

A rehearing is not ordinarily justified where the party applying for it seeks mainly to supplement and strengthen the propositions submitted by him at the original hearing, and does not point out any slip or oversight by the court, or any other peculiar matter raising a reasonable probability that a rehearing would give a different result.

This was a suit in equity by Fred. H. Beach against Clarence W. Hobbs and others for alleged infringement of reissued letters patent No. 11,167, granted May 26, 1891, to complainant, for a machine for staying the corners of paper boxes. The original patent was numbered 447,225.

John Dane, Jr., for complainant.  
Edward S. Beach, for defendants.

PUTNAM, Circuit Judge. The patent involved in this litigation purports to cover an improvement in machines for attaching stays to the corners of boxes. The specification clearly describes the main feature claimed to be covered by the patent, so far as we are concerned with it, as follows:

"It has been customary heretofore, in making paper or strawboard boxes, to apply a stay or fastening strip over the joints at the corners of the boxes, which strip is pasted down on the outside of the box, or is folded over the edge of the box, and secured by paste, both outside and inside of the corner; and such work, as far as I am aware, has heretofore been done by hand. My invention relates to a machine for doing this work."

In another part of the specification the patentee explains that, when the stay is simply placed against the exterior surface of the box corner, and not turned in or over the edge, the device may be simplified; but it is not necessary to explain this in detail. The claims in issue are 1, 2, 3, and 6, as follows:

"(1) The combination, with opposing clamping dies having diverging working faces, of a feeding mechanism constructed to deliver stay strips between said clamping dies, and a pasting mechanism for rendering adhesive the stay strips, said clamping dies being constructed to co-operate in pressing upon interposed box corners the adhesive stay strips, substantially as described.

"(2) The combination, with opposing clamping dies having diverging working faces, said clamping dies being arranged to co-operate in pressing adhesive fastening strips upon interposed box corners, a feeding mechanism constructed to feed forward a continuous fastening strip, and a cutter for severing the said continuous strip into stay strips of suitable lengths, substantially as described.

"(3) The combination, with opposing clamping dies having diverging working faces, said clamping dies being arranged to co-operate in pressing an adhesive fastening strip upon the corner of an interposed box, a feeding mechanism constructed to feed between the dies a continuous fastening strip, a pasting mechanism for applying adhesive substance to the strip, and a cutter for severing the strip into stay strips of suitable lengths, substantially as described."

"(6) The combination of opposing clamping dies having diverging working faces constructed to co-operate in pressing an adhesive stay strip upon an interposed box corner, one of said clamping dies being constructed to act with an elastic or yielding pressure, to enable the dies to operate upon box corners of different thicknesses, substantially as described."



The respondents set up by their own enumeration 17 specific defenses. We have given each of them due consideration. If, however, we should state and fully elaborate each of them, the opinion we would pass down would be unbearable; but if we omit reference to any of them it will be because the consideration of those omitted is rendered unnecessary by our conclusions with reference to other defenses, or because they have been fully disposed of in the previous litigation which has been brought to our attention.

The patent in issue was thoroughly litigated in a suit commenced in the Second circuit against alleged infringers who were other than the respondents in this case, and who are not in privity with them. In the circuit court the judgment was rendered by Judge Coxe on a final hearing on bill, answer, and proofs, and an elaborate opinion was filed by him, which will be found in *Beach v. Machine Co.*, 63 Fed. 597. The case was also thoroughly discussed on appeal in an opinion drawn by Judge Lacombe, entitled on appeal as *Manufacturing Co. v. Beach*, 18 C. C. A. 165, 71 Fed. 420. The same appeal is also reported in 35 U. S. App. 667. In the court of appeals the proceeding is described as an appeal from an interlocutory decree, but by this is intended the usual decree for an injunction and an accounting, rendered after a hearing on bill, answer, and proofs, as we have already explained. There were in issue claims 1, 2, and 3, and also some other claims which are not in issue here; but claim 6 was not considered in that litigation.

Under these circumstances, it is necessary, first of all, that we should determine the effect to be given to the legal proceedings in the Second circuit. So far as a question of that nature appertains to issues made on applications for preliminary or temporary injunctions, the law is well settled, as stated by the court of appeals for this circuit in *Bresnahan v. Leveller Co.*, 19 C. C. A. 237, 72 Fed. 920, 921, and in the Second circuit in *New York Filter Manuf'g Co. v. Niagara Falls Waterworks Co.*, 26 C. C. A. 252, 80 Fed. 924, 929. That, however, does not determine the rule applicable to cases on final hearing, where parties respondent are not estopped by the prior litigation, and are entitled to have their rights determined strictly in accordance with the law and the facts as presented by them. So far as any proposition may be fully presented to the court of appeals in any circuit, and determined by it, resulting in a rule which is, and ought to be, of general application, especially when it involves federal questions, a condition of adjudications which would defeat uniformity throughout the United States would clearly disappoint the contemplation of congress in establishing those tribunals. It certainly was not the expectancy of congress that the establishment of those courts would destroy the general uniformity of adjudications in the federal tribunals touching general principles of law, and especially touching federal questions, which has heretofore existed; nor was it its purpose to create several centers, for the determination of that class of questions, which would take on a local character, as is the fact with reference to the various state tribunals. As was said by the circuit court of appeals for this circuit in *Beal v. City of Somerville*, 1 C. C. A. 598, 50 Fed. 647, 652, the circuit courts of ap-

peal must maintain themselves as tribunals of final jurisdiction, notwithstanding the possibility that cases disposed of by them may in some form reach the supreme court. In view of this fact, a decision of the circuit court of appeals in any circuit, so long as it remains unappealed from, and so long as the supreme court has not issued its writ of certiorari to re-examine it, must be regarded as having more effect than that ordinarily given to even the highest state tribunals, or to any court of merely concurrent jurisdiction, no matter how great its learning. There seems to be no method of maintaining the necessary uniformity of the law with reference to general questions, especially federal questions, unless the mature and solemn judgments of a circuit court of appeals in any circuit are accepted as authoritative declarations of the law, subject only to such criticisms on the score of oversight or evident mistake as would apply to a judgment of the circuit court of appeals in the particular circuit where the litigation then under determination may be pending. These observations must, of course, be limited to what was necessarily determined, and they cannot safely be made to include what was not strictly essential to what was thus determined. These considerations have a special importance as applied to a solemn and well-considered judgment of any circuit court of appeals with reference to a patent for an invention issued by the United States, when the state of the proofs remains substantially the same, in view of the reluctance of the supreme court to issue writs of certiorari in causes of this character, involving mainly questions of fact; otherwise such patents, although intended by statute to have effect throughout the whole country, would, for practical purposes, be territorially limited, and would be of effect only in portions thereof, and practically invalid in other portions. It is also to be borne in mind that there is no serious danger that the courts in any circuit, by following the decisions of the circuit courts of appeal in other circuits, would perpetuate any error, because of the power vested in the supreme court to rectify the same by issuing its writ of certiorari. We are not, however, required to definitely determine the effect of these considerations in the case at bar, because, to the extent that the court of appeals for the Second circuit has reached necessary conclusions in reference to the patent at issue, they meet our approval so far as they concern the condition of the case as it stands before us.<sup>1</sup>

In *Green v. City of Lynn*, 55 Fed. 516, 518, we had occasion to consider in what way the findings and decisions of any court of authority with reference to a particular patent, on a final hearing on bill, answer, and proofs, can be made available on a like final hearing in another court, where the respondents are not the same, and are not conclusively estopped by the prior determination. That new parties litigant are entitled to have their facts carefully scrutinized, with a view of determining whether or not they present a different case from that adjudicated in the prior litigation, is well illustrated by

<sup>1</sup> Note by the court: It is worth noting in this connection that each division of the court of appeal in England always follows the decisions of the other division.

*Andrews v. Hovey*, 123 U. S. 267, 8 Sup. Ct. 101. In *Eames v. Andrews*, 122 U. S. 40, 7 Sup. Ct. 1073, the supreme court considered with exceeding fullness precisely the same patent involved in *Andrews v. Hovey*, and sustained it, giving it a very liberal support. In *Andrews v. Hovey*, however, by reason of a single fact, which the court there said, at page 268, 123 U. S., and page 101, 8 Sup. Ct., was conceded by the brief filed in behalf of the owners of the patent, the court held in favor of a new alleged infringer, who was not estopped by the prior judgment, that the patent was void; and the court confirmed this later determination on an application for a rehearing in *Andrews v. Hovey*, 124 U. S. 694, 8 Sup. Ct. 676. This result with reference to the patent there litigated is a striking illustration of the necessity of carefully securing to new defendants or respondents all their rights as shown by the special facts exhibited by them, notwithstanding determinations in prior litigation, to which they were not parties, with reference to the same subject-matter. This principle was stated in *Mackay v. Easton*, 19 Wall. 619, 632, as follows:

"The cases cited under the second objection are not evidence in this case. The records of them are not before us. The reports of their decision in *Howard* may be referred to as expositions of law upon the facts there disclosed, but they are not evidence of those facts in other cases. \* \* \* The general language of the opinion must be construed and limited by the facts of the case."

In *Green v. City of Lynn*, *ubi supra*, we were asked to apply the conclusion of the supreme court in *Andrews v. Hovey*, and the same patent was in issue in each case; but at page 518 we laid down the rules by which courts are to be guided in adapting to a case in hand the conclusions in prior litigation, involving mixed questions of law and fact, as follows:

"Of course the findings of the supreme court in *Andrews v. Hovey* on questions of law are conclusive on all other courts. The same is true as to its findings of fact, with reference to any other cause in which the court perceives that the proofs are substantially the same as those which came before the supreme court. The reasons for this need not be elaborated; but this distinction is to be noted: that, when the parties are not the same in each case, the determinations of issues of fact by the supreme court do not operate strictly as *res adjudicata*, or as a technical estoppel, but merely upon the conscience of the inferior tribunal. How are the cases to be brought together for this purpose? An answer based on the fundamental rules of law seems simple. First, it is essential that the facts brought to the attention of the supreme court should be proven in the pending cause independently, according to the ordinary rules of evidence; and thereupon the court in the pending cause should advise itself as best it may of what appeared to the supreme court,—ordinarily from the opinion rendered by it, and, if this is not sufficient in detail, from an informal perusal of whatever was laid before it. As this ascertainment is merely to inform the conscience of the court in the pending cause, and to enable it to follow the line of reasoning and conclusions of the appellate tribunal, there is no occasion for burdening the case with the formal proof of what appeared in the supreme court, nor is there any propriety in so doing. Therefore it was that this court granted the motion of the complainant to strike out the two volumes in question, and held that the defendant, if it sought to avail itself of the reasoning and conclusions in *Andrews v. Hovey*, must prove the substantial matters which there appeared as independent facts according to the usual rules of evidence. 3 Rob. Pat. §§ 1017, 1175, touches this question. This portion of this work must, however, be read with care, because, as is too frequent in discussions of this and kindred questions, sufficient dis-

crimination is not made between the rules touching interlocutory and *ad interim* injunctions and those pertaining to final hearings. The court conceives, however, that the author correctly states the principle in section 1175, as follows: 'The weight to be attached to any judgment in favor of a patent as evidence of its validity in future actions depends upon the identity of parties, the identity of issues, the identity of testimony,' and so on. By the words 'the identity of testimony' the author evidently means that the same facts must be proven in each case independently. In *Edgerton v. Manufacturing Co.*, 9 Fed. 450, the court, being asked to apply decisions in several cases to a pending patent cause, said as follows: 'But the proofs in *Brown v. Whittemore* [5 Fish. Pat. Cas. 524; Fed. Cas. No. 2,033], meaning one of the other cases, 'on the question of prior use and sale with the consent of the patentee, and in *Edgerton v. Breck* [Fed. Cas. No. 4,279], meaning also one of the other cases, 'on the question of invalidity, do not seem to have been the same as in the cases now before the court. \* \* \* Of course, if the testimony in these cases was substantially the same as that in the cases heretofore decided by the learned judges in the Massachusetts circuit court, I should feel wholly bound by their decisions, and the construction of the patent given by them.' In *McCloskey v. Hamill*, 15 Fed. 750, the court, touching a like proposition, said: 'The facts which the plaintiff proved upon the second hearing,' meaning a second hearing in a prior cause, 'are the same which he relies upon in this case.' In *Celluloid Manuf'g Co. v. Zylonite Brush & Comb Co.*, 27 Fed. 291, the court said (page 295), 'The facts presented by the record are so strictly similar to those in,' naming a case on the same patent previously heard by another tribunal. In *American Bell Tel. Co. v. Wallace Electric Tel. Co.*, 37 Fed. 672, the court spoke of 'the examination of the record,' meaning plainly the record in the then pending case, made to ascertain whether distinguishable from cases theretofore decided. \* \* \* Therefore, in applying the conclusions of *Andrews v. Hovey*, this court is—First, to inquire what facts are proven in the pending case by independent evidence given under the ordinary rules of law; and, second, to examine the opinions of the supreme court, and the line of reasoning and conclusions which they exhibit, and from these or otherwise—but not by formal evidence—become satisfied whether or not the proofs of which the latter court took cognizance were substantially the same as those in the case at bar. If they were, its line of reasoning and conclusions bind the conscience of this court upon the questions of fact involved; otherwise they fail to do so, perhaps wholly, perhaps in part. It is true that this method of proceeding may produce a result on questions of fact differing from the latest findings of the supreme court, but in this respect we have the example of that court itself, as shown with reference to this very patent, in *Eames v. Andrews*, 122 U. S. 40, 7 Sup. Ct. 1073, and *Andrews v. Hovey*, already referred to."

Applying all the considerations which we have thus explained to the protection of the rights of the present respondents in every particular, and at the same time giving the conclusions of the circuit court of appeals for the Second circuit the weight which, under the circumstances, we feel bound to give to them, whether we should regard ourselves as in any extent conclusively bound by them or not, and adding thereto the fact that those conclusions, so far as they are necessary to the case at bar, receive, after a careful consideration of them, and of the facts now before us, our own approval, the result is that we need refer only in the briefest manner to the more substantial questions raised at bar, and are able to dispose of them without difficulty. The defense pressed on us most fully and urgently relates to alleged anticipations and the prior state of the art. It appears by the opinion of Judge Coxe in 63 Fed., at page 600, that the respondents in the prior litigation introduced 47 patents showing improvements in machines for making boxes, for inserting wire staples, for flanging boiler plates, for sticking labels and revenue stamps, for bending stiffeners for the heels of shoes, and for applying shoe-button

fasteners. Lists of these patents will be found in 35 U. S. App., beginning at page 681, 18 C. C. A. 165, 71 Fed. 420. Judge Coxe, however, stated that it was conceded by the respondents' expert that none of those patents anticipated, and also that the discussion was narrowed down to the consideration of two or three prior patents with reference to the state of the art. Judge Lacombe, in the circuit court of appeals, having before him all these prior patents, said, however, at page 169, 18 C. C. A., and page 423, 71 Fed.: "The patentee indisputably made a machine which did work that theretofore had always been done by hand;" and also at page 170, 18 C. C. A., and page 424, 71 Fed.: "Certainly the state of the art exhibits a necessary part of the work of box-making as done by hand with no machine existing in the art to do it. That machine the complainant was the first to supply." These conclusions were essential to the determination of the appeal. He then considered at length, on the same page, a prior machine used for pasting address labels on folded newspapers, which same machine is again pressed on our consideration. It is entirely plain that, having before it the entire state of the art as exhibited to us, with only two or three exceptions, to which we will refer, the circuit court of appeals for the Second circuit held that the patentee's device was not anticipated, was useful, and involved an important invention. In the present case the respondents have introduced two patents,—one to Maxfield and one to Terry,—which were not before the courts in the Second circuit, and which, so far as we can understand, are introduced more for the purpose of disputing the accuracy of the testimony of the complainant's expert than for throwing light on the case itself. The proposition of the respondents seems to be merely that the machines of Maxfield and Terry were useful for putting stay strips in round boxes, without any claim that they operated in any particular as the complainant's machine operates, or, indeed, that they were in any sense automatic. Whatever may be the position of the respondents in this particular, we are satisfied that the Maxfield and Terry devices present in no respect the functions of that now in issue. The respondents also introduce in evidence a patent granted to one Sawyer for an improvement in label and tag machines, which, apparently, was not in the New York litigation. This, however, was never adapted to the special art involved in the case before us, is subject to the same considerations which dispose of the machines for pasting address labels, and, on principles over and over again stated, cannot deprive the complainant of the benefit of his invention. *Potts & Co. v. Creager*, 155 U. S. 597, 606, 15 Sup. Ct. 194; *National Cash-Register Co. v. Boston Cash Indicator & Recorder Co.*, 156 U. S. 502, 515, 15 Sup. Ct. 434; *Packard v. Lacing-Stud Co.*, 16 C. C. A. 639, 70 Fed. 66, 68; *Boston & R. Electric St. Ry. Co. v. Bemis Car-Box Co.*, 25 C. C. A. 420, 80 Fed. 287, 289.

On the questions of anticipation and the state of the art we therefore follow the conclusions of the circuit court of appeals for the Second circuit. As we have observed, that court did not consider claim 6. This, however, is of no importance, because claim 6 contains the pith of the complainant's invention, which was in the adaptation of the clamping dies, and was necessarily involved in the con-

sideration of alleged anticipations and the state of the art in connection with claims 1, 2, and 3. The conclusions on this topic with reference to claims 1, 2, and 3 apply to claim 6. That court said (18 C. C. A., at page 169, 71 Fed., at page 423) that the first three claims are broad ones, covering "every device for affixing stay strips to the outside of box corners, where the operation is performed by the compound action of a feeding mechanism, a cutting mechanism, and a pasting mechanism, in combination with any opposing clamping dies whose faces diverge." We think that this broad statement goes beyond what the case demanded, and must be regarded as a dictum which we are not required to follow. However this may have been, the respondents have brought to our attention certain facts, apparently not brought to the attention of the courts in the prior litigation, which do not permit the broadest construction of the incidental devices for feeding, cutting, and pasting. We will refer to these again hereafter; but, so far as the general conclusion of the circuit court of appeals for the Second circuit is to the effect that the actual invention of the complainant was a valuable one, that it was broad in its character, and that it should receive a liberal support, we follow it.

We are also prepared to follow that court in the conclusions contained in the opinion of Judge Lacombe, found at page 171, 18 C. C. A., and page 425, 71 Fed., adverse to the contention so strongly urged on us, that there was some broadening or expansion of the first three claims while the applications were pending in the patent office, impairing the patent as issued. We also say the same as to the conclusions of Judge Lacombe's opinion, found at page 170, 18 C. C. A., and page 424, 71 Fed., adverse to the further propositions, also strenuously urged on us, that the patent now before us is a mere paper one, and that whatever utility apparently attaches to it really belongs to machines constructed according to later devices. With reference to all of these propositions, the facts before us are in all respects the same as in the prior litigation, and each of them received the full consideration of the courts at that time, so that the prior adjudications with reference thereto ought to bind us; and, in addition thereto, we are satisfied that their conclusions were correct.

As we follow the determinations in the prior litigation only with reference to the topics we have already discussed, we will have no occasion to consider the criticisms made by the respondents in reference thereto touching other particulars.

The respondents press the defense that the combinations of claims 1, 2, and 3 constitute nonpatentable aggregations, maintaining that each mechanism—that is, the one for pasting, the one for feeding, the one for cutting, and the one for pressing—"produces its appropriate effect unchanged by the others." The most practical and useful definition of an aggregation is that found in *Hailes v. Van Wormer*, 20 Wall. 353, 368, as follows:

"It must be conceded that a new combination, if it produces new and useful results, is patentable, though all the constituents of the combination were well known, and in common use, before the combination was made. But the results must be a product of the combination, and not a mere aggregation of several results, each the complete product of one of the combined elements."

Merely to produce an effect is not to produce a result within the meaning of this definition, nor can it be truthfully said that either of the mechanisms referred to produces an "effect unchanged by the others." The feeding mechanism, the cutting mechanism, and the pasting mechanism are only steps, each, to be sure, distinguishable and complete steps, towards the result which is accomplished when the pressing has been done, and which is the only result, in a practical sense, accomplished by the combinations covered by these claims. The patent law necessarily looks only at practical, not at theoretical, definitions and considerations in these particulars, as in all others. It would be hard to conceive of a device for doing automatic work where strips of paper are to be severed into pieces, and each piece separately manipulated, without a proper feeding, cutting, and pasting device, if pasting is a part of the entire work. The important case of *Machine Co. v. Lancaster*, 129 U. S. 263, 9 Sup. Ct. 299, could never have resulted as it did if the proposition of the respondents in this particular was entitled to approval.

The complainant first applied for his patent June 10, 1885, and it was issued February 24, 1891. He discovered some errors in the drawings, which, if literally followed, would clearly have made his device inoperative. He thereupon, with a promptness which leaves no opportunity for criticism in that particular, on April 9, 1891, applied for a reissue, which he obtained May 26, 1891. The respondents say, in substance, that, notwithstanding the defects in the drawings, any person ordinarily skilled in the art would not have been misled by them, and that, therefore, the original patent was not, in fact, inoperative. This suit is brought on the reissue, and the respondents claim that for the reasons stated the commissioner had no authority to grant a reissue, and that it is invalid. This proposition does not seem to have been submitted to the courts in the prior litigation.

Section 4916 of the Revised Statutes provides as follows:

"Whenever any patent is inoperative or invalid, by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new, if the error has arisen by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, the commissioner shall, on the surrender of such patent and the payment of the duty required by law, cause a new patent for the same invention, and in accordance with the corrected specification, to be issued to the patentee."

The application of the complainant for the reissue, and the oath accompanying it, set out every jurisdictional fact required to entitle him to a reissue. They declared that the patent was inoperative by reason of the errors to which we have referred, and also that the errors arose by inadvertence. It is true that by the letter of the statute the commissioner has no jurisdiction to grant a reissue unless the jurisdictional facts exist as required by law; but the allegations made by the applicant with reference to the alleged inoperativeness and the alleged inadvertence raised pure questions of fact, peculiarly fitted to be disposed of by an adjudication of the commissioner of patents, and in no way involving any of the class of fundamental questions affecting the interests of other parties, which the

supreme court has not hesitated to reinvestigate on questions of reissue, notwithstanding the determination of the patent office with reference thereto. This precise question came before this court in *American Sulphite Pulp Co. v. Howland Falls Pulp Co.*, 70 Fed. 986, 991, where we said as follows:

"While, according to our opinion, the reissue was not necessary, and the construction and effect of the patent are in all respects the same as though it had not been obtained, yet the application for it claimed inadvertence with regard to the description of the compactness of the material used for lining, and to the directions with reference to its thickness; so that we think that on the whole the determination whether the specification needed amendment, and whether a reissue was essential or proper, was so much a matter of doubt, and therefore rested so largely with the commissioner of patents, that it cannot be properly reviewed by us."

This case came before the court of appeals (25 C. C. A. 500, 80 Fed. 395), but the question of reissue was not raised in it. The appellate court therefore did not pass on this proposition, and the decision of this court with reference thereto stands as yet unchallenged, and is sufficient to control us in the present case. We may add, however, that in *U. S. v. American Bell Tel. Co.*, 167 U. S. 224, 17 Sup. Ct. 809, the court, at page 267, 167 U. S., and page 809, 17 Sup. Ct., reaffirmed the statement that, even in matters of reissues, the commissioner of patents exercises quasi-judicial functions. We are not aware of any decision of that court which deprives him of the power of exercising such functions with reference to questions of mere detail, and affecting no substantial right. It would be an unreasonable state of the law which, in a matter of detail of this character, would deprive both the patentee and the public of the benefit of the conclusive effect of a summary proceeding at the patent office, and would compel both to await the result of a long litigation before being able to ascertain whether a reissue was effective or otherwise, and whether, on account of it, there existed or not a valid patent, which the one was entitled to enforce and the other bound to respect.

There is no substantial question as to the validity of the sixth claim which has not been met by what we have already said with reference to the other claims. The respondents maintain that this claim came in by amendment in November, 1890, which was after one Horton applied for a patent for his machine, which the respondents say is the alleged infringing machine in the case at bar. The fact is, however, that it must have been apparent on the earliest application, filed by the complainant June 10, 1885, that what now appears as claim 6 was the real pith of his invention. Any person having any skill in the art could not have failed to have discovered this, and to have been warned, accordingly, of what might develop as the proceedings progressed in the patent office. But a conclusive answer to the proposition of the respondents is that on December 8, 1886, a claim was brought in by amendment in all respects the same as claim 6, except that it in terms limited the elasticity to the lower end of the plunger. This was a clear statement of the nature of the complainant's invention as now shown in the sixth claim, and any one fairly conversant with the topic must have seen that his limiting the



elasticity by the mere letter to the lower end was a blunder. Further than this, the patent to Horton states as follows:

"This invention relates to that class of machines for applying stays to the corners of boxes and box covers, in which a rectangular mandrel is employed to support the box or cover internally, while a reciprocating plunger having a re-entrant angle in its operating face descends, and bends the stay into angular form, and presses it upon the corner of the box body or cover while the same is supported by the mandrel. The invention has for its object to provide a simple, efficient, and rapidly operating machine of this class."

By this statement, Horton, and the respondents, who are manufacturing under him, are expressly limited to an improvement on the pith of the device shown in the sixth claim. They made that their point of departure, and by so doing they assumed all hazards, whatever they might be, of the rights of any person to priority with reference to the substance of the sixth claim, whether a patent had been issued, or applied for, or neither.

The respondents contend that one Jaegar obtained a British patent for exactly the same invention as that now in issue, and that this British patent has expired. It is not claimed that this patent was obtained under any authorization from the complainant, direct or indirect, or that Jaegar in fact anticipated him. So far as the record shows, it was obtained in violation of the complainant's rights. Nevertheless, the respondents maintain that, by reason of the mere letter of the closing paragraph of section 4887 of the Revised Statutes, the complainant's patent in the United States expired when this unauthorized patent terminated. Such a construction of the law is too unreasonable to obtain credit in any court, and is easily met by the fact that the whole section is to be taken together; and it is apparent from the first part of it that the whole relates only to patents taken out by patentees under the laws of the United States.

We now have left only the question of infringement. With reference to the sixth claim, there is no occasion for any discussion on this point. The complainant's expert testifies, without contradiction, that the respondents' machine has all the elements contained in this claim, and he enumerates them for the purpose of making his testimony emphatic and unmistakable in this particular. He is plainly right. There are serious difficulties with reference to the question of the infringement of claims 1, 2, and 3. These depend on their proper construction. As we have seen, the court of appeals for the Second circuit expressed the view that they applied to every device for affixing stay strips to the outside of box corners, where the operation is performed by the combined action of a feeding mechanism, a cutting mechanism, and a pasting mechanism, with any opposing clamp dies whose faces diverge. This permits any forms of feeding mechanism, cutting mechanism, or pasting mechanism. But each of the claims closes with the words "substantially as described." The cutting mechanism described in the specification is of so simple a character that possibly almost any device for cutting with sharp edges would be regarded as comprehending its equivalent; but the feeding mechanism therein described is a complicated combination, with minute details evidently intended to accomplish special functions, al-

though the functions are not set out in the patent. The commissioner of patents, by his communication of December 26, 1890, required that the words "substantially as described" should be used to limit the word "mechanism" in each claim wherever the word "mechanism" occurred; but the complainant replied, December 31, 1890, that this was unnecessary, because, as he stated, "it is perfectly clear that the words 'substantially as described,' found at the end of each claim, refer to each and every part mentioned in the claim." These incidental mechanisms were expressly made elements in claims 1, 2, and 3. It is not necessary to go over the question of a limitation by a patentee of the claims of his patent by what occurs in the patent office, because this has all been fully covered by the court of appeals for this circuit in *Reece Buttonhole Mach. Co. v. Globe Buttonhole Mach. Co.*, 10 C. C. A. 194, 61 Fed. 958; and the proposition is also restated in the opinion passed down August 20th in *Hart & Hegeman Manuf'g Co. v. Anchor Electric Co.*, 82 Fed. 911. But, certainly, what thus appears on the records of the patent office must be accepted as the complainant's formal acquiescence of record in the demand of the patent office that the claims should be expressly limited in the way in which the patentee thus solemnly says they were in fact limited. This series of facts does not seem to have been brought to the consideration of the courts in the Second circuit, but they have been especially brought to our attention, and we are, therefore, required to give them due effect. In this particular these claims are like those of the patent in *Machine Co. v. Lancaster*, 129 U. S. 263, 266, 9 Sup. Ct. 299, already cited; and yet in that case, at every point where it considered the incidental mechanisms forming a part of the entire machine, as the incidental mechanisms here of feeding, cutting, and pasting form parts of this machine, the court, at pages 284-286, 289, and 290, 129 U. S., and page 299, 9 Sup. Ct., assumed and impliedly held that the patent covered only known substitutes or equivalents for those incidental matters.

Now, in the case at bar, as we have already said, the feeding mechanism of the combination is expressed to be of a detailed character, apparently having in view special functions. The work to be done by the respondents' machine is much simpler than that which can be accomplished by the complainant's, as it relates wholly to pasting stay strips on the outside of the corners of boxes. Therefore the strips can be made to approach the dies in the respondents' device at right angles to the line by which they must approach it in the complainant's device for at least a part of its operations; and for this and other reasons the respondents' feeding device might well be much simpler than the complainant's, and have regard to very different functions. In saying this we bear in mind that the reciprocating plates of the respondents' mechanism, carrying the stay strip, are generally regarded as the equivalent of the complainant's feed rolls with their intermittent motion; but, notwithstanding this, the respondents' device for feeding seems to omit the complicated details which are parts of the complainant's device, as we have already explained them. The complainant has not deemed it necessary to elaborate his case on this question, and it is possible that we do not fully under-

stand the nature of his combination with reference to the feeding device; but, from the examination we have given it, we feel bound, for the reasons stated, to hold that the combinations in claims 1, 2, and 3 are so limited in this particular that the respondents do not infringe them.

Let the complainant file a draft decree for an injunction and an account with reference to the sixth claim only, such draft decree to be filed on or before the 11th day of September next, and corrections thereof to be filed on or before the 18th day of September next.

### On Rehearing.

(October 8, 1897.)

PUTNAM, Circuit Judge. On this motion for a rehearing, the complainant does not point out any mere slip or oversight on the part of the court, or any other peculiar matter which raises any reasonable probability that a rehearing would give any new result. His main purpose is to supplement and strengthen his propositions submitted in argument at the hearing. Matters of that character do not ordinarily justify a rehearing. While the court is not inclined to insist too strictly on the application of rules of this nature, and would especially be inclined to relax them if there were not ample remedy by appeal for any errors it may have committed, it is certain that there does not appear such a degree of probability in favor of the complainant on this application as to justify the expense, delay, and vexation of further litigation in this court.

The complainant insists that we have misapprehended the considerations that were had in view by the court of appeals for the Second circuit in *Manufacturing Co. v. Beach*, 18 C. C. A. 165, 71 Fed. 420, in construing claims 1, 2, and 3 of the patent in litigation. In determining this matter, we were governed by what we found on the face of the opinion of the court, coupled with what further appeared in the case as reported. The complainant now asks to bring in the briefs submitted to the court, and also certain affidavits of counsel who took part in the arguments, for the purpose of showing that all the considerations urged upon us were also urged upon the court of appeals in the Second circuit. If in any instance, not of an exceptional character, we could be required to go into an incidental investigation of this kind, so full of labor and uncertainties that it might involve more than all the rest, even of an important and complicated case, it would result in no advantage here, because a study of the opinions on appeal and at the circuit in the prior litigation shows that the infringement of claims 1, 2, and 3 was admitted; so that the construction of them did not come in issue in the way in which it comes in issue here. Moreover, we are governed on this point by *Machine Co. v. Lancaster*, 129 U. S. 263, 266, 9 Sup. Ct. 299, referred to in our opinion passed down August 23, 1897, whatever may have been the view of the courts in the Second circuit. The petition for a rehearing is denied.

## ÆTNA LIFE INS. CO. et al. v. LYON COUNTY, IOWA.

(Circuit Court, N. D. Iowa, W. D. November 1, 1897.)

## 1. COUNTIES—CONSTITUTIONAL LIMIT OF INDEBTEDNESS—REFUNDING BONDS—DEMURRER.

In a suit against a county, the bill alleged that defendant was empowered to incur indebtedness up to, but not exceeding, a specified limit, and was authorized to issue bonds to refund existing valid debts. For the purpose of taking up various debts of that character, it appointed a financial agent, prepared bonds showing on their face that they were intended for refunding purposes, and, as inducements to the purchasers, explained the nature of the indebtedness to be paid off, and the county's financial condition and resources. From time to time the county sold the bonds to various parties, and the proceeds thereof were, in whole or in part, in fact used to pay off the pre-existing valid indebtedness of the county. If the amounts of all the bonds sold were to be added to the pre-existing debts, the total would show an excess over the constitutional limit. Upon demurrer, in a suit in equity, brought by the same persons who advanced the money direct to the county, and based on the entire transaction, *held*, that in so far as the proceeds were in fact used to pay off the prior valid indebtedness, they would create no excess over the limit, and that the suit might be maintained.

## 2. FORM OF ACTION—RES ADJUDICATA.

An action was brought at law, but was dismissed on the ground that relief should be sought in equity, and this judgment was affirmed on appeal. A suit was then begun in equity. *Held*, that defendant could not then object that the action should be at law.

## 3. STATUTE OF LIMITATIONS—COUNTY BONDS.

In so far as a given contract between a county and parties who advance money to it to pay off existing debts, and who receive county bonds as evidence of their claim, is valid, the statute of limitations does not begin to run as to the principal until the date fixed in the bonds for payment.

This was a suit in equity by the Ætna Life Insurance Company and others against Lyon county, Iowa, to recover money paid to the county for certain of its refunding bonds. The cause was heard on demurrer to the bill.

Cummings, Hewitt & Wright and Henderson, Hurd, Lenehan & Kiesel, for complainants.

N. T. Guernsey, A. Van Wagenen, and H. G. McMillan, for defendant.

SHIRAS, District Judge. The general facts upon which this proceeding in equity is based are set forth at length in the case of Ætna Life Insurance Co. v. Lyon County, heard before this court, and reported in 44 Fed. 329. In that case, which was an action at law on coupons belonging to a part of the series of bonds issued by Lyon county, which are involved in the present suit, the defense was interposed that the entire series of bonds was void, because in excess of the 5 per cent. limitation; but it was held therein that, under the evidence, it appeared that part of the series of bonds were valid and enforceable, and part were invalid; but in order to ascertain the amount for which the county should be held liable, and to determine whether all the bondholders should share ratably in the amount, or whether the bonds first sold, and up to the constitutional limit, should be paid in full, required the bringing of a suit in equity. In pursuance of this ruling,

the bill in equity in the present case has been filed, in which is recited the action taken by the county authorities for the purpose of refunding the existing debt of the county, the procurement of the money from complainants, the issuance and delivery of the bonds, it being further averred that the money realized from the sale of the bonds issued by the county and sold to complainant was used in paying off indebtedness of Lyon county, which was then valid and enforceable to the amount of \$62,107.23, and a further indebtedness, evidenced by valid and existing judgment, to the amount of \$30,213.26, the items and details being set forth at length in the bill; and the general questions presented by the demurrer are whether a recovery can be had against the county for the amounts of money by it received from the parties advancing the same, and used in the payment of valid existing indebtedness, and, if so, whether the action should not be at law, in the nature of an action for money had and received.

In support of the demurrer upon the first branch of the proposition, reliance is mainly placed upon the ruling of the supreme court in the cases of *Litchfield v. Ballou*, 114 U. S. 190, 5 Sup. Ct. 820, and *Hedges v. Dixon Co.*, 150 U. S. 182, 14 Sup. Ct. 71. In the former case it appeared that the city of Litchfield, Illinois, had issued bonds which were in excess of the constitutional limitation of 5 per cent., and in an action at law on the bonds they had been declared void for that reason. Thereupon a suit in equity was brought, wherein it was sought to hold the city liable, on the ground that the money realized from the sale of the bonds had been used in the erection of a waterworks plant for the benefit of the city. The supreme court held that the provisions of the constitution of Illinois in terms prohibited the city from becoming indebted, in any manner or for any purpose, in an amount exceeding 5 per cent. on the value of its taxable property, and that to permit a recovery against the city for an amount in excess of the limit, upon the theory of an implied promise to repay the money used in erecting the waterworks, would be as much a violation of the constitutional provision as to allow a recovery upon the express promise of payment contained in the bonds, because in each case alike the indebtedness of the city would thereby be caused to exceed the constitutional limit. In *Hedges v. Dixon Co.*, the facts were that, under the vote of electors of the county, a donation of bonds in an amount exceeding the limit of indebtedness fixed by the constitution of Nebraska was made by the county to a railway company. The holders of the bonds filed a bill in equity, praying that an accounting might be taken to ascertain the limit of valid indebtedness which the county might incur, and that the excess of the bonds over the sum should be decreed invalid, and each bond should be scaled down its proper proportion, so that the bonds should be held to represent, in the aggregate, the amount of indebtedness legally creatable by the county. The supreme court held that the entire issue of bonds was invalid and void at law, and that, as the county did not receive the proceeds of the sale of the bonds, there was no ground for equitable relief. The difference in the facts between these cases and the one at bar renders the ruling therein inapplicable to the question now under consideration. In the case now before the court the bonds

were issued for the purpose of refunding the outstanding indebtedness of the county. The statutes of the state authorize the issuance of bonds for this purpose. The money realized from the sale of the bonds was used for the benefit of the county, and no reason exists why the county should not be held liable, except in so far as protection against liability can be based upon the constitutional limitation of 5 per cent. In order to determine the rights of the parties, it is necessary to ascertain the amount of the valid and enforceable indebtedness existing against the county at the several times when the bonds were sold to the complainants, for this is not a case wherein an entire issue of bonds, in an amount in excess of the 5 per cent. limitation, was sold at one time to one purchaser; and therefore it may well be that the sale of a part of the bonds did not increase the indebtedness beyond the constitutional limit, while subsequent sales may have exceeded the limit. Furthermore, the facts, when properly put in evidence, will doubtless present the question whether refunding bonds issued under the provisions of the statutes of the state, the proceeds of which are shown to have been properly used, in payment of outstanding valid and enforceable indebtedness, can be defeated on the ground that, if the amount of the bonds be added to the pre-existing debt, the constitutional limit would be exceeded, or whether it is permissible to prove that the bonds were issued for refunding purposes, were sold under the provisions of the state statute, and the proceeds were applied in payment of existing debts, thereby in fact not increasing the county indebtedness.

It is clear, under the ruling of the supreme court in *Doon Tp. v. Cummins*, 142 U. S. 366, 12 Sup. Ct. 220, that a recovery cannot be had upon a series of bonds which of themselves exceed the 5 per cent. limitation, by simply showing that the series were sold for cash, and that, if the county officials had properly used the proceeds in payment of existing indebtedness, the total debt of the county would not have been increased; for, as is said in that case, "it would be inconsistent alike with the words and with the object of the constitutional provision, framed to protect municipal corporations from being loaded with debt beyond a certain limit, to make their liability to be charged with debts contracted beyond that limit depend solely upon the discretion or the honesty of their officers." This case, however, does not go to the extent of holding that if A. should advance or loan to the county a certain sum, say, \$100,000, for the purpose of enabling the county to refund its existing valid indebtedness, and the money should be applied to that purpose, A. could not recover because the sum he loaned in itself, or if added to the pre-existing indebtedness, exceeded the constitutional limitation. If, in such a case, A. should advance the named sum for refunding purposes to the county officials, and they should misappropriate the money, then A. could not recover against the county, because to recognize the indebtedness would of necessity increase the total amount to a sum beyond the limit. If, however, A. should, for the purpose named, pay to the county officials the agreed amount, and they should apply it in payment of the pre-existing debts of the county, the actual indebtedness would not be increased, and no reason exists why A. should not be entitled to re-

cover back the sum so advanced and used in extinguishing pre-existing indebtedness. In the supposed case, if A. is asked to advance or loan the county a given sum to refund the county indebtedness, he is bound to know that the question of whether he will have a valid claim against the county depends upon the proper application of the money advanced; and, if he chooses to intrust that matter to the good faith of the county officials, the validity of his claim, in whole or in part, will depend upon their action. If he advances, for refunding purposes, the sum of \$100,000, and that sum is properly applied in paying up valid county indebtedness, the loan made by him has not increased the total indebtedness, and I can see no good reason why A. could not recover the money so advanced. For illustration: Suppose Lyon county to be indebted in the sum of \$100,000, evidenced by valid judgments rendered against it; and desiring to fund this indebtedness, and thus extend the time of payment, the county officials should induce A. to loan to the county the sum of \$100,000, upon the promise that the sum so advanced should be used in paying the judgments, and that, upon payment thereof, they would issue to A. bonds in the sum of \$100,000, payable in 10 years. In pursuance of this arrangement, A. advances the money, the judgments are paid off, and then bonds to the amount of \$100,000 are delivered to A., as evidence of debt to him. To a suit upon the bonds, could it be successfully pleaded as a defense that by adding the amount loaned by A., and now represented by the bonds, to the amount of the pre-existing valid debts which were paid by the use of the money advanced, the aggregate would exceed the constitutional limit. The receipt of the money and the use thereof by the county for the agreed purpose of paying the existing valid indebtedness would certainly create a right of action in favor of A., if the county did not repay the sum at the agreed time; and the issuance and delivery to A. of county bonds for the amount of the loan, and as written evidence of the existing debt, would certainly not invalidate A.'s claim, based upon the contract with the county. Complete protection can be afforded to the municipal corporation in cases of this character by holding that, where a party advances money to refund outstanding valid indebtedness of the county, he is bound to take notice of the constitutional limitation, and is therefore charged with the knowledge that, to create a valid claim against the county, the money he advances must be used in payment of valid indebtedness. In view of the constitutional limitation, and in view of the character of these municipal corporations, where it is sought to refund outstanding debts, the obligation rests upon the party advancing the money, in whatever form that may be done, to see to it that the money is properly applied to the payment of the existing debts. Ordinarily, when money is loaned to an individual, the obligation to repay is created by the advancement and receipt of the money, without regard to the use or misuse thereof by the recipient, because the individual has full legal power and right to borrow any amount, without regard to the purpose to which it is to be applied. Municipal corporations in Iowa are limited, both as to the amount of indebtedness and the purposes for which they can borrow money. When such a corporation seeks to borrow money for the purpose of

refunding existing valid debts, the parties from whom the money is sought are bound to know the limitations placed upon the power of the municipality by the constitution of the state in which it exists, are bound to know that the municipality cannot rightfully exceed the limitation, and are therefore bound to know that the mere act of advancing money to the county officials for refunding purposes will not necessarily create a valid claim against the county, but that, to create a valid claim, it must appear that the money advanced was in fact used for proper refunding purposes; but if the party advancing the money shows that the municipal corporation has the power and right, under the statutes of the state, to refund existing valid or enforceable indebtedness, by issuing bonds, and procuring the money thereon, and applying the same in payment of the indebtedness, and further shows the existence of valid indebtedness, the issuance of bonds under the statute, the procurement and proper application of the money, upon what principle of law or equity should the contract between the county and the one advancing the money be held invalid and void?

In the case of Doon Tp. v. Cummins, supra, which is the case upon which reliance is mainly placed to sustain the demurrer, it is stated that, if an exchange of bonds is made, the constitutional limitation would not be infringed, which clearly recognizes the idea that valid debts may be refunded by the substitution of new bonds therefor, so long as the effect thereof is not to increase the indebtedness beyond the constitutional limit. In the Doon Case the action was at law, based upon the bonds as negotiable instruments issued by the township. In cases wherein the right of recovery is thus rested upon negotiable paper, and wherein the holder may seek to estop the municipality by the recitals found on the face of the note or bond, or relies upon the peculiar privileges accorded by the commercial law to paper of this character, it is entirely proper to hold that, under that aspect, the paper itself creates an independent indebtedness, the validity of which, as against the constitutional limitation, depends upon the question whether the amount thereof, being added to the pre-existing debts, brings the aggregate beyond the limit.

But if the suit is not based upon the rights created by the purchase of negotiable paper, but upon the facts of a transaction to which the plaintiffs and defendant were parties, then it would seem that the transaction must be viewed as a whole, and that the rights of the parties must be determined by the effect of the entire transaction. Thus, in this case it appears that Lyon county was indebted to various parties; that the county determined to refund this outstanding indebtedness; that, for that purpose, B. L. Richards was appointed the financial agent of the county; that the issuance of bonds, under the provisions of the statutes then in force, and up to the limit of \$120,000, was authorized; that the bonds on their face showed that they were intended to be used for refunding purpose; that, to induce the parties to purchase the same, the nature of the indebtedness to be paid off was explained to the purchasers; that, from time to time, bonds were sold to the various parties; that the money realized therefrom was used in paying off the pre-existing indebtedness of the county. Thus,



It appears that the case is not one wherein the plaintiffs can assert no contractual relation with the county, other than that based upon the ownership of the bonds, as would be the case if the plaintiffs had simply purchased the bonds in open market as negotiable securities from prior owners and holders thereof. On the contrary, the facts averred in the petition show that the plaintiffs and the defendant county are the original parties to contracts upon which the right of action is now based, which, in substance, are to the effect that the county, desiring to raise money with which to refund the existing indebtedness of the county, applied to the several plaintiffs to furnish the money for that purpose, and, as inducements thereto, submitted to the plaintiffs statements of the financial condition and resources of the county. Upon the statements and representations submitted by the county, the plaintiffs severally agreed to take a specific number of the refunding bonds of the county, and paid the face amount thereof to the county officials, by whom it was used in paying off the existing debt of the county. Under the facts of this case, it must be held that the plaintiffs knew that they could not create valid claims against the county by simply purchasing the refunding bonds of the county, if the amount thereof, added to the pre-existing debt, would exceed the constitutional limit. To create a liability, it must be made to appear, not only that the money was furnished, but that it was also used in paying off valid pre-existing debts. If, however, it is shown that the county, for the purpose of refunding the indebtedness of the county, did induce the plaintiffs to furnish the money needed, and to take the bonds as evidence thereof, and did use the money so procured in paying off the pre-existing indebtedness, upon what ground can it be said that the county is not bound to carry out the several contracts it made with the plaintiffs, whereby it induced them to furnish the money and take the bonds as security for the repayment of the sum furnished. As already pointed out, a valid claim against the county is not created until the money is actually used for the payment of the debts proposed to be refunded; but if the money is furnished for that purpose, and is used for that purpose, why is not the county liable for the sums thus advanced to it? The defense is that the transaction, in effect, creates a debt in excess of the constitutional limitation; but the defense is not made out unless the debt is in fact increased to such an extent as to infringe the constitutional limit. This limitation is intended for the protection of municipalities, and courts should in all cases see to it that its provisions are not evaded; but, on the other hand, courts should also see to it that the municipalities of the state do not use the provision as a means to escape the payment of just liabilities, and which in their inception did not, in fact, violate the constitutional limitation. Construing the bill in this case as being intended to base the rights of the complainants upon the facts of the transactions had between the county and the several complainants, it is clear that it cannot be held on demurrer that the claims of the plaintiffs are invalid because of the constitutional limitation.

In support of the demurrer, it is further urged that a court of equity has no jurisdiction, because there is an adequate remedy at law. As

already stated, the Ætna Insurance Company brought an action at law in this court to recover on the bonds held by it, and it was held that for the proper ascertainment of the rights of the parties, it was necessary to bring an action in equity. From this ruling, and the judgment based thereon, dismissing the law action, the plaintiff took a writ of error to the supreme court, in which court the judgment was affirmed. 15 Sup. Ct. 1037. In pursuance of the ruling thus made, the present bill in equity was filed, and it is now objected thereto that the action ought to be at law; but it is apparent that it is not now open to the defendant to urge the objection. When relief was sought at law, the court held that it was necessary to invoke the aid of equity; and this ruling, which stands in full force, compelled the complainants to proceed in equity, and it would be a travesty on justice to permit the defendant, which escaped a judgment in the law action, on the ground that the facts of the transaction were such as to require the aid of a court of equity, to now defeat the jurisdiction in equity, on the ground that an action at law is the appropriate remedy.

The last position taken in support of the demurrer is that the action is barred by the statute of limitations, and this is on the theory that the claims of the plaintiffs is for money had and received, and that the right of action accrued when the money was furnished, which was more than five years before this suit was brought. There can be no question that if the suit is to be viewed as one wherein the complainants are seeking to recover damages because they were induced to part with their money on the promise of receiving therefor valid bonds of the county, which were not in fact furnished them, then, under the rulings made in *Morton v. City of Nevada*, 3 C. C. A. 109, 52 Fed. 350, and *Merrill v. Town of Monticello*, 18 C. C. A. 636, 72 Fed. 462, the right of action for damages or for money had and received would be deemed to have accrued when the money was paid over and the void bonds were delivered, or, at furthest, when the county ceased paying interest on the bonds; but, as already stated, this proceeding is not for the recovery of damages, nor is it a case wherein the county had no authority to issue refunding bonds under any circumstances. In the cases just cited, the defendant town had no authority whatever to issue the bonds upon which the money was obtained, and it was held that the statute began to run against the right to recover the money paid from the date of the payment thereof. In the case at bar the suit is based upon the facts of the transactions had between the complainants and the defendant county, it appearing that the county obtained certain sums of money from the complainants for the purpose of refunding the debt of the county. The county had full authority to refund its indebtedness. It had the power to borrow money for that purpose. It had the power to issue bonds for refunding purposes. The averments of the bill show that it procured money from the several complainants for refunding purposes, and that the money thus procured was applied in whole or in part to the refunding of valid existing indebtedness of the county. The real contracts between complainants and the county were to the effect that, to enable the county to refund its existing debt, the complainants would furnish certain sums of money, and the county agreed to apply the

same in payment of the county debts, and to repay the money so received in 20 years, with annual interest, and, as evidence thereof, was to deliver to the complainants coupon bonds of the county duly executed. It is averred in the bill that the several complainants advanced the sums agreed on; the county bonds were delivered to complainants; and the money so received was used in paying the pre-existing debt of the county. It is now claimed that the county is relieved from the performance of its several contracts with the complainants, because thereby the indebtedness of the county was caused to exceed the 5 per cent. limitation found in the constitution of the state. If, upon a full hearing upon the facts, it appears that any one or more of the several transactions had between the county and the complainants resulted in creating a debt which was a violation of the constitutional limitation, then that contract cannot be enforced either by a suit on the bonds or by suit for damages or for money had and received, because the constitutional limitation prohibits the creation of a debt beyond the limit, in any and every form. If, however, upon a hearing upon the facts, it appears that any one or more of the several transactions between the county and the complainants resulted in the creation of a valid claim against the county, then that claim would be enforceable according to its terms, which were that the money was to be repaid in 20 years, with interest payable annually. The points of inquiry are: What, in effect, were the contracts that were entered into between complainants and the county, in pursuance of which the complainants advanced the money for which they received the bonds of the county? Are these contracts void by reason of the constitutional limitation? If they are void, no recovery in any form can be had thereon; but, if they are not void, then, being valid and in force, the county is bound by the terms thereof, and the principal of the debts does not become due for 20 years, although the interest for years past is overdue; and it may be that the statute of limitations may be applicable to some of the overdue interest, but that cannot be determined until the facts of the case are fully before the court. The demurrer, for the reasons stated, must be overruled, with leave to the defendant to answer by the December rule day.

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ILLINOIS TRUST & SAVINGS BANK v. SEATTLE ELECTRIC RAILWAY  
& POWER CO. et al.

(Circuit Court of Appeals, Ninth Circuit. October 19, 1897.)

No. 368.

RAILROAD MORTGAGES — VALIDITY AS TO PERSONALITY — AFFIDAVIT OF GOOD FAITH.

A railroad corporation of the state of Washington executed in 1890 a mortgage or deed of trust of all the real estate and personal property then owned by it, or thereafter, to be acquired. Thereafter S. secured a judgment against the company, which was affirmed on appeal. In a suit to foreclose the mortgage, persons interested in that judgment were made parties, and claimed a preference over the mortgage debt. By 1 Hill's Code Wash. § 1648, a mortgage of personal property is declared void, as

against creditors, unless accompanied by a specified affidavit of good faith. No such affidavit accompanied the trust deed in question. *Held*, that in connection with article 12, § 17, of the constitution of Washington, providing that rolling stock and other movable property of a railroad corporation shall be considered personal property, and shall be liable to execution and sale in the same manner as the personal property of individuals, and 1 Hill's Code Wash. § 1646, authorizing mortgages upon all kinds of personal property of a railroad company, the failure of the trust deed to contain the affidavit rendered the mortgage void as to the personal property, and that to that extent the S. judgment was superior to the lien of the trust deed, and that this result was not affected by 1 Hill's Code Wash. § 1500, empowering private corporations generally to mortgage real and personal property.

Appeal from the Circuit Court of the United States for the Northern Division of the District of Washington.

Thos. R. Shepard, for appellant.

Geo. E. De Steiguer, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. The appellant brought suit in the circuit court for the district of Washington on December 31, 1894, against the Seattle Electric Railway & Power Company, the Seattle Consolidated Street-Railway Company, the Central Trust Company of the City of New York, and a number of other defendants, to foreclose a mortgage or deed of trust executed by the first-named defendant on March 15, 1890, in favor of the appellant, to secure the payment of the principal and interest of \$400,000 of bonds, of which amount bonds aggregating the sum of \$381,000 were issued. Among the parties made defendants were Annie Sears and Frank Sears, her husband. It is alleged in the bill that these defendants were judgment creditors or claimants of a lien upon a judgment for the sum of \$16,000 in their favor in the state court of Washington, but that no lien had been acquired in their favor upon any of the mortgaged property, except by the entry and docketing of the judgment on June 16, 1893, in the execution docket in the office of the clerk of the superior court of King county, Wash. The bill sets forth a judgment in favor of these defendants in the superior court of King county, dated March 29, 1892, and a judgment by way of affirmance in the supreme court of the state, dated June 16, 1893, and a final judgment of affirmance in the supreme court of the state for \$16,000, rendered November 20, 1893, as of date June 16, 1893. It is also averred that William H. Thompson, Eduard P. Edsen, and John E. Humphries, as co-partners under the style of Thompson, Edsen & Humphries, and George E. M. Pratt and William H. White, as co-partners under the style of Pratt & White, claim certain attorneys' liens on this last-named judgment, and that J. B. Maxon also claims a lien on the judgment by way of an assignment. At the time this bill was filed in the circuit court, on December 31, 1894, the property of the Seattle Consolidated Street-Railway Company, as the corporate successor of the Seattle Electric Railway & Power Company, was in the hands of M. F. Backus, a receiver appointed by the circuit court in two cases,—one brought by A. P. Fuller against the Seattle Consolidated Street-Railway Company, commenced

June 14, 1893, in which the receiver was appointed on the same day, and two days prior to the entry of the Sears judgment in the supreme court of the state, and the other brought by the same plaintiff against the same company and the Illinois Trust & Savings Bank, trustee, and the Central Trust Company of New York, commenced October 17, 1893. By an order of court entered June 6, 1895, all three cases were consolidated under the administration of the receiver appointed in the first case.

From the answers of the defendants Frank and Annie Sears, and the other parties claiming interests in the Sears judgment, it appears that on the 16th day of September, 1891, while Annie Sears was a passenger upon one of the street cars operated by the Seattle Consolidated Street-Railway Company, the corporate successor of the Seattle Electric Railway & Power Company, the car in which Mrs. Sears was riding ran off the track, and she was seriously and permanently injured; that thereafter she and her husband brought suit in the superior court of King county, Wash., against the company, to recover damages for the injury; that on the 29th day of March, 1892, they recovered a judgment for \$15,000 and costs of suit; that the company appealed the case to the supreme court of the state, and in order to stay proceedings, and for a supersedeas, filed a supersedeas bond, in the sum of \$16,000, with E. C. Kilbourne, Leilla S. Kilbourne, L. H. Griffith, Toney W. Griffith, V. Hugo Smith, Margaret Smith, J. S. Porter, and Helen Porter as sureties; that on the 18th day of November, 1893, the judgment was affirmed by the supreme court of the state, and a judgment rendered on the supersedeas bond against the principal and sureties in the sum of \$16,000. It is alleged in the answer that at the time Mrs. Sears recovered her judgment in the superior court of King county, and thereafter, while the judgment was superseded upon the appeal thereon, the street-railway company was in receipt of an income from its railway lines of about \$15,000 per month; that such receipts were used in payment of operating expenses and interest on the indebtedness of the company, including the mortgage indebtedness to the complainant; that the amount so received by the company over and above the amount of the operating expenses was more than enough to have satisfied the Sears' judgment, with interest; and that the company, while the supersedeas was in force, wrongfully appropriated the income to the payment of interest on the mortgage indebtedness and other indebtednesses, instead of paying off the judgment. It is also alleged in the answer, in support of the priority of this judgment over the mortgage lien, that the trust deed and mortgage mentioned in the bill of complaint did not contain the affidavit provided for chattel mortgages in the state of Washington, to the effect that the mortgage was made in good faith, and without any design to hinder and delay or defraud creditors. The answer prayed for an accounting, and that out of the diversion of the company's income the claim and judgment in favor of Frank and Annie Sears be first paid. To this answer a general replication was filed. Among the intervening petitions for preferential claims filed in the case is one by E. C. Kilbourne and Leilla S. Kilbourne, sureties on the supersedeas bond given in the state court to stay proceedings on the Sears judgment, filed in the cir-

cuit court December 19, 1895. This petition prays that the amount of the judgment, together with interest and costs, in favor of Frank and Annie Sears, be paid off and satisfied, to the end that the petitioners might be relieved from the said judgment.

The appellant, the Illinois Trust & Savings Bank, filed its answer to this petition, setting forth the income and disbursements of the corporation in detail. The answer prayed for a dismissal of the petition, and for costs against the petitioners. No reply to this answer was filed. No proofs were made, and the hearing was had upon the petition in intervention, the answers thereto, the bill of complaint in the cause, and the various orders and proceedings therein. The court below on January 18, 1896, entered an order and decree upon this petition; allowing the claim of the petitioners as preferred, and directing it to be paid by the receiver out of the funds of the receivership and proceeds of the property of the Seattle Consolidated Street-Railway Company next after the payment of an issue of receiver's certificates amounting to \$80,000, for repairs, etc., and prior to the indebtedness of the company secured by the mortgage of the Illinois Trust & Savings Bank, and to the Central Trust Company of the City of New York. It was further ordered that the receiver issue and deliver receiver's certificates to the various parties interested in the Sears judgment for the amounts of their respective interests, and that the receiver should pay and take up said certificates, when he should come into the possession of funds properly applicable thereto, out of the proceeds of the sale of the property of the Seattle Consolidated Street-Railway Company, or otherwise, and when he should be directed so to pay and take up said certificates by the further order or decree of the court. From this order and decree an appeal was taken to this court. The appeal was heard and dismissed on the ground that the receiver and certain creditors other than Frank and Annie Sears had not been made parties to the appeal, that they were necessary parties, and that their absence was fatal to the hearing of the case on appeal. A full statement of the material facts of the case, and of the various proceedings that took place in the court below up to the entering of the order and decree of January 18, 1896, will be found in the statement of the case made by this court upon the motion to dismiss this first appeal. 22 C. C. A. 599, 76 Fed. 883.

It appears that pending the appeal to this court from the order and decree of January 18, 1896, the foreclosure suit proceeded to a final decree of foreclosure of the appellant's mortgage, which was entered on May 20, 1896. Under this decree, the property of the Seattle Consolidated Street-Railway Company was, on December 1, 1896, sold for \$139,601. The sale was confirmed by an order entered on December 24, 1896. The purchase price was thereupon paid into court, and the master's deed issued to the purchasers, who, on December 31, 1896, entered upon and took possession of the property. In section 6 of this decree of May 20, 1896, it was adjudged that the appellant's mortgage or deed of trust was the proper act and deed of the Seattle Electric Railway & Power Company, by it authorized,

made, and delivered, in all respects, in conformity with law, and was a valid conveyance for the purposes therein stated, but that the mortgage or deed of trust did not contain or have appended thereto the affidavit provided for chattel mortgages in the state of Washington, to the effect that the mortgage was made in good faith, and without any design to hinder, delay, or defraud creditors; and in section 15 and in paragraph 3 of section 21 of this decree the question whether or not the Sears judgment was entitled to a preference over the appellant's mortgage lien was reserved for adjudication at or after the confirmation of the sale directed by the decree, or in case the decree awarding preference to said claim should be affirmed on the then pending appeal to this court. The decree, so far as it related to the Sears judgment and the Kilbourne petition of intervention, was based upon a stipulation of the parties that all the allegations of fact contained in the appellant's bill of complaint were true; expressly excluding from the scope of the admission and stipulation, however, any and all allegations or conclusions of law set forth in the bill of complaint, and particularly the claim of priority of the lien of the mortgage over the lien of the judgment in favor of Annie Sears and Frank Sears, her husband. After the appeal from the decree of January 18, 1896, was dismissed by this court, but shortly before the mandate on the dismissal was filed in the court below, that court, by a decree dated February 15, 1897, amended and supplemented the decree of May 20, 1896, with respect to the Sears judgment, and provided for its allowance and payment out of the proceeds of the sale of the property, and provided further that:

"This allowance shall occupy the same position, and be entitled to the same priority, and take the same rank, in every respect, as the decree heretofore entered on the — day of January, 1896, on the petitions of Kilbourne et al., for the allowance and payment of the same judgment; and said judgment is, and shall be, a prior lien upon all the property and assets mentioned in said mortgage of the plaintiff, and this adjudication of priority of said judgment of said Sears over the mortgage indebtedness of plaintiff in this case shall be subject to the right of appeal which may exist therefor."

It is from this last decree that the present appeal is prosecuted, wherein the receiver and other necessary parties have been joined.

The mortgage or deed of trust involved in this case was executed March 15, 1890, by the Seattle Electric Railway & Power Company, a corporation organized under the laws of the state of Washington, and conveyed to the Illinois Trust & Savings Bank, trustee, certain described real estate in the city of Seattle, state of Washington, together with the buildings thereon, and also all the buildings, roadbed, tracks, machinery, railway plant, engines, boilers, dynamos, electrical machines, electric motors, and other electrical apparatus, rolling stock, cars, poles, lines, and rails, of whatever description, and wherever situated, including all the rights, privileges, and franchises of the company. It was further declared that it was the intention and meaning of the instrument to embrace thereunder, and subject to the lien therein provided, all the real estate and personal property, rights, and privileges that might be thereafter acquired, as well as that then owned by the mortgagor.

The constitution of the state of Washington (article 12, § 17) provides:

"The rolling-stock and other movable property belonging to any railroad company or corporation in this state, shall be considered personal property and shall be liable to taxation and to execution and sale in the same manner as the personal property of individuals, and such property shall not be exempted from execution and sale."

It is contended by the appellees that under this constitutional provision a large part of the property described in the mortgage or trust deed is personal property, and subject to the law of the state relating to chattel mortgages.

Section 1646 of the Statutes of Washington (1 Hill's Code) provides as follows:

"Mortgages may be made upon all kinds of personal property and upon the rolling stock of a railroad company and upon all kinds of machinery, and upon boats and vessels, and on growing crops and on portable mills and such like property."

Section 1648 of the same Statutes (1 Hill's Code) provides as follows:

"A mortgage of personal property is void as against creditors of the mortgagor or subsequent purchasers, and incumbrancers of the property for value and in good faith, unless it is accompanied by the affidavit of the mortgagor that it is made in good faith, and without any design to hinder, delay or defraud creditors, and it is acknowledged and recorded in the same manner as is required by law in conveyance of real property."

The decree of May 20, 1896, found that appellant's mortgage or trust deed did not contain, or have appended thereto, the affidavit required by the last section. In *Hammock v. Trust Co.*, 105 U. S. 77, the supreme court held that the provisions of the statute of Illinois in relation to chattel mortgages did not apply to mortgages by a railway corporation in connection with its real estate and franchises, and including personal property used and appropriated for railroad purposes. And in *Southern Cal. Motor-Road Co. v. Union Loan & Trust Co.*, 29 U. S. App. 110, 12 C. C. A. 215, and 64 Fed. 450, this court held that a statute of California, relating to chattel mortgages, similar to that of Washington, did not apply where the mortgage of a railroad company covers personal property in connection with real estate and corporate franchises. But in both of these cases the exception was based upon the provisions of statutes conferring upon railroad corporations organized or incorporated under the laws of the state for public purposes the power to mortgage their franchises and real and personal property as an entirety. In the last case cited, Judge Hawley, speaking for the court, said:

"In all of the decisions which hold that the locomotives, engines, and other rolling stock of a railroad are subject to the provisions of the act relating to chattel mortgages, it is conceded, if the question is referred to, that, if there is an independent statute of the state authorizing railroad companies to mortgage their corporate property and franchises to secure the payment of their bonds, the chattel mortgage act would not be applicable, because it must be, and is, universally acknowledged that it is within the power of the legislature of a state to regulate the mode and prescribe the manner in which the real and personal property within the state may be conveyed or mortgaged."



It was accordingly held that section 456 of the Civil Code of California, authorizing railroad corporations, for the purpose of constructing and completing their roads, to mortgage their corporate property and franchises, was such an independent statute, and under its authority the mortgage of a railroad company, covering personal property, real estate, and corporate franchises, created a valid and binding lien on the entire property of the corporation, and the provisions of the chattel mortgage act had no application to such a mortgage. A similar statute in Illinois was referred to by the supreme court in *Hammock v. Trust Co.*, supra, as authority for a railroad corporation to mortgage its franchises and property as an entirety, and relieving such a mortgage from the operation of the local statutes relating to the redemption of real estate, and a statute providing a limitation of two years for the possession of mortgaged personal property by the mortgagor under certain conditions. We find, however, no such independent statute in Washington, conferring upon railroad corporations organized and incorporated in that state the right to mortgage all their corporate property and franchises as an entirety. Section 1500 of the General Statutes of Washington (1 Hill's Code) enumerates the powers of private corporations generally, and provides, among other things, that they shall have power "to purchase, hold, mortgage, sell and convey real and personal property." To hold that this general enabling statute, passed for the benefit of all corporations alike, is sufficient to exempt the mortgage of a railroad corporation, covering both real and personal property, from the requirements of a special statute relating to chattel mortgages, would, in our opinion, enlarge the scope of the doctrine in *Hammock v. Trust Co.* beyond its true purpose and meaning, and introduce confusion and uncertainty into the law relating to personal property; and this we are not prepared to do, in view of the provision of the constitution of the state that the personal property of a railroad company shall be liable to execution and sale in the same manner as the personal property of individuals. Const. art. 12, § 17. In *Radebaugh v. Railroad Co.*, 8 Wash. 570, 36 Pac. 460, the supreme court of Washington considered the authority of *Hammock v. Trust Co.*, and held that it was not applicable to the statute of Washington, and that, with respect to the rolling stock of a railroad company, it was the intention of the legislature to place it on the same footing as other personal property, and that a mortgage executed and recorded as a real-estate mortgage, which did not comply with the formalities required in the execution of a chattel mortgage, did not bind such property. This is the law prevailing in New York. *Hoyle v. Railroad Co.*, 54 N. Y. 314; *Vilas v. Page*, 106 N. Y. 439, 13 N. E. 743. The failure of the trust deed to contain the affidavit required for a chattel mortgage in the state of Washington rendered the mortgage void as to the personal property, and to that extent the *Sear's* judgment is superior to the lien of the trust deed. This determination renders unnecessary the consideration of other questions contained in the record and discussed by counsel. The decree of the circuit court is affirmed, with costs.

## TERRE HAUTE &amp; I. R. CO. v. PEORIA &amp; P. U. R. CO.

(Circuit Court, N. D. Illinois, S. D. November 8, 1897.)

## 1. INJUNCTION—JURISDICTION—STAYING ACTION IN STATE COURT.

Rev. St. § 720, which declares that federal courts shall not by injunction stay proceedings in state courts except in bankruptcy matters, does not deprive a federal court of jurisdiction to enjoin proceedings in a state court as ancillary to granting relief in a case in which the federal court has jurisdiction.

## 2. SAME—DEFENSE COGNIZABLE AT LAW.

A federal court of equity will not stay an action at law in a state court on account of a defense which may possibly be cognizable at law, until the court of law has refused to consider such defense.

Suit in equity by the Terre Haute & Indianapolis Railroad Company against the Peoria & Pekin Union Railroad Company. The cause was heard on a motion for an injunction to stay certain proceedings in a state court.

J. G. Williams, W. J. Calhoun, and W. J. Lyford, for complainant.  
Stevens, Horton & Abbott, for defendant.

GROSSCUP, District Judge. The motion is for an injunction restraining the defendant from proceeding at law in the circuit court of Peoria county upon a certain bond made by the complainant and its sureties to the defendant. The facts essential to the disposition of the motion may be stated as follows: The complainant, the Terre Haute & Indianapolis Railroad Company, is lessee of a railroad organized under the laws of Illinois, and known as the Terre Haute & Peoria Railroad Company. This last company purchased its road at a receiver's sale in 1887, the road before that time being the property of the Illinois & Midland Railroad Company, running from a point on the Toledo & Western Railroad, four miles east of Peoria, to a point near Terre Haute. During the period that the Illinois & Midland Railroad Company was in the hands of the court, its receiver, Louis Genis, made a contract with the Peoria & Pekin Union Railroad Company, the defendant here, whereby the Midland road was given the use of terminal facilities in and near Peoria at a rental of \$13,000 per year. In view of the contemplated sale of the road on the then pending foreclosure proceedings, in aid of which the receiver had been appointed, the contract provided that the purchaser or the owner of the property might, at the termination of the receivership, extend the contract for the full period of 50 years from February 1, 1881. The complainant, as lessee of the Terre Haute & Peoria Railroad Company, purchaser at the foreclosure sale, went into possession of the road some time in 1892, and in connection therewith used the defendant's tracks and terminal facilities. Differences having arisen between the two companies over the interpretation of the contract, the defendant claimed rental at the rate of \$22,000 per year,—a sum obtained from certain other roads using the terminal,—while the complainant offered and paid at the rate of \$13,000 per year. It was understood that the lesser amount should be currently paid, but that its payment and acceptance should not prejudice

the rights of either party in any adjudication upon the controversy between them. In 1894 the defendant served notice upon the complainant that, unless the rentals were to be paid at the rate of \$22,500 per year from the date of the company's possession, in 1892, the complainant would be excluded from the use of the tracks and the terminal facilities; whereupon the complainant filed its bill in equity in the circuit court of Peoria county for an injunction restraining the defendant from proceeding to execute its threats of exclusion. A temporary restraining order having been made ex parte, the same was, upon the motion and full hearing, dissolved, but the court, upon application of the complainant, under the practice provided by the statutes of this state, continued the injunction in force pending the appeal, upon the complainant's executing its bond, with surety, for the payment of all back rentals at the rate of \$22,500 per year, in case its judgment was affirmed. This bond also contained the usual provisions for the payment of all damages. The judgment was affirmed by the appellate court (61 Ill. App. 405), whereupon, upon application to a justice of the supreme court, the injunction was again continued in force, pending an appeal, upon the execution of a bond of like tenor as the first. On the hearing in the supreme court the judgment of the circuit court, together with that of the appellate court, was affirmed. The successful party, the Peoria & Pekin Union Railroad Company, thereupon began suits on each of these stay bonds in the circuit court of Peoria county, and it is to restrain the further prosecution of these suits that the present bill is filed.

It seems that the bill for an injunction filed in the circuit court of Peoria county, and reviewed by the appellate and supreme courts, was framed upon the theory that the Peoria & Pekin Union Railroad Company was a union depot company, under the laws of Illinois. In such event, the Indianapolis & Terre Haute Railroad Company would, independently of any rights obtained under the contract between the receiver, Genis, and the Peoria & Pekin Union Railroad Company, have been entitled to the use of the terminals at a reasonable rental. Each of the state courts through which the case passed, however, found that the Peoria & Pekin Union Railroad Company was not a union depot company under the laws of Illinois, and it was upon this finding that the original injunction was dissolved, and the contention of the Indianapolis & Terre Haute Railroad Company defeated. But the supreme court of the state, in its written opinion, took occasion to refer to the contract between Genis and the Peoria & Pekin Railroad Company, and the relation of the Indianapolis & Terre Haute Railroad Company, as successor to Genis, under such contract, and in so doing intimated, at least, that the Indianapolis & Terre Haute Railroad Company was entitled, under such contract, to the use of the tracks and terminal facilities at the rate of \$13,000 per year. It is averred in the bill before me that the Indianapolis & Terre Haute Railroad Company, in the bill originally filed in the state court, predicated its right to the use of these terminals at the rate of \$13,000 per year upon the contract, as well as upon the law relating to the union depot companies. The su-

preme court, however, could not have so understood the bill, for it could not, on such a case, in holding the views expressed in its opinion respecting the rights of the Indianapolis & Terre Haute Railroad Company under the contract, have affirmed the judgments below. It is insisted by the Peoria & Pekin Railroad Company, on the contrary, that the Indianapolis & Terre Haute Railroad Company did not, in fact, and was unwilling to, base any part of its case upon the Genis contract, because by so doing it would have bound itself to the use of the terminals at the rental stated for the full term of 50 years,—an obligation it did not wish to assume in view of contemplated terminals of its own within the city. Whatever may have been the fact in that respect, the Indianapolis & Terre Haute Railroad Company was, in fact, defeated, and is now defendant to two suits at law as the result of such defeat. Whether the Peoria & Pekin Union Railroad Company ought to recover the full penalty within the bonds, namely, rentals at the rate of \$22,500 per year since 1892, notwithstanding the expression of the supreme court that the Genis contract, with its \$13,000 per year rental, was binding upon the parties, is one question that must—either in the court in which the suit upon the bond is now pending, or in some other court—ultimately be determined.

Preliminary to this inquiry, however, is the question whether this court will entertain a motion to enjoin the defendant from prosecuting its suit upon the bond in the state court. Section 720, Rev. St. U. S., provides that the writ of injunction shall not be granted by any court of the United States to stay proceedings in any state court except in case where such injunction may be authorized by any proceeding in bankruptcy. The literal application of this statute to the case before the court would, of course, forbid the issuance of the injunction asked.

The constitution of the United States (article 3, § 2) provides that the judicial power of the courts of the United States shall extend to all cases in law and in equity arising under the constitution, the laws of the United States, treaties, or between citizens of different states. The statutes of the United States have, ever since the original judiciary act, provided that the circuit courts shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity arising under the constitution or laws of the United States, or in which there shall be controversies between citizens of different states. Injunctions to restrain proceedings in a state court are frequently an incident to a case to which the constitutional and statutory power of the United States courts is thus extended. An action, for instance, to annul a judgment at law obtained by fraud is a distinct case in equity, and can, therefore, be brought within the jurisdiction of the federal circuit courts, if proper diversity of citizenship exists; but such an action may carry with it, as one of its imperative necessities, the right to restrain the state court from issuance of an execution and the collection of the judgment debt; otherwise the possible decree to follow might be made ineffectual in advance. To take this injunctive

right away would be to cut down, in its most material aspect, the substance of the court's jurisdiction. The injunctive right withdrawn, the whole case—that is, the case with its remedies—is no longer within the power of the court. Such a case was *Marshall v. Holmes*, 141 U. S. 589, 12 Sup. Ct. 62. That action was begun originally in the federal court, upon the ground that such judgment had been obtained by the fraud of one of the parties in forging the plaintiff's signature to a paper, on the strength of which alone the judgment was obtained. The injunction was issued in aid of the main purposes of the suit, restraining the judgment creditor from issuing an execution upon such judgment pending the final decree. Another illustration is found in the case of *Dietzsch v. Huidekoper*, 103 U. S. 494. That case was an action of replevin, brought originally in the state court, then removed to the federal court, and judgment rendered therein in favor of the plaintiff. In the state court, however, such right of removal was challenged, and the case proceeded there, and a judgment was entered against the plaintiff. Of course, if the state court had jurisdiction, the plaintiff was, on this judgment of right of property, liable to the defendant upon the replevin bond; and in fact such action was brought in the state court. The successful party in the federal court responded by a bill, filed in that court, seeking to enjoin the further prosecution of the bond in the state court. The injunction was issued, and subsequently sustained in the supreme court.

The removal statutes have, in substance, from the original judiciary act to the present time, provided that any suit of a civil nature at law or in equity, of which the circuit courts of the United States are given jurisdiction, shall be removable. It seems plain that, if the federal court cannot protect its jurisdiction by restraining all proceedings in the state court destructive thereof, the whole case is not, in fact, removed. Indeed, had not the right of such injunction upon state proceedings been sustained in *Dietzsch v. Huidekoper*, the federal court would, by the removal, have obtained nothing but the shell of the case, while its substance—the real power affecting the interests of the parties—would have remained in the state court.

These statutes, conferring jurisdiction in all cases arising in law or in equity, where certain conditions exist, were not intended to confer merely fractional jurisdiction. The right of the federal court to take cognizance of the controversies arising in such cases, with all the remedies usually applied in law and in equity, was clearly contemplated. Section 720 could never have been intended to trench upon this grant of jurisdictional domain. Such interpretation would imply an intention on the part of congress to repeal a portion of the power expressly given to the courts, both by the constitution and the judiciary act. In their literal scope, the constitution and statutes conferring jurisdiction, and this section 720, are in conflict, and to the extent of such conflict the legal effect of the latter statute must be narrowed down. The cases cited, and a line of cases in the supreme court of the United States, of which they are a development, clearly show that this is the interpretation put upon these two apparently inconsistent lines of legislation.

But the jurisdiction of the federal circuit court is extended only to distinct cases in law or in equity, where the stated condition prevails. Power is not thereby conferred to take jurisdiction of causes pending in the state court, or phases of such causes, such as proceedings tantamount to the common-law practice of moving to set aside a judgment for irregularities, or tantamount to a writ of error or bill of review. All such causes, however independently instituted, are, in their nature, merely parts of the cause to which they are related. The courts of the United States cannot establish a right to review proceedings of the state courts by any such assumption of jurisdiction. The case over which the courts of the United States can obtain jurisdiction, and, with it, carry the right of injunction,—other conditions precedent existing,—must be a distinct and separate cause of action, as distinguished from a merely ancillary action. The action in the state court sought to be stayed by the bill under consideration is upon two bonds of a supersedeas character. Whether the defense, the equitable consideration, thrust into the relations of these two railroad companies by the dicta of the supreme court opinion respecting the effect of the contract, can be interposed as a defense in these suits at law, I am not prepared to say. If the court at law has no power to hear such equitable defense, it may be that a court of equity will have jurisdiction to correct such shortcomings of the court of law. Such a cause may constitute a distinct case in equity, a case equipped with the necessary powers of injunction against the execution of a judgment thus rendered against the right, cognizable in the federal court. Until, however, the state court refuses to hear this defense, I cannot assume that the matter thus set up is not involved in the controversies before the state courts. I do not know what view the court may take of the nature of the bonds. It may hold these provisions to be in the nature of damages only, and therefore defeasible, on a showing that in fact, considering the contract between the parties, there was no damage. The motion for an injunction will be overruled, with leave to renew at any date.

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TUTTLE v. LEITER.

(Circuit Court, N. D. Illinois. October 13, 1897.)

1. LANDLORD AND TENANT—COVENANT TO PURCHASE IMPROVEMENTS—SUBLET-  
TING AND ASSIGNMENT.

On November 1, 1865, A. leased certain premises to plaintiff and his intestate from that date "for and during and until" July 1, 1885. The lessees covenanted to build on the premises, and the lessor agreed at the expiration of the term "to purchase the improvements erected upon said premises at an appraised valuation for material for building purposes." The lessees agreed not to remove any buildings or improvements, except for rebuilding, without consent, and to insure, and that the rent should be a lien on buildings and improvements that might at any time be erected, etc. The lease was duly recorded. The lessees entered and erected a building. Thereafter they transferred a term to L., H. & L. from April, 1870, "for and

during and until" July 1, 1885; reserving rent to themselves, and guaranteeing the insurance money, in case of fire, to L., H. & L., for rebuilding. They also gave to L., H. & L. the right to alter and improve, and to elect to buy the improvements on the same terms named in the original lease, and thereupon to acquire the rights of the original lessees in that respect against the lessor. The instrument provided that at the end of the term the premises should be delivered up to the original lessees, who also reserved a right of re-entry for nonpayment of rent. Subsequently L., H. & L. transferred to H. H. The building was destroyed by fire. H. H. then transferred to the Bank of C., which, receiving \$2,000 insurance money, erected a \$30,000 building, and later transferred to W. On April 10, 1878, the interest and reversion of the original lessor was conveyed to defendant. At the expiration of the term, suit was brought on behalf of the original lessees against defendant to recover for the material in the \$30,000 building. *Held*, that the improvements mentioned in the original lease comprehended the improvements existing at the end of the term.

2. *SAME.*

*Held*, further, that if, as would seem to be the case, the transfer from the original lessees was a subletting, and not an assignment, it did not shut off their right to recover the value of the improvements under the lease.

3. *SAME.*

*Held*, further, that, if that transfer was an assignment, yet the obligation of the original lessor to pay for improvements was a charge on the reversion, and that the covenant creating this charge was not assigned.

4. *SAME.*

*Held*, further, that, whether the transfer to L., H. & L. was an assignment or a sublease, defendant was bound by the obligation to pay for the improvements.

Wm. P. Black and Joseph N. Barker, for complainant.  
Isham, Lincoln & Beale, for defendant.

SHOWALTER, Circuit Judge. On the 1st day of November, 1865, Anne G. Turnbull leased to Augustus C. Shelton and Byron Tuttle a certain parcel of land on Madison street, in Chicago. The lessees were to have and to hold the same from the 1st day of November, 1865, "for and during and until the first day of July," 1885. The rent was \$500 for the first year, and \$800 for each year thereafter. This lease, which was under seal, and was duly recorded in the recorder's office of Cook county, Ill., contained the following provision:

"The said party of the second part [the lessees] further covenants to build and erect upon said premises good and substantial brick buildings, as soon as it can reasonably be done; and at the expiration of the term the said party of the first part [the lessor] agrees to purchase the improvements erected upon said premises at an appraised valuation for material for building purposes."

It was further provided that the rent reserved should be a—

"Lien upon any and all buildings and improvements on said premises, or that may at any time be erected, placed, or put on said premises by the said party of the second part, their heirs, executors, administrators, or assigns, and upon his or their interest in this lease and the premises hereby demised."

The lease contained also the following provision:

"It is further agreed by the party of the second part that they will, and their heirs and assigns shall, keep the buildings to be erected upon said premises fully assured by a responsible insurance company, and assign the policy or policies of insurance to the said party of the first part, to be held as collateral security for rent of said premises."

Also the following:

"And the said party of the second part further agrees not to remove any buildings or other improvements from said premises, except for the purpose of rebuilding, without written consent of said party of the first part."

Shelton & Tuttle entered under this lease, and erected a building on the premises at a cost of about \$7,000. On the 1st day of April, 1870, Shelton & Tuttle made an instrument, in the form of a lease, whereby they transferred to William Lewis, Charles H. Ham, and Joseph B. Lewis a term in said premises from the 1st day of April, 1870, "for and during and until the first day of July," 1885. In this instrument the rent reserved was \$3,500 per annum, payable quarterly. The stipulation concerning insurance in the original lease was referred to in the instrument of April 1, 1870, and then came the following provision:

"The party of the first part [Shelton & Tuttle], and their heirs and assigns, shall, in accordance with the above-recited clause, in case of destruction or damage by fire of said premises, guaranty to said party of the second part the full benefit of all money recovered from such insurance, for the purpose of rebuilding said premises."

This second instrument contained also the following provision:

"It is further agreed by the party of the first part that, whereas it is provided in the lease of said premises from Anne G. Turnbull to said party of the first part as follows: 'And at the expiration of the term the said party of the first part agrees to purchase the improvements erected upon said premises at an appraised valuation for material for building purposes,'—said party of the second part shall have the right to alter and improve the building upon said premises at any time during the continuance of said term, but solely at their own expense; and said party of the first part hereby agrees that said party of the second part may at any time during the continuance of this lease elect to buy from said party of the first part the improvements on said premises belonging to said party of the first part, upon the terms provided in said lease from Anne C. Turnbull to said party of the first part, namely, for their appraised valuation for material for building purposes: provided that, should said party of the second part so elect, said party of the first part shall be released from any liability to said Anne G. Turnbull, her heirs and assigns, to keep said buildings insured from such time forward: and provided, further, that, in case of such election and purchase, said party of the second part shall be substituted to all the rights of the party of the first part by reason of the clause in the lease from said Anne G. Turnbull to said party of the first part binding said Anne G. Turnbull to purchase any improvements standing upon the premises at the expiration of said lease at the appraised valuation for material for building purposes."

This instrument provided that at the end of the term the premises were to be delivered up to Shelton & Tuttle. It also provided that, in case the rent were not paid, Shelton & Tuttle might sell out all the interest in the premises of the party of the second part, or might themselves re-enter.

Lewis, Ham & Co. entered under the foregoing writing. On the 23d day of September, 1870, they assigned whatever estate had been thereby transferred or created to H. H. Honore; and on the 5th day of January, 1872, Honore assigned to the National Bank of Commerce of Chicago. In the meantime, and on or about the 9th of October, 1871, the building was destroyed by fire. Shelton & Tuttle collected \$2,000 of insurance money, and turned the same over to the National Bank of



Commerce; and that concern thereupon erected the building which now occupies said premises, at a cost of \$30,000. Later the bank assigned to one Whitney, who held for the residue of the term. On the 10th of April, 1878, the executor and trustee and the heirs of Anne G. Turnbull, who had in the meantime died, conveyed all the interest and reversion vested in Anne G. Turnbull at the time of her death to the defendant Levi Z. Leiter. Shelton & Tuttle paid the rent at all times in accordance with the requirements of the original lease. The term, as has already been said, expired on the 1st day of July, 1885. This suit is brought by Tuttle, in his own right and as representing the estate of Shelton, now deceased, to recover for the material in the present building, by virtue of the provisions of the original lease above quoted.

It does not appear that Shelton & Tuttle, after they had erected the original building on the premises, and the same had been destroyed by fire, were bound to rebuild, but they certainly had the right to rebuild if they saw fit. By the terms of the lease, Shelton & Tuttle, in case they should rebuild, could not remove the structure so erected. Such second building would become part of the realty, and, if it still remained on the premises "at the expiration of the term," the reversioner would be bound to pay a sum equal to the value for "building purposes" of the material in such building. Since the building first erected by Shelton & Tuttle was destroyed pending the term, no obligation, so far as the material in that building was concerned, could ever arise as against the reversioner. The language, "at the expiration of the term the said party of the first part agrees to purchase the improvements erected upon said premises at an appraised valuation for material for building purposes," comprehends improvements on the premises "at the expiration of the term." The court is not authorized to narrow the scope of the covenant, and make it apply only to the "brick building" which Shelton & Tuttle obligated themselves to erect in the first instance. It is the grammatical import of the words of the covenant, and the spirit of the entire instrument, that the value for building purposes of the material in whatever improvements were on the land on July 1, 1885, should be paid by the reversioner. If Shelton & Tuttle continued to occupy the premises, and had themselves erected the present building, it seems to me that the obligation to pay them for the material in that building would be clear.

It is said, however, that the instrument of April 1, 1870, was in law an assignment of the entire leasehold estate, and not a subletting, that it was by a subsequent agreement between the reversioner of the first leasehold and an assignee under the second instrument that the present building was erected; and that Shelton & Tuttle, since the second instrument was an assignment and not a subletting, have no right whatever as against the reversioner. From the recitals quoted above, it will be seen that the terms of the indenture of April 1, 1870, were very different from those of the original lease. The right to be paid for the building material was expressly reserved, as was also the right on the part of Shelton & Tuttle to themselves receive the possession of the premises at the end of the term. Within the law, as stated in 1 Washb. Real Prop. (at pages 543-546), the instrument of April 1, 1870,

would seem to be a subletting, rather than an assignment. Such was evidently the clear intent of the parties. Following out the terms of that instrument, the premises would be surrendered on the 1st day of July, 1885, to Shelton & Tuttle, by their tenant, and afterwards, and on the same day, if need be, by Shelton & Tuttle to the reversioner under the old lease. On this view, there was neither privity of estate nor privity of contract between Mr. Leiter and Mr. Whitney, the latter having been simply the assignee of a sublease. The old term created by the first lease would thus have remained outstanding in Shelton & Tuttle. So far as concerns Leiter, the case was precisely the same as though Shelton & Tuttle themselves had never made any sublease, but had remained in possession of the property, and erected thereon the present building. The successors to the original lessor, on this theory, mistook the situation, in undertaking to deal with the National Bank of Commerce and with Whitney. The bank and its successor, Whitney, held only that estate which had been created by Shelton & Tuttle in the writing of April 1, 1870. They had no power to vacate, alter, or release the old covenant here in question. The provision of the original lease that Shelton & Tuttle were to be paid for the material in the building at the close of the term, assuming that such provision was incidental to the leasehold estate, remained unassigned and unimpaired. The second lease here refers to, and was made subject to, the first. There is no difficulty in understanding that the possession was to be surrendered by the second lessees on July 1, 1885, so that Shelton & Tuttle could afterwards, even on that day, surrender to Leiter. The logic of the case does not demand that the intent of the contracting parties to make a sublease be disregarded. In *Stewart v. Railroad Co.*, 102 N. Y. 602, 8 N. E. 203, there was a writing whereby a term of 50 years was first created, followed by an agreement to sell the reversion to the lessee on certain terms. If this agreement were kept, then there never could be any re-entry by the party of the first part. The lessee made its original entry as well under the contract of purchase as under the lease. This contract and all interests under it passed to an assignee. The latter thereupon made a 99-year lease to the defendant. The court ruled that the defendant was an assignee of the 50-year term, since no reversion out of that term could have remained in the first assignor. The doctrine which complainants' counsel contend for here is recognized by Judge Rapallo in the following language:

"Neither can the covenant to surrender have any bearing. It was a covenant to surrender at the expiration of the ninety-nine years lease, long after the expiration of the fifty years lease. Where, in an assignment of a lease, or in a demise by the lessee for the same term as that granted by the original lease, there is a covenant to surrender to the assignor, this has in some cases been held to prevent the sublease from operating as an assignment; but this has been because the whole instrument, taken together, has been held to reserve to the original lessee some fragment of the original term, though almost inappreciable in point of duration, as in the case of *Post v. Kearney*, 2 N. Y. 394, where the assignee of a lease demised the premises for the residue of his term, reserving the right to a delivery of possession by his assignee to him on the last day of the term, and a right to intermediate possession in case the buildings should be destroyed by fire. These reservations were held sufficient to characterize the demise as a sublease, and not an assignment. The right to pos-

session on the last day would leave a fragment of that day of the term in the assignor, and was sufficient to create a technical reversion, and thus prevent a privity of estate between his lessee and the original lessor."

The dissenting opinion in the foregoing case went apparently on the ground that the initial contract, as a whole, was really not a lease; that the money paid under the name of rent was really part of the price of the property, and, since there was really no term for 50 years, there could be no reversion following such term, wherefore the 99-year lease was a sublease, and not an assignment of the alleged 50 years' term. In the present case the obligation to pay for the material in the building could not arise until the 20-year term expired. This obligation was rather a charge on the reversion than an incident to the leasehold estate. There might have been an assignment of the leasehold, leaving the reversion charged with the covenant in favor of Shelton & Tuttle. Clearly, they did not assign this covenant, even if they did assign the leasehold. I doubt, therefore, if the question of assignment be material here. On this view, Leiter, even if he had not expressly assumed the obligation, took the reversion subject to the charge, and with full notice of the same.

In the suggestion that the claim of complainant is inequitable, defendant's counsel forget that complainant and Shelton owned the 20-year term. The property increased rapidly in value, but complainant and Shelton were entitled to all the benefits of this increase. They controlled also the building right. They were careful to observe the advantage given by the terms of their lease, in the requirement that the lessor or her successors must pay a sum equal to the value of the building material on the ground when the lease expired.

I think the exceptions to the master's report, other than the fifth, should be sustained. The master has found the value of the building material to be \$5,673. I see no reason to criticise this finding, and a decree may go for this amount.

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BRISCO et al. v. MINAH CONSOL. MIN. CO., Limited, et al.

(Circuit Court, D. Montana. May 17, 1897.)

No. 235.

1. VENDOR AND PURCHASER—VENDOR'S LIEN—LANDS HELD IN SEVERALTY SOLD IN SOLIDO.

Where the several owners of different mining claims join in a contract for the sale of all the claims for a sum in solido, payable to them jointly, and the several deeds are executed, and possession taken thereunder, in pursuance of the contract, they jointly have a vendors' lien on all the property conveyed, for the unpaid purchase money.

2. SAME—NOTICE OF LIEN—INNOCENT PURCHASER.

A grantee or mortgagee, who knew at the time his grantor purchased the real estate that he did not pay all the purchase money, will be charged with notice if it still remains unpaid at the time of the conveyance to him, and he will take title subject to the lien therefor.

3. SAME—WAIVER OF LIEN.

An agreement by the vendors of mining claims to accept payment therefor out of the proceeds of the mines, is not a waiver of the vendor's lien for the unpaid purchase money.

**4. SAME--DEFECT IN TITLE--DEFENSE TO ACTION FOR PURCHASE MONEY.**

It is no defense to an action for purchase money that the grantor had only a possessory title to a portion of the land conveyed, the contract having been for the delivery of deeds and abstracts showing full and complete title, where abstracts were delivered which correctly showed the title, and the deeds were accepted, possession taken thereunder, and the grantor has not been ousted.

**5. SAME--SET-OFF AGAINST PURCHASE MONEY--PLEADING.**

A claim for damages constituting a proper set-off against purchase money will not be considered if not set forth by cross bill.

**6. PROCESS AGAINST FOREIGN CORPORATION--MONTANA STATUTE--GARNISHMENT.**

Comp. St. Mont. div. 5, § 442, requiring foreign corporations to file with the secretary of state the designation of an agent within the state upon whom process against the corporation may be served, and the consent of the corporation to accept such service, does not authorize the service on such agent of a notice to such corporation to answer as garnishee.

**7. VENDOR AND PURCHASER--ACTION TO FORECLOSE LIEN--LESSEES AS PARTIES.**

Lessees of real estate are not necessary parties to a suit for purchase money and foreclosure of vendor's lien, unless a decree is sought affecting their rights.

Walsh & Newman, Sanders & Sanders, and A. J. Craven, for complainants.

George F. Shelton and Cullen, Day & Cullen, for defendants.

**KNOWLES, J.** The first point presented for consideration in this case is the right to a vendor's lien. Plaintiffs contracted to sell and convey to defendants certain quartz lode mining claims named and described as the "Minah Lot 41, East End," "Minah Lot 49, West End," "Homestake," "The Annie B," "The Hillsdale," "Iron Dollar," "Gold Cross," and "Iowa," situate in Colorado mining district, Jefferson county, Mont. The contract of sale recites: "Whereas, the first parties are the owners and in possession of certain mining ground consisting of quartz lode mining claims situate near Wickes, in the county of Jefferson, state of Montana." Then, after providing for the examination of the said mining claims, it is provided that the first parties, the plaintiffs above named, shall deposit in the Second National Bank of Helena, Mont., title deeds and abstracts showing full and complete title, free and clear of incumbrance, to said property, except a mortgage for \$35,000, held by the Montana Smelting Company. It is provided that this mortgage shall be paid out of the first payment on said property, which was to be £20,000 sterling. The payments of stock are to be made to the parties jointly. It is also provided that the second party to this contract, which is the defendant Minah Consolidated Mining Company, Limited, shall make a contract to the effect "that the proceeds of the mine or mines sold shall be placed in the Second National Bank of Helena, Montana, in trust, and in the name of E. D. Edgerton, president, as trustee for each and both of the parties hereto, 10,000 pounds sterling, and on receipt of that sum or amount, either from the proceeds of the mine or otherwise, if deposited for that purpose, the said bank, by E. D. Edgerton, president, shall pay the same to the first parties." Of this £10,000 sterling plaintiffs admit that they have received the sum of \$4,224.80, and that defendant is entitled to a credit thereon of the sum of \$7,621.35. The

lien is claimed on all of the property conveyed for the balance, claimed to be \$54,912. There was no price named as the value of or consideration of any one of these mining claims. They were all conveyed for so many pounds sterling and for so much stock. The facts, however, appear to be that the title to all of said mining claims was not in all of the defendants jointly. The plaintiff Annie E. Briscoe held the title to the Iron Dollar quartz lode mining claim known in the surveyor general's office as "Survey No. 2,027," and "Lot No. 94," being a portion of township 7 N., range 4 W. She also owned the Annie B. quartz lode mining claim, known in the surveyor's office as "Survey No. 2,064, Lot 96," being a portion of township 7, range 4 W. The Minah Consolidated Mining Company held the title to and conveyed to the Minah Consolidated Mining Company, Limited, the Minah Lot 44, East End, Homestake, Hillside, and Iowa lodes. Annie E. Briscoe, John O. Briscoe, and James E. Sites conveyed to said last-named company, the defendant herein, the Minah Lot 49, West End. The several deeds conveying this property are either deeds of general or special warranty, and all are, at least, deeds of grant, bargain, and sale. The defendant the Minah Consolidated Mining Company, Limited, of London, England, accepted these deeds, and went into the possession of all of said property thereunder.

I do not know that the courts of Montana have decided the question as to whether or not, in this state, a vendor's lien exists in favor of one who conveys real estate for the unpaid purchase price thereof. In Pom. Eq. Jur. § 1249, it is stated:

"It is a firmly established doctrine of the English equity that the grantor of land who has sold and conveyed and delivered possession to the grantee, as well as the vendor in a contract for the sale and purchase of land, who has delivered possession to his vendee, retains an equitable lien upon the land for the unpaid purchase money, although he has taken no distinct agreement or separate security for it, and even though the deed recites that the consideration has been fully paid."

This rule is maintained, also, in Story, Eq. Jur. § 1218.

In the case of Cordova v. Hood, 17 Wall. 1, 5, the supreme court, speaking through Justice Strong, said:

"It is a general principle that a vendor of land, though he has made an absolute conveyance by deed, and though the consideration is in the instrument expressed to be paid, has an equitable lien for the unpaid purchase money, unless there has been an express or an implied waiver of it."

In the case of Gold Mines v. Seymour, 153 U. S. 509, 14 Sup. Ct. 842, the supreme court again said, speaking through Justice Brewer,

"\* \* \* Such a lien is one which appeals strongly to the favorable consideration of a court of equity."

In the case of Chilton v. Braiden's Adm'x, 2 Black, 458, the supreme court said:

"When one person has got the estate of another, he ought not, in conscience, to be allowed to keep it without paying the consideration. It is in this principle that courts of equity proceed as between vendor and vendee."

Considering these views, it ought to be held that a vendor's lien exists for the unpaid purchase money of real estate conveyed to a vendee, and of which real estate the vendee has received possession.

It is contended, however, that in this case there can be no lien because the contract of sale was for a sum in solido, and the plaintiffs owned the property conveyed in severalty; that a vendor's lien attaches only in favor of the person making the conveyance; and that the amount of the lien on the property each conveys should be specific and definite. In other words, Annie E. Briscoe cannot have a lien upon the mining claims conveyed by the Minah Consolidated Mining Company, and said company cannot have a lien upon the claims conveyed by Annie E. Briscoe. It must be confessed the point here presented is not without difficulty. It should be remembered, however, that the contract to convey the several mining claims named was a joint contract, and that the sum to be paid was a sum in solido for all the claims named. In the case of *Loomis v. Railroad Co.*, 3 McCrary, 489, 17 Fed. 301, it was held that:

"A person who has purchased real estate, and paid for it, and has a right to a deed in his own name, and who sells the same to a purchaser, and causes conveyance to be made direct to such purchaser by the party from whom he has purchased, has a right in equity to a vendor's lien for the purchase money."

There is nothing in this case to preclude the presumption that all of these claims were held by the parties to the conveyances jointly. It should also be noticed that the quotations from Pomeroy's Equity Jurisprudence and Story's Equity Jurisprudence state that a person who contracts to sell land, and delivers the premises to his vendee, is entitled to a vendor's lien. It is recognized by the contract of sale in this case and by this action that the parties plaintiff are jointly entitled to the unpaid purchase money for the claims sold. In many of the states a claim for unpaid purchase money for land sold can be assigned, and this assignment carries the right to the vendor's lien for such purchase money. Pom. Eq. Jur. § 1252. That author says that the rule in those states where the assignment of the claim for unpaid purchase money does not carry the lien "seems to rest on no ground of principle." It is held in some states that "whenever, by an arrangement between the parties, a note for the purchase price is given by the grantee to a third person instead of to the grantor, such person is generally held entitled to enforce the lien." See Pom. Eq. Jur. § 1254, note, and authorities cited. The rules upon this matter have been formulated for the most part in accordance with the dictates of right as viewed by the chancellor. I cannot see why, in a case like the one at bar, a vendor's lien should not exist in favor of all the parties contracting to sell the mining claims named, and who were to be paid in solido therefor. The right to have the purchase money paid is a joint right, and the equity is vested in them all jointly. I therefore hold that plaintiffs have a vendor's lien for the amount of the unpaid purchase money, namely, for \$54,912.

There is a claim that the defendant Mainwairing has a lien by mortgage on the said mining claim, and that the said mortgage was taken subsequent to the sale of the said mining claims to the Minah Consolidated Mining Company, Limited, and that this mortgage was taken without any notice of lien of plaintiffs. At the time of the

sale of the said mining claims to the mining company, the said Mainwairing was the chairman of the board of directors of said mining company. The allegations of said bill are:

"That the said Mainwairing is, and since the organization of said defendant company was, one of the trustees and managers and the president or chairman of the board of trustees, and could not make or enter into a contract with said company; and the said Mainwairing, at all times since the execution of the contract hereinbefore set forth, knew of the rights of these plaintiffs under said contract, and knew that they had not been fully paid for the premises hereinbefore described as provided in said contract, and that they had a right to and claimed a vendor's lien upon said premises and every part thereof."

The defendant Mainwairing, in answer to this part of the bill, says:

"It is not a fact that this defendant, at the time of the loaning of said money, and the execution and delivery of said mortgage, knew of any pretended rights claimed by the plaintiffs in this suit under said contract, or that they had not been fully paid for the premises described in said bill and in said contract, or that they had a right to a vendor's lien upon said premises or any part thereof."

The bill in this case was under oath, and the answer was also sworn to. It will be observed that this answer in this particular does not fully meet the allegations of the bill. The bill states that the defendant Mainwairing at all times since the execution of the contract hereinbefore set forth knew of the rights of these plaintiffs under said contract, and knew that they had not been fully paid. The answer simply denies that at the time the mortgage was executed to him he knew these facts. This leaves the court to draw the inference that at the time of the execution of the contract he did know this. In *Wade, Notice*, § 19, this rule is expressed:

"So, when the adverse claim is a vendor's lien for the unpaid purchase money, notice to the purchaser that the title passed without actual payment of the price agreed upon, although the deed contains an acknowledgment of full payment, will be sufficient to put him upon inquiry as to that fact; and, failing to exercise reasonable diligence to ascertain whether there has been a subsequent payment, he will be charged with actual notice of what remains unpaid, and will hold title subject to the prior lien."

It is believed that this is a correct rule. The defendant Mainwairing, then, by his pleading, having admitted that he knew at the time of the sale of this property that the purchase price had not been paid, cannot claim to be an innocent purchaser, and it must be held that he took his mortgage subject to the vendor's lien of plaintiffs.

It is claimed that plaintiffs waived this lien. The burden was upon the defendants Mainwairing and Scott to show this fact. *Story, Eq. Jur.* §§ 1224, 1225; *Cordova v. Hood*, 17 Wall. 1; *Gold Mines v. Seymour*, 153 U. S. 509, 14 Sup. Ct. 842. The fact that plaintiffs agreed that this £10,000 sterling should be paid out of the proceeds of the mine does not prove this contention. It rather sustains the position that the plaintiffs expected to look to this property conveyed for the payment of this sum. The payment from the proceeds of the mine was only a mode of payment. There is no other evidence that bears upon this point. In regard to the defendant Scott, it is certain he had actual notice that this £10,000 sterling—a part of the consideration of purchase—was not paid at the time of the purchase of said premises, for he signed the contract

of purchase as the agent of the defendant the Minah Consolidated Mining Company, Limited. In this contract it was provided for the payment of said sum, and the manner of the payment thereof. This knowledge was sufficient to put him upon inquiry as to whether it ever had been paid. When the Minah Consolidated Mining Company, Limited, put it out of its power to pay the money named in the mode provided, then the liability to pay the same became absolute. The defendant Scott cannot be said to be a purchaser in good faith for a valuable consideration. He knew, as has been stated, of this indebtedness of the company to plaintiffs, and he purchased the property, which it is not denied was valuable, for a nominal sum of five shillings. His title, then, must be considered subordinate to that of the lien of plaintiffs.

The fact that the plaintiffs had only a possessory title to two of the claims conveyed, namely, the Annie B. and Iron Dollar, while they had contracted that they would deposit in the Second National Bank of Helena, Mont., title deeds and abstracts showing full and complete title, free and clear of incumbrance, to said property, except a mortgage of \$35,000, will not invalidate their lien. The Minah Consolidated Mining Company took possession of the property named in pursuance of the deeds named, and it does not appear that it, or its grantees, have ever been ousted from that possession by any superior title. This is not a good defense against a demand for the purchase money for said mining claims. The authorities upon this point are numerous and conclusive. There are strong grounds for believing that defendant the Minah Consolidated Mining Company, Limited, and defendant Scott were fully apprised of this fact as to the title to these claims before the deeds were delivered to said company. There was an abstract of the title delivered with said deed that showed this fact. The defendant Scott, after he obtained title to the same, had his name substituted for that of the plaintiff Annie E. Briscoe in the proceedings in the United States land office, and, thus availing himself of proceedings instituted by said Annie E. Briscoe, obtained a patent to said lodes. The title was thus made complete. Under these circumstances, neither the said company nor Scott could do more than ask to have the amount paid to obtain the patent credited upon the amount due for the purchase money. *Bush v. Marshall*, 6 How. 284; *Galloway v. Finley*, 12 Pet. 264.

There is also claimed as an offset against this demand for purchase money certain damages which it is claimed the said company suffered on account of the plaintiffs John O. Briscoe and Annie E. Briscoe taking possession of the mining claims above described. There was a suit instituted by the defendant the Minah Consolidated Mining Company, Limited, against the said John O. and Annie E. Briscoe to recover possession of said premises, and for damages for the unlawful taking of the same, and for rents, issues, and profits. In this action said company recovered a judgment of possession and damages for the ore taken from said claims the sum of \$7,500. It is claimed in the answer that the claim for this unpaid purchase money was litigated in this said action, and that the said sum of \$7,500 was the amount due said company over and above this claim. An



examination of the issues in that case shows that this could not have been the case, and it is not perceived how it could have been. The damages sought in that case were founded upon a tort. The claim in this case is founded upon contract. There is some claim made for damages arising out of a prevention of the sale of the stock of the corporation on account of the wrongful acts of John O. and Annie E. Briscoe, which were not considered in said action. But such damages, if any, were not the proximate damages arising from the alleged trespasses of said parties, but are so remote that they cannot be considered. In regard to these damages it is true, as claimed by plaintiffs, that they should have been set forth in a cross bill if a proper set-off. This was not done.

It is claimed that all interest in this claim for £10,000 sterling was garnished by the Omaha & Grant Smelting & Refining Company. It appears that this company obtained a judgment for the sum of \$30,512.99, with costs, against the Minah Consolidated Mining Company of Montana and John O. Briscoe; that subsequently it caused an execution to issue on said judgment, and the sheriff to whom the same was issued did serve the same upon W. E. Cullen as the statutory agent of the Minah Consolidated Mining Company, Limited, of London, by delivering to him a certified copy of the same, together with a notice that by virtue thereof he had duly attached all stock, shares, or interest in stock or shares of the Minah Consolidated Mining Company, Limited, of London, and all moneys, goods, effects, debts due or owing, or any other personal property belonging to the defendants in said action, namely, John O. Briscoe and the Minah Consolidated Mining Company, the Montana corporation. On the 3d day of October, 1891, having advertised this contract for the payment of £10,000 sterling for sale, he sold the same to said Grant Company for \$60. The question presented is as to whether or not this was a valid sale. In considering this point, the first matter for consideration is as to whether or not the said Minah Consolidated Mining Company, Limited, of London, could be garnished in Montana. Unless some statute authorized the proceeding, it could not be garnished in this state. The defendant mining company, limited, of London, filed, it appears, the proper certificate of corporation and proper statement, as required by section 442, Comp. Laws Mont., then in force, and the said company also filed the certificate under the seal of the corporation and the signature of its president, W. F. B. Massey Mainwairing, and its secretary, A. G. Wolff, in the following words:

"The Minah Consolidated Mining Company, Limited, 13 St. Helen's Place, London, E. C. May, 1890. We, the Honorable William Frederick Barton Massey Mainwairing and Adolph Grainger Wolff, respectively the president and secretary of the Minah Consolidated Mining Company, Limited, incorporated under the Joint-Stock Companies Acts 1862 to 1886, and having its registered office at No. 13 St. Helen's Place, in the city of London, and a place of business at Wickes, Jefferson county, Montana, United States of America, do hereby certify and declare that the said corporation has consented, and hereby consents, to be sued in the courts of the state of Montana, United States of America, upon all causes of action arising against it in such state, and that service of process may be made upon William E. Cullen, of Helena, Montana, United States of America, attorney at law, as agent for it, and in its behalf; and said company has also consented, and doth hereby consent,

that if and when process shall be at any time served upon the said William E. Cullen it shall be taken, deemed, and held to be valid, to all intents and purposes, as if it were served upon the company in Great Britain.

"The Minah Consolidated Mining Company, Limited.

"W. F. B. Massey Mainwairing, President.

"A. G. Wolff, Secretary."

W. E. Cullen, named in the above certificate, accepted this agency in the following words:

"State of Montana, County of Lewis and Clarke—ss. To Whom It May Concern: Know ye that I, W. E. Cullen, of the city of Helena, and state aforesaid, the person named in the foregoing appointment as the agent of the Minah Consolidated Mining Company, Limited, for the purpose of receiving service of process on it for all causes of action arising in this state, do hereby accept the said appointment. In testimony whereof I have hereunto subscribed my name at Helena, Montana, this 16th day of June, A. D. 1890. W. E. Cullen. In the presence of C. H. Cooper."

These papers were filed in the office of the secretary of state for Montana. I believe these papers comply with the provisions of section 442, Comp. Laws Mont., which were in force at the date of the above suit, and I think it is very evident from the certificate of acceptance of the agency that W. E. Cullen agreed to accept service of process only in cases against that company. He accepts the appointment for the purpose of receiving service of process on it for all causes of action arising in this state. The service of process in a garnishee proceeding is not a service for a cause of action. I do not think the statute under which these certificates were made out and filed contemplated that an agent should be appointed for service in a garnishee proceeding, an auxiliary proceeding. I know there are decisions under statutes somewhat similar to this which hold that process meant the service of garnishee notices. Taking the whole statute together, I cannot think that such was the intention of the legislation. It could not be presumed that an agent would know enough of the business of the company he represented to answer questions as to the indebtedness of the company to any individual. I have doubts also as to the right to sell such a contract as the one under consideration, not in the possession of the officer making the sale.

The defendants urge that Hersey and Bean are necessary parties to this suit. They are lessees of the mining claims above named. They do not appear to be residents or citizens of Montana, although conducting the business of mining therein. Justice Story, in his work on Pleadings, lays down the rule that a lessee is not a necessary party unless it is sought to affect or prejudice his rights. Story, Eq. Pl. § 157. It may be said that, as these parties are not citizens or inhabitants of this state, the court would have the right to proceed and determine the issues here presented. I believe, however, there should be no judgment in this case which should prejudice their rights. It is ordered that a decree be entered in accordance with these views.

**HUTCHINGS v. LAMPSON et al.**

(Circuit Court, N. D. Illinois, N. D. November 8, 1897.)

**LIMITATION OF ACTIONS—IMPLIED PROMISE—CORPORATIONS.**

Under statutes making stockholders liable for corporate debts in case the same cannot be collected from the corporation, the liability is based upon an implied promise created by the acceptance of the stock, within the purview of the Illinois statute barring actions on oral contracts in five years.

This was an action at law by Charles F. Hutchings, as executor, against S. Warren Lampson and others. The case was heard on demurrer to the declaration.

Thompson, Delamater & Clark, for plaintiff.  
David Kirtan, for defendants.

GROSSCUP, District Judge (orally). The action is to recover against the defendant on his statutory liability as a shareholder in a Kansas corporation. The declaration sets up the existence of the corporation, the constitution and statutory provisions of Kansas relating to liability of shareholders therein, the obtaining of the judgment, and the issuance of execution thereon, returned nulla bona, and some other facts not essential to the inquiry raised by the demurrer. The declaration shows that the original debt, merged into the judgment, was contracted in January, 1882, and matured four years thereafter; that judgment thereon was recovered in the United States circuit court for the district of Kansas October 8, 1888, and on the 25th of September, 1890, a pluries execution was issued thereon, which on the 25th of September, 1890, was returned by the marshal nulla bona. The action in this court was begun on the 24th of August, 1897, and is by the executor of the party to whom the debt was originally due. It is not alleged when he became such executor, nor is the date of the decease of the original creditor averred. The question raised by the demurrer to the declaration relates to the statute of limitation.

In states where the statutory liability of the shareholder is primary (that is, where the creditor can proceed against the shareholder irrespective of a judgment and execution against the corporation), an action such as this is considered to be upon the original indebtedness; and, if the evidence of such original indebtedness is a promissory note, the statutory limitation of 10 years, beginning at the maturity of such note, would be applied. The promissory note evidencing the original indebtedness in this case matured in January, 1886; and but for the fact that the payee, in the interval, died, the statute of limitations would have run in January, 1896. The declaration does not show any facts which legally enlarge the time of the running of this statute.

But the liability of the defendant in this cause is not primary, under the laws of Kansas. Such liability is contingent upon the failure to collect the debt from the corporation. Clearly, then, this action is not upon the original promissory note. Nor is it an action upon the judgment entered in the circuit court of the United

States for the district of Kansas. The defendant was individually no party to that judgment. For the purposes of proceedings of that kind, the corporation and its shareholders are distinct and separate persons. The legal source of liability in actions like this, which seems to have met the approval of the supreme court of the United States (*Carroll v. Green*, 92 U. S. 509), may be stated as follows: The shareholder, acquiring stock in a Kansas corporation, impliedly undertakes, by virtue of the constitution and laws of Kansas entering into the contract, to be personally liable to creditors of the corporation, to the extent of his stock, in the contingency that the corporation itself cannot pay its debt. The liability, therefore, is a contract liability, and resides in the act of accepting the stock of such a corporation. The action upon such liability is not, therefore, upon a written promise or undertaking to pay money, nor upon any judgment, but upon the stockholder's implied promise in his act of accepting the stock. In this view of the case, the five-year limitation applies. It follows, therefore, that the demurrer to the declaration must be sustained.

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AMERICAN EXCH. NAT. BANK OF NEW YORK v. FIRST NAT. BANK  
OF SPOKANE FALLS et al.

(Circuit Court of Appeals, Ninth Circuit. October 4, 1897.)

No. 336.

1. NOTICE TO TAKE DEPOSITIONS—REASONABLENESS AS TO TIME.

What constitutes a reasonable notice, in point of time, of the taking of depositions, under Rev. St. §§ 863-865, depends upon the circumstances of each particular case; the chief circumstances to be considered being distance, number of witnesses, and facility of communication to obtain proper representation at the taking.

2. DEPOSITIONS—NOTARY'S CERTIFICATE.

A statement in the certificate of a notary taking a deposition that he is "not of counsel nor interested in any manner whatever in this cause" is a substantial compliance with the requirement of Rev. St. § 863.

3. BANKS AND BANKING—COVERT BORROWING BY BANK.

If, for the purpose of enabling a bank to borrow without having its printed statements show it as a borrower, another bank credits a sum to the borrower's account, and charges the same to a special account, and takes an individual guaranty note from the borrower's directors, amounts drawn on the credit constitute a loan to the bank, and not to its directors.

4. SAME—TRIAL—QUESTION FOR JURY.

Upon the question whether a loan was made to the defendant bank itself, and secured by a guaranty note of its directors individually, or was made to the directors upon their own note, there was conflicting testimony as to the original agreement, but it appeared that interest was charged to the bank, and by it entered on its books under profit and loss; that the note itself was a promise to repay loans made to the bank; that the bank's cashier, in transmitting the note, referred to it as a guaranty; and that the loan was credited to the bank, and drawn on by it in the ordinary method and course. *Held*, that there was sufficient evidence of a loan to the bank to warrant a submission to the jury.

5. SAME—BORROWING IN DIRECTORS' NAMES.

On the question whether a loan was made to a bank or to its directors, the private arrangements of the directors as to how the transaction should

be entered on the bank's books would not be controlling as against the lender.

**6. CORPORATIONS—CONTRACTS BY UNAUTHORIZED AGENT—RATIFICATION.**

A corporation may become liable upon contracts assumed to have been made in its behalf by an unauthorized agent, by appropriating and retaining, with knowledge of the facts, the benefits of the contract.

**7. SAME—EVIDENCE.**

The fact that the directors of a bank unite in making a guaranty note to secure a loan to the bank previously arranged for by the cashier is evidence of ratification of the cashier's act.

**8. BANKS—NOTICE OF DIRECTORS' MEETINGS.**

If the directors of a bank have long pursued an established custom of holding meetings and transacting business at the bank during business hours whenever a sufficient number were present, the custom would carry with it a standing notice to each director, and enable those present to proceed, in the absence of a controlling by-law or statute.

**In Error to the Circuit Court of the United States for the Eastern Division of the District of Washington.**

The writ of error in this case was sued out by the First National Bank of Spokane Falls and F. Lewis Clark, receiver of said bank, defendants in the court below, for certain errors claimed to have been committed by the trial court in admitting and rejecting evidence, in giving and refusing to give instructions to the jury, and in denying a motion for a verdict in favor of the defendants (plaintiffs in error), in the sum of \$16,021.70, with interest, etc. The action was brought by the American Exchange National Bank of New York to recover the sum of \$34,472.20, with interest thereon from the 5th day of August, 1893, at the rate of 8 per cent. per annum, and interest on the sum of \$50,000, at the rate of 6 per cent. per annum from the 1st day of May, 1893, to the 5th day of August, 1893. The complaint alleges, substantially, that on or about the 9th day of November, 1892, the defendant the First National Bank of Spokane Falls, by and through its cashier and board of directors, borrowed of the plaintiff, the American Exchange National Bank of New York, and the latter, through its duly authorized officers, loaned to said defendant bank, the sum of \$50,000, which sum was then and there, by and with the authority and consent of the cashier and board of directors of the defendant bank, placed to the credit of defendant bank on the books of the plaintiff bank, and was afterwards, but prior to the 26th day of July, 1893, drawn upon by the defendant bank, and fully paid out by the plaintiff bank upon the checks and drafts of defendant bank, in the due and ordinary course of business between the two banks, the plaintiff bank, during all the times and periods mentioned, being the defendant bank's correspondent in the city of New York; that it was agreed that said loan should bear interest at the rate of  $1\frac{1}{2}$  per cent. per annum until said rate should be changed by mutual agreement; that afterwards, on the 7th day of March, 1893, it was mutually agreed between said banks that the rate of interest upon said loan should be changed from  $1\frac{1}{2}$  per cent. per annum to 6 per cent. per annum; that on the 26th day of July, 1893, the defendant bank became and was insolvent, closed its doors, and shortly thereafter went into the hands of a receiver for liquidation, defendant F. Lewis Clark being appointed by the comptroller of the currency as such receiver; that for a long time prior to the making of said loan of \$50,000, as aforesaid, the plaintiff bank was, and continued to be up to the date when the defendant bank closed its doors, the regular correspondent of the latter bank in the city of New York, and during all of said period there was a large and varied account between the two banks, upon which the defendant bank received the credit of said \$50,000; that at the time the defendant bank closed its doors, as aforesaid, there appeared to be a balance of \$15,527.80 on the said account in favor of the defendant bank, which amount the plaintiff bank then and there credited upon said loan of \$50,000; that but for said credit of \$50,000, so entered upon said account, as aforesaid, in favor of the defendant bank, on account of said loan, there would have been an overdraft of \$34,472.20 against the defendant bank at the time

it closed its doors, instead of an apparent balance in its favor. The answer contained a general denial as to the fact of the alleged loan to the defendant bank, and set up, as a further and separate defense and counterclaim, that on the date of the suspension of the defendant bank, which was the 26th of July, 1893, the plaintiff bank had in its hands, belonging to the defendant bank, funds, moneys, and credits amounting to the sum of \$16,383.49, for which sum, with interest thereon at 8 per cent. per annum from the 26th day of July, 1893, judgment was prayed. Both sides introduced evidence, and, after trial duly had, the jury returned a verdict for the plaintiff bank, the defendant in error here, for the sum of \$34,713.71, with interest on the same from May 4, 1893, to April 30, 1896, amounting to \$6,225.35, and aggregating a total of \$40,939.06, for which sum judgment was entered in favor of the plaintiff bank.

O. S. Voorhees (Jones, Voorhees & Stephens, of counsel), for plaintiffs in error.

Blake & Post, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge, after stating the case as above, delivered the opinion of the court, as follows:

The assignment of errors contains some 59 specifications, but the principal one to be considered by this court, the determination of which will go far in disposing of many of the remaining ones, is the 1st, to wit:

"That the court erred in giving any instructions whatever to the jury, except an instruction to find a verdict for defendants for the sum of \$16,021.70, for the reasons that there was no evidence whatever in said cause tending to show any right of the plaintiff to a verdict in said cause against said defendants or either of them, and that the evidence in said cause required the jury to find a verdict for defendants for the sum of \$16,021.70, together with interest thereon at the legal rate."

This assignment of error raises the question whether there was any evidence tending to show that the plaintiff was entitled to the verdict. However, preliminarily, and before considering this assignment of error, two other assignments of error (Nos. 35 and 36), relating to the admission in evidence of two depositions, may with propriety be disposed of. It is contended, under these two assignments, that the notice given of the taking of the depositions of Edward Burns and Dumont Clarke, two witnesses on behalf of the plaintiff bank, was not reasonable in point of time, and that the certificate of the notary public was fatally defective, in that it failed to certify that such notary was not, at the time of the taking of such depositions, of counsel or attorney to either party, and was not interested in the event of the cause. The evidence of these two witnesses was of great importance to the plaintiff bank, and its suppression would have withdrawn from the consideration of the jury evidence without which it is difficult to see how they could have found a verdict in favor of the plaintiff bank. With respect to the reasonableness of the time, notice was given by the attorneys for the plaintiff bank at Spokane to the attorneys for the defendant bank and the receiver, on February 29, 1896, that the testimony of Edward Burns and Dumont Clarke, residents of the city of New York, would be taken, under the provisions of sections 863, 864, and 865 of the Revised Stat-

utes, before Carlton J. Barnes, a notary public in and for the city and county of New York, at the law offices of Cardozo & Nathan, No. 120 Broadway, in the city and state of New York, on the 10th day of March, 1896, at 10 a. m., and thereafter from day to day, as the taking of the depositions might be adjourned. This notice was duly received and acknowledged by the attorneys for the defendant bank on February 29, 1896. It gave them 10 days within which to communicate with their representatives in New York, and to prepare for the taking of the depositions. While this notice was short, it cannot be said, under the circumstances, to have been so unreasonable, without any showing on the part of the defendant bank that bona fide efforts were made by them to be represented at the taking of the depositions, as would justify the trial court in suppressing the depositions. It is true that the defendant bank was deprived of the cross-examination of these two witnesses, but this could have been avoided had there been all due diligence and alacrity in the matter. No effort, so far as the records show, appears to have been made to secure a postponement of the examinations. Five or six days, at the most, under ordinary circumstances, would have sufficed to write to New York and communicate with attorneys there to be represented at the examination. This would still have left four or five days in which to prepare for the taking of the depositions. As a matter of fact, the taking of the depositions did not begin on the 10th of March, 1896, but it was continued to the next day, the 11th of March. The question of reasonableness of notice depends, obviously, upon the circumstances of each particular case. It is a relative question. What may be reasonable in one instance may not in another. The chief features to be considered in determining whether a certain notice is or is not reasonable are distance, number of witnesses, and facility of communication and to obtain proper representation. Considering all of these elements with reference to the taking of depositions in a place like New York City, and particularly with respect to the circumstances of this case, we think that the notice was reasonable.

With respect to the claim that the certificate of the notary public is fatally defective in the particular above indicated, it is enough to say that the certificate, as it appears in the printed transcript of record, contains the following statement: "That I am not of counsel nor interested in any manner whatever in this cause." This would seem to comply substantially with the provisions of section 863 of the Revised Statutes. *Donahue v. Roberts*, 19 Fed. 863; *Coal Co. v. Maxwell*, 20 Fed. 187; *Stewart v. Townsend*, 41 Fed. 121; 1 *Fost. Fed. Prac.* (2d Ed.) p. 512, § 286. The action of the lower court in denying the motion to suppress the depositions, and in admitting them in evidence, was, we think, correct and proper.

Reverting to the 1st assignment of error, it is hardly necessary to observe that the function of this court, in reviewing a case upon a writ of error, is not to try the case *de novo*, but simply to ascertain whether there was sufficient evidence to go to the jury. *Pleasants v. Fant*, 22 Wall. 116, 122; *Commissioners v. Clark*, 94 U. S. 278, 284; *Elliott v. Railway Co.*, 150 U. S. 245, 246, 14 Sup. Ct. 85;

Railroad Co. v. Johnson's Adm'x, 44 U. S. App. 1, 16 C. C. A. 317, and 69 Fed. 559, and cases there cited.

There is no question as to the fact that the plaintiff bank, the American Exchange National Bank of New York, advanced the sum of \$50,000. It is contended by the plaintiff bank that the evidence shows that this sum was advanced or placed to the credit of the First National Bank of Spokane Falls; while it is claimed on the other hand, by the defendant bank and F. Lewis Clark, its receiver, that the evidence tends to show that the money was advanced to the directors of the bank upon their individual responsibility. The jury, by their verdict, necessarily adopted the view that the money had been advanced to and drawn by the defendant bank, and not by the directors individually. Were they justified in so finding, and were the rulings and instructions of the court in this respect correct? It appears from the evidence that the plaintiff and defendant banks were at the time of the loan, and had been for some time previous, corresponding banks; that from the fall of 1890 to 1892 the defendant bank had had some three or four runs which had embarrassed it very much, almost compelling it to close its doors on two or three occasions; that in the fall of 1891 Mr. Horace L. Cutter, the cashier and one of the directors of the bank, had occasion to take a trip East; that, before going, he talked with several of the other directors about the advisability of making arrangements with some of the bank's Eastern correspondents to allow the bank, in case of an emergency, an overdraft all the way from \$25,000 to \$100,000; that while no express and specific authorization to incur a loan for the bank appears to have been given by the board of directors to Cutter, as its cashier and one of the directors, nevertheless, in pursuance of the conversation had as stated, Cutter, while in New York City, called at the place of business of the American Exchange National Bank of New York, and had an interview with its vice president, Mr. Dumont Clarke, and its cashier, Mr. Edward Burns, relative to a loan or advance of \$50,000 or \$100,000 should his bank need such a sum. The testimony of Cutter, who was called as a witness for the defendant bank, as to the arrangements he effected to secure the loan, is briefly as follows:

"Q. Did you have any conversation with the said Clarke and Burns in the city of New York, in the fall of 1891, relative to the loan of fifty or one hundred thousand dollars? A. I did. Q. Now, you may state, Mr. Cutter, in detail, as fully as you can, such conversation. A. In the fall of 1891—I think it was in the fall of 1891—I was in New York City, and called at the American Exchange National Bank, and had an interview with Mr. Clarke, the vice president of the bank, and Mr. Burns, the cashier, relative to a loan of fifty or a hundred thousand dollars. I said at the time that I did not desire to use the credit of the bank, but that certain of our directors, who owned the majority or most of the stock of the bank, would give their individual liability therefor. Upon my going there the following day, they told me that we could have it. It was then arranged that the fifty thousand dollars or the loan we might take would be placed to the credit of the First National Bank of Spokane on special account by the giving of this individual liability of the directors. \* \* \* Q. You may state what was said in the conversation on the second day to which you have alluded, in connection with the credit upon which this loan was made. A. It was simply to be placed to the credit of the First National Bank of Spo-



kane on special account, on the individual liability of the members constituting the board of directors."

Edward Burns, cashier of the American Exchange National Bank of New York, called for the plaintiff bank, testified:

"Q. Will you please state fully the conversation that you had with Mr. Cutter in October, 1891? A. Mr. Cutter and the president and myself talked for some time in regard to the matter of loaning him fifty or one hundred thousand dollars. The principal part of the conversation related to the manner in which it would be loaned, and this was for the reason that Mr. Cutter stated that he was unwilling to let his printed statements go forth in his community showing him a borrower of money. He wished therefore the loan to be arranged in such a way as to avoid making this statement. We showed him how the loan could be made so that he could have a credit on our books, and yet not need to print on his statement the rediscounting of any of his bills receivable, the method which we told him of being as follows: We to charge the First Spokane special account, say, \$50,000, and credit the First National Bank account (the general account) \$50,000. This would give him the \$50,000 to draw against on his regular account on his books. This would really show as against him, as an item due to banks. When I say 'this,' I mean the \$50,000 would appear on his books as an item due to banks. Q. Give what Mr. Cutter said in the connection. A. Cutter was entirely satisfied with this plan, as it covered the very point he wanted to cover, as it afforded a plan to enable him to borrow without showing it as rediscounted paper on his statement. The plan which we proposed to Mr. Cutter was one which was used in many cases by banks which had the same object in view as that mentioned by Mr. Cutter; that is, the avoidance of printing bills rediscounted on the statements which they would be called upon from time to time to make by the comptroller. Q. State whether at that interview you did agree with Mr. Cutter to make any loan, and, if so, on what terms. A. We did agree to loan the First National Bank of Spokane \$50,000 against the guaranty of his board of directors. The rate was made as low as one and one-half per cent., on account of an understanding that was had that the money was needed chiefly as a balance with us."

Mr. Dumont Clarke, vice president of the plaintiff bank, testified as a witness on its behalf, as follows:

"Q. Will you state fully the conversation then had with Mr. Cutter? A. The conversation was in relation to an accommodation which he desired or might desire. He wanted to place it in a shape that it would not appear upon any statement that he might render to the comptroller, as bills rediscounted for his bank. It was then suggested that we might make for him, as we did occasionally for some others, a special account; and, in case of his desiring accommodation, we could charge that special account, and credit his general account. In his statement it would then appear as due to banks. He was to give us as security, in case he needed such accommodation, a guaranty signed by his board of directors, or a major portion of them. Q. Did you have any talk with him as to a loan, or the amount of a loan, your bank should make when called upon? A. He wanted from fifty to one hundred thousand dollars. Q. What did Mr. Cutter say, if anything, in regard to this plan of borrowing money? A. The arrangement suited Mr. Cutter entirely."

In pursuance of this arrangement, the evidence tends to show that the sum of \$50,000 was placed to the credit of the First National Bank of Spokane, and the monthly statements, designated as "Plaintiff's Exhibit 1" and "Plaintiff's Exhibit 5," and the vouchers accompanying the same, designated "Plaintiff's Exhibit 3," tend to establish the facts that on the 9th day of November, 1892, the defendant bank was given a credit of \$50,000 on the books of the plaintiff bank, and that thereafter, between said 9th day of November, 1892, and the 26th day of July, 1893, inclusive, the latter being the date when the defendant

bank closed its doors, the account of the defendant bank with the plaintiff bank was drawn upon only in the usual and ordinary course of business between corresponding banks, and the moneys, funds, and credits on deposit with the plaintiff bank were paid out only upon drafts, checks, and orders signed by the duly authorized officers of the defendant bank issued to its customers in the usual and ordinary course of business. It appears, further, that the sum of \$50,000 was not fully used up until the 14th of February, 1893, when it appears that the whole amount, and more, had been drawn out by the defendant bank in the regular course of business between the two banks. While this was the way in which the account stood between the two banks, the account on the books of the defendant bank appeared in this way: Prickett, one of the directors, was credited on his account with \$50,000 on the 28th of January, 1892, that being the same day on which the note for \$50,000 was executed to the plaintiff bank. On October 3, 1892, following, he was charged with \$50,000, and the whole account was closed out so far as he was concerned, at that time. On December 15, 1892, the American Exchange National Bank special account of \$50,000 was credited, on the books of the defendant bank, with \$50,000, and the general account charged with \$50,000, the effect of which was to close the special account, and carry the \$50,000 into the open or general running account between the two banks. It was testified that Prickett held the \$50,000 as trustee for the other signers of the note, and then advanced it to the bank, or rather used it in payment of \$50,000 of the \$150,000 increased capital stock. The capital stock was credited, on October 3, 1892, with \$150,000. This amount, it was testified, was made up from \$98,000 in paid-up dividends, to which the directors added certain small sums, aggregating \$2,000 more, making \$100,000; and this sum, with the \$50,000 credited on the books to Prickett's account, went to make up the \$150,000 increased capital stock.

It is a significant fact that through all these charges and credits, where it appeared that Prickett held the \$50,000 as trustee for the directors who signed the note therefor, and then advanced it to the defendant bank in payment of \$50,000 of the increased capital stock, the plaintiff bank did not know Prickett as trustee of this money. It had not advanced or agreed to advance the money to Prickett as trustee. On the contrary, its contention all through the trial was that the money had been placed to the credit of, and loaned to, the defendant bank, and not to the directors individually, and that the directors' note was simply a collateral security,—a "guaranty note." The evidence tends to show that it dealt with, and only with, the defendant bank in the regular course of business as a corresponding bank. The money was not drawn by Prickett as trustee or otherwise, but by the defendant bank in the regular course of business. The \$50,000 was never in the possession or under the control of Prickett as trustee or otherwise; for, the first time credit was given by the plaintiff bank was on November 9, 1892, which was over a month after Prickett's account as trustee with his own bank had been closed out, on October 3, 1892. Moreover, this was some nine months after Prickett was first credited, on the books of the defendant, with the sum of \$50,000 as trustee, viz.

January 28, 1892. As a matter of fact, Prickett and his associates still owe the \$50,000 which it is claimed Prickett advanced in payment of increased capital stock. It is apparent, therefore, that, whatever private arrangements or understanding the directors of the defendant bank may have had among themselves with respect to how this advance or overdraft of \$50,000 should appear upon their books, that could not affect the legal rights of the plaintiff bank to the defendant bank, providing the jury believed from the evidence that the plaintiff bank had loaned the defendant bank, and not the directors individually. If the jury believed that the plaintiff bank had simply placed to the credit of the defendant bank the sum of \$50,000 should the latter need that sum or any part of it, and had secured a guaranty note from the directors of the bank as collateral security therefor, and that such was the result of the arrangements entered into between Cutter, on behalf of the defendant bank, and of Clarke and Burns, on behalf of the plaintiff bank, it had the right to place such construction on the account of Prickett, as trustee, as it stood upon the books of the defendant bank, as was consistent with the view which it took that the money had been borrowed by the bank, and used by the bank, and not by the directors individually. There was evidence, further, tending to show that the plaintiff bank charged the defendant bank, and not the directors, with the interest on the loan. In this connection it is significant that on the books of the defendant bank, under date of May 4, 1893, there appears a charge to the profit and loss account of \$735.49, as interest on the amount borrowed from the American Exchange National Bank. No attempt was made by the American Exchange National Bank to charge the directors with interest. No charge for interest was made against the directors on the books of the defendant bank. No exception was taken at that time, or at any subsequent time, until the trial, to the plaintiff bank charging the defendant bank, and not the directors individually, with the interest. It is true that at the trial, for the first time, the witness Cutter sought to explain this by stating that the charge to profit and loss was only made temporarily. But this explanation was for the jury to consider, and give such weight to it as they deemed proper. Evidence was also introduced on behalf of the defendant bank tending to show that the note given by the directors of the bank was intended as their personal promissory note, and not as collateral security for the money loaned to the bank. On the other hand, evidence was introduced on behalf of the plaintiff bank tending to show that the note was a guaranty note, intended solely as collateral security. The evidence was conflicting, and it was for the jury to determine the fact. The note was as follows:

"First National Bank.

"Jas. N. Gloyer, Prest. H. W. Fairweather, Vice Prest. Horace L. Cutter, Cashier. F. K. McBroom, Asst. Cashier.

"Spokane, Wash., Jan'y. 28th, 1892.

"\$50,000. For value received, we promise to pay to the American Exchange National Bank of New York City, or order, in gold coin of the United States of America, any and all sums of money which the said American Exchange National Bank of New York City may loan or advance to the First National Bank of Spokane, Washington, or on its account, to the amount of fifty thousand dollars, and

with interest on such loans and advances from the time the same are made respectively, at the rate of six per cent. per annum; said payment to be made by us on demand, said advances or overdrafts being made at our special instance and request, and upon the faith of this understanding, and this obligation shall always apply to the balance of the First National Bank of Spokane, Washington, indebtedness or liability to said American Exchange National Bank of New York City, after deduction of all payments made before demand thereon.

"[Signed]

"[Signed]

"[Signed]

"[Signed]

"[Signed]

James N. Glover.

Horace L. Cutter.

J. L. Prickett.

H. W. Fairweather.

J. Monaghan."

Aside from the terms of this instrument, it is a significant fact that Cutter, while denying in his testimony that the note was intended as a guaranty for the loan to the bank, speaks of the note as a guaranty note in a letter sent by him to the plaintiff bank, inclosing the note in question. That part of the letter introduced in evidence, and marked "Exhibit A," is as follows:

"Spokane, Wash., Jan. 28th, 1892.

"Edward Burns, Esq., Cas. American Exch. Natl. Bank, New York City—Dear Sir: I inclose herewith individual guaranty note of the directors of this bank, \$50,000, being  $\frac{1}{2}$  of the line arranged with your people when I was last in your city (Oct., 1891), to be credited as suggested by you to our special account, and applied on our active account as required. We do not know that we shall have occasion to use this, but thought best to have it with you in case we find it to our advantage to do so. \* \* \*

Horace L. Cutter, Cas."

In answer to this letter, E. Burns, cashier of the plaintiff bank, sent the following reply (Exhibit E):

"New York, Feb. 6th, 1892.

"Horace L. Cutter, Esq., Cashr., Spokane Falls, Wash.—Dear Sir: Your favor of the 28th ult. received, with inclosure, guaranty of the directors of your bank, which we file away for use whenever you get ready to call upon us. \* \* \*

E. Burns, Cashr."

Cutter, in his testimony, claimed that he had used the word "guaranty" inadvertently. The jury undoubtedly gave such weight to this statement as they saw fit. It is unnecessary to refer to other evidence introduced in this connection. The jury, as stated, returned a verdict in favor of the plaintiff bank, thereby necessarily finding that the loan was made to the bank, and not to the directors individually. But it was not only necessary that the plaintiff bank should have made the loan to the defendant bank, and not to the directors individually; but Cutter, the one who negotiated the loan or advance, must have had authority to do so from the board of directors, or else his unauthorized acts in that direction must have been ratified by the board of directors.

As was said in *Bank v. Armstrong*, 152 U. S. 346, 350, 14 Sup. Ct. 574, which is a case of striking similarity to that at bar:

"It may be conceded that the New York bank acted upon the theory that the loan was to the Ohio bank, and took the notes and certificates of stock as collateral. But the liability of the Ohio bank is not a necessary consequence of such a concession. It has further to be shown that the Ohio bank was really a party to the transaction, either by having authorized Harper to effect the loan on its behalf, or by having ratified his action and having accepted and enjoyed the proceeds of the discount."

In determining this question in this case, we must return to the acts of Cutter in negotiating this loan. We find that when he returned to Spokane, Wash., he apprised the directors of what he had done. James N. Glover, president of the defendant bank, testified:

"Q. Did you have any talk with Mr. Cutter, in connection with other members of the board, after he came back, as to what he had done in that direction? A. Yes, sir; I think I remember of some little conversation with Mr. Cutter after he returned from New York, from his trip, in reference to the results of his trip. Q. Well, what did he report about that? A. Mr. Cutter stated to me that he had arranged with the American Exchange National Bank to get fifty thousand dollars, and that in case of an emergency they were to extend it to a hundred thousand. I think I asked him the question on what kind of terms he got it. He said they agreed to allow us the use of that amount of money, and charge us a very reasonable interest,—I forget now just what the interest was,—at any time that we used it, and for such amounts as we used, only. Q. What security did he say they demanded, if any? A. At that time he did not mention any security at all. Q. Well, did he afterwards? A. Well, as my recollection serves me,—of course, I could not have told the date,—but there was a note came along after a bit during the winter season (the winter of '92,—'91 and '92); the note that this seems to be a copy of, or the original note, perhaps,—the original, I guess. And he then stated that they had required a note of the directors,—a directors' note; and stating, of course, at the same time, that in case we did not use the money, that we would have no interest to pay; and upon that representation we signed this note that is here. That we did not require it as a bank at that time. We did not require any money, because we had plenty of money of our own at that time, but this arrangement, as I understood it, was, as I stated before, was simply to guard against trouble in case we needed money, had a run or frustration of business affairs, so that we required a little assistance, we were to have it."

Mr. H. W. Fairweather, a director and vice president of the bank, testified:

"Q. Do you remember the time when Mr. Cutter went to New York, in '91,—fall of '91? A. Yes. Q. What conversation, if any, did you have with him, either before or after, about his mission to New York, and especially with the American Exchange National Bank of that city? A. Oh! We talked the matter over with Mr. Cutter, to see if we could raise some money. He thought he could, with our Eastern correspondents at St. Paul, Chicago, and elsewhere. Q. Whom do you mean by 'we'? A. Well, that is the directors,—the board,—at an informal meeting. We were usually all in there, and we would just say, 'Let's have a meeting.' That would be call for it,—personal notice. That is the way most of our meetings were held. Q. Well, for whom were you expecting to get money, or trying to get money, arranged to get money? A. For the bank. Q. Well, what did Mr. Cutter tell you about the result of his mission to New York after he returned? A. Oh! When he came back, he said he had arranged for a fifty thousand dollar option or overdraft, in case we required it, with the American Exchange National Bank, and he had asked for a hundred, and possibly might reach a hundred. \* \* \* Q. When, if at all, was it brought to your attention that any sort of security should be advanced? A. Oh! Not until some time the following January. Q. Well, what was the occasion at that time? A. I think Mr. Cutter then said he had promised a director's note as a sort of guaranty for this fifty thousand dollar overdraft, and that he had asked for it, and they had asked for the note."

Mr. Cutter, while denying that he had any previous authorization from the board of directors to incur a loan for the bank, admits that, when he returned, he apprised the directors of what he had done, and subsequently secured their signatures to the guaranty note. It is true that there is no record of the minutes of any meeting in which

the acts of Cutter were expressly ratified; but this is unimportant, in view of the fact that the evidence tends to show that the meetings of the board were purely informal. As a matter of fact, no record or minutes were kept of the proceedings of any of the meetings thus informally held, except at the regular meetings of the board; and the evidence shows that but two or three regular meetings were held during the year. The other meetings were entirely informal; that is, they occurred generally during business hours, and whenever a sufficient number of directors were present. It affirmatively appears that this was the custom of the directors. As stated, no minutes of these frequent informal meetings were kept, and the recollection of those directors who testified as to what took place or what was said does not now seem to be very clear. But, however this may be, a stronger evidence of ratification can hardly be imagined than when all the directors, excepting one, who was then absent from the state, signed the guaranty note. It is true that Cutter denies that it was signed or intended as a guaranty note, and Glover testifies that he did not understand that it was a guaranty note; but, on the other hand, both Clarke and Burns, respectively vice president and cashier of the plaintiff bank, and Fairweather, one of the directors of the defendant bank, and one of those who signed the note, testify that the money was loaned to the bank, and that the note was intended as a guaranty note. This conflict in the evidence was for the jury to determine. Further evidences of a ratification, which the jury were entitled to consider, were the fact that the interest on the amount loaned was charged up to the defendant bank, and not to the directors individually, as has been already indicated; that on the 5th of June, 1893, shortly before the defendant bank closed its doors, a telegram was sent by the defendant bank through Cutter, as cashier, to the plaintiff bank, asking for the additional \$50,000, which Cutter had stated he might desire to draw on the plaintiff bank in case his bank, in a period of emergency, should require that further sum. The jury were entitled to consider all of these facts and circumstances in determining whether or not there was a ratification, express or implied, by the board of directors. As the verdict was a general one, the court cannot say whether the jury found that the loan was made upon a previous authorization or a ratification. But, in any event, the verdict would stand; for we think there was sufficient evidence to go to the jury of a ratification of Cutter's acts as cashier and director, within the rule laid down in *Bank v. Armstrong*, supra. There it appeared that one E. L. Harper, vice president and general manager of the Fidelity National Bank of Cincinnati, Ohio, had borrowed the sum of \$200,000, which was secured by collateral notes signed by one A. P. Gahr, and indorsed by said E. L. Harper. The money was borrowed from the Western National Bank of New York. The latter bank brought suit against the receiver of the Fidelity National Bank of Cincinnati, Ohio, alleging that the Fidelity National Bank was indebted to the complainant bank in the sum of \$207,290, on account of a loan made on May 28, 1887, by the New York Bank to the Ohio Bank, "at the special instance and request of E. L. Harper, who was then the vice president and general manager of the

said Fidelity National Bank, with full authority to make said loan on its behalf." The answer denied that the Fidelity National Bank was indebted to the complainant bank; that the complainant had on May 28, 1887, or at any time, loaned the Fidelity National Bank the sum of two hundred thousand dollars, or any other sum; and alleging that the notes mentioned in the bill, made by A. P. Gahr, and indorsed by E. L. Harper, were discounted by the complainant bank for said Harper, and that the proceeds of such discount were received by said Harper; that the said notes were at no time the property of the Fidelity National Bank; and that the Fidelity National Bank never had any interest in said transaction, and was in no way responsible therefor. The cause was tried, and a decree entered dismissing the bill. On appeal to the supreme court, the decree was affirmed, it being held that the said Harper had neither been authorized to borrow the money, nor had his action in so doing been ratified by the board of directors of which he was vice president. Mr. Justice Shiras, in delivering the opinion of the court, said:

"Even, therefore, if it be conceded that it was within the power of the board of directors of the Fidelity National Bank to borrow \$200,000 on time, it is yet obvious that the vice president, however general his powers, could not exercise such a power unless specially authorized so to do; and it is equally obvious that persons dealing with the bank are presumed to know the extent of the general powers of the officers. Without pursuing this part of the subject further, we think it evident that Harper had no authority to borrow this money, and that the bank cannot be held for his engagements, even if made in behalf of the bank, unless ratification on the part of the bank be shown. It is scarcely necessary to say that a ratification, to be efficacious, must be made by a party who has power to do the act in the first place,—that is, in the present case, the board of directors; and that it must be made with knowledge of the material facts. There is not the slightest evidence shown in this record that the board of the Fidelity National Bank, by any act, formal or informal, undertook to ratify Harper's action in the premises, or that they ever had any knowledge of the transaction."

Bringing the present case within the rule of ratification laid down in the case just cited, we think there was sufficient evidence of a ratification to call for the judgment of the jury. The fact, also, that the defendant bank used the money, drew on it in the usual course of its business between the two banks, would tend to bring the case within the doctrine recognized in the case just cited, "that a corporation may become liable upon contracts assumed to have been made in its behalf by an unauthorized agent by appropriating and retaining, with knowledge of the facts, the benefits of the contracts so made in its behalf." See, also, *Bank v. Patterson*, 7 Cranch, 299; *Bank v. Dandridge*, 12 Wheat. 64; *Zabriskie v. Railroad Co.*, 23 How. 381; *Gold Mining Co. v. National Bank*, 96 U. S. 640; *Gas Co. v. Berry*, 113 U. S. 322, 327, 5 Sup. Ct. 525; *Pennsylvania R. Co. v. Keokuk & H. Bridge Co.*, 131 U. S. 371, 381, 9 Sup. Ct. 770. While the evidence in some respects may not be as strong and satisfactory as might be desired, still, in our opinion, there was sufficient to go to the jury, and their verdict should not be disturbed. The action of the court below in declining to instruct the jury to find for the plaintiffs in error was therefore proper, and is not error. This disposes of the 1st assignment of error.

The 2d, 3d, 4th, 5th, 6th, 7th, 8th, and 9th assignments of error relate to instructions given to the jury. We are of opinion that there was no material error, to the prejudice of the plaintiffs in error, committed by the court in these instructions. They appear to be proper and fair, and to state the law, as applied to the evidence presented in the case, clearly and fully.

The 10th assignment relates to the refusal of the court to instruct the jury that, unless all of the members of the board of directors were present or notified to be present, any action taken by the board in connection with the \$50,000 loan would not be binding on the bank, without the further qualification subjoined that, if any member of the board of directors was absent and beyond the reach of notice within a reasonable time, a valid meeting of the board might be held without his being present, or without his being actually notified, so long as a quorum of the board were present or were notified. The court explained to the jury that the by-laws of the company, as introduced in evidence, did not, nor did the law, prescribe the kind of notice; that a good notice might be given by a writing specifying the time and place and object of the meeting, delivered to or sent by mail to each of the directors, or a messenger might be sent to notify the directors to meet, or they might notify each other of the time and place of meeting, or if the directors had a stated time for meeting, which they all knew about, a meeting held at that time and that place would be deemed a meeting of which all had notice; and if it was the regular custom, pursued for a number of years, for the directors to hold a meeting and transact the business of the bank at the banking house during business hours whenever a sufficient number were present, that custom would carry with it a notice to each of the directors of a meeting to be held within the business hours of the bank for transacting the banking business, and whenever a sufficient number were there assembled, and took action upon the business of the bank within the powers of the board of directors, it would be deemed a meeting held, of which all the members of the board had notice. These remarks accorded with the evidence in the case about the manner in which the meetings were held, and appear to be proper and correct. It appeared that Cyrus Happy, one of the directors of the defendant bank, was not present at some of the meetings, and that he was absent from the state during the month of May, 1893, shortly before the bank closed its doors.

Dillon, in his work on *Municipal Corporations* (2d Ed.) p. 319, § 200, says:

"All corporators are presumed to know of the days appointed by the charter, statute, usage, or by-laws for the transaction of particular business; and hence no notice of such meeting for the transaction of such business is necessary, or for the transaction of the mere ordinary affairs of the corporation on such days; yet, if it is intended to proceed to any other act of importance, a notice is necessary, the same as at any other time."

Section 201. "A notice, when necessary, must, if practicable, be given to every member who has a right to vote."

See, also, *Thomp. Corp.* § 3938; 17 *Am. & Eng. Enc. Law*, p. 85; *Paola & F. R. Ry. Co. v. Commissioners of Anderson Co.*, 16 *Kan.* 308; *Bank of Middlebury v. Rutland & W. R. Co.*, 30 *Vt.* 159, 170; *Waite v.*



Mining Co., 37 Vt. 608; *Edgerly v. Emerson*, 23 N. H. 555. In the case last cited, it was held that a corporation is bound where a quorum of the directors meet and unite in any determination, whether the other directors are or are not notified. In *Chase v. Tuttle*, 55 Conn. 455, 12 Atl. 874, it was held that the failure on the part of some of the directors, who were out of the state, to receive notice, does not invalidate the action of the majority, forming a legal quorum at such meeting. It is to be observed, further, that section 21 of the by-laws of the defendant bank provided that:

"The board of directors hold meetings at the banking house of said corporation as often as seems necessary, or at such times as they shall by resolution designate. The president shall preside at such meetings. A majority of the number of directors shall constitute a quorum, and by a vote representing a majority of the number of directors may transact business and determine any proposition."

The evidence clearly showed that it was the custom of the directors to hold meetings whenever they deemed the same necessary; that they generally held informal meetings during business hours whenever there was a sufficient number to constitute a quorum. It is not pretended that any of the directors were not aware of this custom. Under the evidence as presented, we fail to find any error in the refusal of the court as above indicated.

The assignments of errors from and including the 11th to and including the 57th (excepting, however, the 35th and 36th) relate to the admission and rejection of evidence. We fail to detect any material error committed by the court below in any of its rulings in this respect. The evidence, admitted over the objections of the plaintiffs in error, which is assigned as error, related to, and was introduced for the purpose of showing, the true state of facts surrounding the arrangements which were made for this loan or overdraft; also, to show a previous authorization or a subsequent ratification of Cutter's acts in relation thereto. The evidence so admitted was, in our opinion, competent, relevant, and material. The rulings of the court in rejecting the evidence indicated by the several assignments were proper and correct.

Assignments of error numbered 35 and 36 have already been considered by us. They related to the admission of the depositions of the witnesses Clarke and Burns.

The 57th and 59th assignments of error were practically decided by the first assignment. The 57th relates to the refusal of the court to grant a nonsuit, and the 59th is that the verdict was contrary to law and the evidence. There does not appear to be any 58th assignment of error.

For the reasons given above, the judgment of the court below should be affirmed; and it is so ordered.

## BOSWORTH v. ROGERS.

(Circuit Court of Appeals, Seventh Circuit. November 16, 1897.)

No. 429.

## MASTER AND SERVANT—NEGLIGENCE—FELLOW SERVANT—RAILROADS.

A brakeman employed by the St. L. Ry. Co. was killed in a collision between his train and a train of the C. R. Co., through the negligence of whose servants in charge of the latter train the accident occurred. The St. L. Co. was the owner, and the C. Co. the lessee, of the right of way; and they had agreed together for joint use of the tracks, the lessor company to comply with the regulations of the lessee company in reference to operation of trains, and the latter to have general control of the line of railway, and each had agreed to discharge any of its agents or employés for just cause at the demand of the other. *Held*, that the decedent and the employés of the C. Co. were not fellow servants.

## In Error to the Circuit Court of the United States for the Southern District of Illinois.

This action was brought by the defendant in error, Anna Rogers, as administratrix of the estate of her husband, Frank Rogers, deceased, to recover pecuniary damages resulting from the death of her husband, alleged to have been caused by the negligence of the servants of the appellant C. H. Bosworth, who was at the time receiver of and engaged in the operation of the railway of the Chicago, Peoria & St. Louis Railway Company (hereinafter termed, for brevity, the "Chicago Company"). The St. Louis & Eastern Railway Company (hereinafter called, for brevity, the "St. Louis Company") operated a railway from the Mississippi river, at or near Venice, in the state of Illinois, to the Indiana state line. The Chicago Company operated a line of railway from the city of Pekin to the city of East St. Louis, and, by agreement between the two companies, the St. Louis Company leased to the Chicago Company, for the term of 99 years, its certain right of way between Peters and Venice, in the state of Illinois. The Chicago Company agreed to construct a line of railway over that right of way, and it was arranged that the two companies should use the line of railway in common, the St. Louis Company agreeing to observe, comply with, and carry out all reasonable rules and regulations which might from time to time be established by the Chicago Company with reference to the operation of trains over the railway so jointly occupied, and that the Chicago Company should have the general control, management, and supervision of the line of railway over such right of way, and the property connected therewith which might be used jointly by the parties, and should have the sole control of, management, use, location, improvements, and repairs of the line of railway, and the supervision of all officers, agents, and employés necessary for such purpose; that the Chicago Company might from time to time establish and enforce such reasonable rules and regulations as it might deem necessary and proper; but it agreed that any of its agents or employés, for just cause, on demand of the St. Louis Company, should be discharged, and the St. Louis Company agreed, for just cause, upon demand of the Chicago Company, to discharge any of its agents and employés employed in reference to such joint use.

About 6 o'clock on the evening of December 18, 1895, a south-bound local freight of the Chicago Company entered the yards of this joint track at Madison, and was backed upon a side track. The engine, having been detached, went upon the main track, and backed to the north end of the yards; then went upon a side track, hauled eight or ten cars upon the main track, detached two or three cars from the south end, and started back north on the main track, to place upon the side track the remaining cars. The night was dark, and it was raining; and no lights or signals were displayed upon the rear end of the engine. A freight train of the St. Louis Company at this juncture approached from the north. As soon as the train was discovered by the crew of the Chicago Company, the engineer started his engine south, and one of the

train crew started north to flag the approaching train, and met it about 12 car lengths from the engine of the Chicago Company, and signaled it to stop; but, before that could be done, the incoming freight collided with the train of the Chicago Company, and Frank Rogers, who was a brakeman on the approaching train, and was in the service of the St. Louis Company, was killed. The contention at the trial was largely with respect to the fact which crew was in fault. The questions sought to be presented by this writ of error are (1) whether Rogers was a fellow servant of the train crew of the Chicago Company; (2) whether the court below erroneously instructed the jury with respect to the subject of damages, which instruction was as follows: "If you should find from the evidence that the defendant is guilty of the negligence charged in the declaration, and that the death of the plaintiff's husband resulted therefrom, while he was in the exercise of ordinary care for his own safety, then the plaintiff is entitled to recover, for her own and her child's benefit, such damages as the jury may believe to be fair and just compensation to them for the pecuniary loss they have sustained in the death of the said Frank Rogers, not exceeding the amount claimed in the declaration, five thousand dollars." There was no exception to the charge, but requests in various forms to instruct the jury that Rogers was a fellow servant of the crew of the Chicago Company were made and refused. There was also an assignment of error that the circuit court erred in overruling the motion for a new trial.

P. B. Warren, for plaintiff in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

JENKINS, Circuit Judge (after stating the facts, delivered the opinion of the court). The test of fellow service is a common master and a common service. These must concur. There must be unity of service and control. This principle underlies every ruling upon the subject from the time of *Priestley v. Fowler*, 3 Mees. & W. 1, and *Murray v. Railroad Co.*, 1 McMull. 384, the pioneer cases upon the subject, and *Farwell v. Railroad Corp.*, 4 Metc. (Mass.) 49 (in which Chief Justice Shaw delivered his masterly exposition of the doctrine of master and servant), down to the latest recorded decision. The exemption of liability on the part of the master for injury occurring to one servant by the negligence of another servant in a common service is only permitted when the master has discharged his obligations to his servant, among which, notably, are: (1) To use reasonable care to furnish a reasonably safe place to work in, having regard to the character of the employment; (2) to use reasonable care to provide safe tools and appliances for the doing of the work; (3) to use proper diligence in the hiring of reasonably safe and competent men to perform their respective duties; (4) in the case of railway employment, to adopt and promulgate proper rules for the conduct of the business. *Railroad Co. v. Peterson*, 162 U. S. 346-353, 16 Sup. Ct. 843. The servant relying upon the discharge of these duties by the master assumes the risks incident to his service and those arising from the default of a fellow servant in the common service. He has a right to rely upon the discharge by the master of his duty with respect to the employment of competent co-servants, and assumes only the risks of injury arising from the default of a co-servant upon the assumption that the duty of the master has been performed. If that has not been done, and the servant is injured by reason thereof, he may recover of the master for the injury. This is because the master has the control, and is bound to exercise proper diligence to employ only competent and to

discharge an incompetent servant. This duty to the servant continues through the entire service, and furnishes a shield and protection to him, subject to which is his assumption of risk.

In the case in hand there was no common master. The intestate of the defendant in error was in the service of the St. Louis Company. The servants through whose fault the jury found the collision to have occurred were in the service of the plaintiff in error, the receiver of the Chicago Company. The deceased was engaged in the operation of one of the trains of the former company. They who were neglectful and whose neglect caused the death were engaged in the operation of the trains of the receiver of the Chicago Company. There was no common master. The receiver was not bound in duty to Rogers by any obligations of a master, because Rogers was not in his service. It is not correct to say that because the trains of both companies, by agreement between them, were operated over a joint track, under and according to rules and regulations from time to time established by the Chicago Company, therefore the servants of the St. Louis Company in the operation of its trains over the joint track were in the service of the Chicago Company. They were neither operating the trains of the latter company, nor, in any just sense, engaged in its service. It or its receiver had no control over them. It is true the trains were to be operated in accordance with the rules and regulations established by the Chicago Company. That was indispensable to the operation of a joint track; but, in so operating the trains, the servants of the one company did not become the servants of the other company; the trains of the one company did not become the trains of the other company; the servants of the one company did not, for the time being, transfer their allegiance to the other company. They were bound, it is true, to operate the trains according to certain rules and regulations to which their master had agreed; but, in so doing, they discharged their duty to their own master, and not a duty owing by them to the other company. Neither company had control over the servants of the other company. Neither could discharge the servants of the other, and the right of discharge is a sure test of control. It is true that the companies had agreed that, for just cause, either party, upon demand of the other, would discharge any of its servants employed in reference to the joint use of the track; but each for itself had to determine the cause, and whether it would comply with the demand. The stipulation gave no right to one company to discharge the servant of the other, and gave no control whatever over him. He owed service to his own master, and to no other, and could not be controlled or discharged by any other. Nor were these men engaged in a common service. The one set was operating the train of one company; the other set, the train of another company. The service was distinct; none the less so because the two trains, at the time of the injury, were upon the same track. They were engaged in the like service, but not in the same service. They were not working to a common end. They were serving separate masters, and in distinct employments. These views, as we think, are abundantly sanctioned by authority. *Warburton v. Railway Co.*, L. R. 2 Exch. 30; *Railroad Co.*

v. Stoermer, 1 U. S. App. 276, 2 C. C. A. 360, and 51 Fed. 518; Railroad Co. v. Craft's Adm'x, 29 U. S. App. 687, 16 C. C. A. 175, and 69 Fed. 124; Sawyer v. Railroad Co., 27 Vt. 370; Robertson v. Railroad Co., 160 Mass. 191, 35 N. E. 775; Zeigler v. Railroad Co., 52 Conn. 543; Smith v. Railroad Co., 19 N. Y. 127; Svenson v. Steamship Co., 57 N. Y. 108; Railroad Co. v. Hardy, 57 N. J. Law, 505, 31 Atl. 281, affirmed in court of errors, 58 N. J. Law, 205, 35 Atl. 1130; Railroad Co. v. Armstrong, 49 Pa. St. 186; Philadelphia, W. & B. R. Co. v. State, 58 Md. 372; Railroad Co. v. O'Connor, 119 Ill. 586, 9 N. E. 263; Phillips v. Railway Co., 64 Wis. 475, 25 N. W. 544.

There is a class of cases, of which Rourke v. Colliery Co., 46 Law J. C. P. 283, 1 C. P. Div. 556, Johnson v. City of Boston, 118 Mass. 114, and Ewan v. Lippincott, 47 N. J. Law, 192, are examples, to the effect that one may be in general the servant of one person, but for a special purpose, on a particular occasion, may make himself the servant of another; as where the servant of one is lent, for the time being, to another, to perform some service for that other, remaining, however, under pay from the former. In such case it is held by these decisions that, while performing such service, he is a fellow servant with those in the service of the one for whom he is at the time working, although he be under pay from another. We need not here question the correctness of these decisions, since, as we conceive, they are not pertinent to the case in hand; for, as we have said, Rogers was in no just sense working under employment by, or in the service of, or for the purposes of, the plaintiff in error. The Ewan Case is referred to in the subsequent case of Hardy, in the same court, and is stated to have gone to the extreme, and is not to be considered as infringing upon the general doctrine stated; the Johnson Case was not deemed by the supreme judicial court of Massachusetts in the Robertson Case to impair the general rule; and the Rourke Case was also distinguished upon its facts from the Warburton Case. The case of Clark v. Railroad Co., 92 Ill. 43, does not sustain the contention of the plaintiff in error. That was an action by Clark against his master to recover for injuries sustained through the negligence of the servant of another railroad company, and it was held that the master was not guilty of negligence. We are of opinion that the court rightly ruled that Rogers was not a fellow servant of the train crew in the service of the plaintiff in error.

It is further objected that the jury was instructed to award damages to the full extent of the statute, and that the language employed is susceptible of that construction, within the decision in Railway Co. v. Austin, 69 Ill. 426. We are not at liberty to consider this objection, nor other objection which may be made to the charge with respect to damages for failure to call the attention of the jury to the elements of damage, because no requests in either respect were presented, no exception was taken to the charge, and error is not assigned thereon. The overruling of the motion for a new trial cannot be assigned for error. The judgment will be affirmed.

## RHODE ISLAND MORTGAGE &amp; TRUST CO. v. MOULTON.

(Circuit Court, N. D. Illinois, N. D. November 8, 1897.)

## CORPORATION—LIABILITY OF STOCKHOLDER FOR CORPORATE DEBT.

The statutory liability of a shareholder in a Kansas corporation for the corporate debts follows the stock, so that one who holds stock when judgment is rendered against the corporation is liable therefor, although he owned no stock when the debt accrued for which the judgment was rendered.

This was an action at law by the Rhode Island Mortgage & Trust Company against Don A. Moulton. The case was heard on demurrer to the declaration.

T. W. Pringle and J. G. Slonecker, for plaintiff.  
J. H. Higle, for defendant.

GROSSCUP, District Judge (orally). The action is brought against the defendant as a shareholder in a Kansas corporation, and the declaration sets forth the provisions of the constitution and laws of Kansas wherein the shareholder's statutory liability is created, the creation of debt by the corporation, the judgment thereon, and the issuance of an execution and its return nulla bona. The declaration also avers that the defendant was, at the time of the judgment and the return of the execution, a shareholder in the corporation, but does not aver that he was such shareholder at the time the debt was originally created. The demurrer to the declaration raises this question: Can there be a recovery against one who was a shareholder at the time of the judgment and execution who was not a shareholder at the time the debt was created? After a careful examination of all the authorities, I am constrained to hold that the statutory liability of a shareholder in a Kansas corporation follows the stock, and is, therefore, in force against all shareholders who hold stock at the time of the judgment and default, independently of their relationship to the company at the date of the creation of the debt. The demurrer will therefore be overruled.

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PATTON v. SOUTHERN RY. CO.

(Circuit Court of Appeals, Fourth Circuit. November 3, 1897.)

No. 200.

## 1. NEGLIGENCE—PROVINCE OF COURT AND JURY.

When, in an action of negligence, the facts are undisputed, and such that all reasonable minds must draw the same conclusion from them, it is the duty of the judge to say, as matter of law, whether or not they make a case of actionable negligence.

## 2. SAME.

In all actions of negligence there is a preliminary question, which the judge must decide: Whether, granting to the testimony all the probative force to which it is entitled, a jury can properly and justifiably infer negligence from the facts proved.

8. SAME—QUESTIONS FOR JURY.

In all actions founded on negligence, whenever the facts are in dispute or conflicting, or the credibility of witnesses is involved, or the preponderance of testimony, and wherever the facts admitted or not denied are such that fair-minded men might draw different inferences from them, it is a case for a jury.

4. MASTER AND SERVANT—NEGLIGENCE OF RAILROAD COMPANY—SAFETY OF ROADBED.

It is the duty of a railroad company to provide a safe track and roadbed, and not to expose its employes to any perils or hazards against which they may be guarded by proper diligence.

5. SAME—DEGREE OF CARE REQUIRED.

The degree of care required from a railroad company in respect to the condition and equipment of its tracks and roadbed is to be measured by the exigencies of the situation, and will often depend upon the situation of the road and the topography of the ground.

6. SAME—ASSUMPTION OF RISKS.

Employes of a railroad company whose road runs through a land of steep grades assume greater risks than if upon level lands.

7. SAME—EVIDENCE—QUESTION FOR JURY.

Plaintiff was injured by the derailment of a train at a sharp curve at the foot of a steep grade. It appeared that there had been previous accidents at the same place from the same cause. There was evidence that a guard rail at that point would be a great safeguard. *Held*, that a question of fact was presented for the jury, whether plaintiff was subjected to any increased or unnecessary danger through lack of some appliance which would have prevented the derailment.

8. SAME—PRESUMPTIONS.

The happening of a railroad accident does not of itself prove negligence, but, where it reveals defects such that ordinary diligence and care would have discovered and prevented them, the company cannot be free from the imputation of negligence in failure to adopt some safeguards or preventive remedies in proportion to the imminency of the danger.

9. SAME—NEGLIGENCE—ACCIDENT.

If an injury is the combined result of accident and negligence, the fact that the contributing cause was pure accident would not exonerate a defendant, if guilty of a want of ordinary care by which the result of the unavoidable calamity might have been essentially mitigated.

Goff, Circuit Judge, dissents generally on the facts.

In Error to the Circuit Court of the United States for the Western District of North Carolina.

F. A. Sondley and Theodore F. Davidson, for plaintiff in error.

George F. Bason and Charles Price, for defendant in error.

Before Mr. Chief Justice FULLER, GOFF, Circuit Judge, and BRAWLEY, District Judge.

**BRAWLEY**, District Judge. It is difficult to mark with precision the exact line which separates the functions of the judge from the functions of the jury in actions of negligence; for this being a mixed question of law and fact, and the terms by which it is usually defined having a relative significance, the rule requiring judges to decide questions of law, and juries to decide questions of fact, is perplexed with subtleties when applied to the special circumstances of each particular case. When the facts are undisputed, and such that all reasonable minds must draw the same conclusion from them, it is clearly the duty of the judge to say, as matter of law, whether or not they make a case of actionable negligence; but such is the in-

firmity of the human mind, and such its idiosyncrasies, that minds equally honest may sometimes draw different conclusions from the same facts. In all such cases, and wherever the facts are in dispute, it is as clearly the duty of the judge to submit them to the jury; for the law holds that 12 impartial men, applying their separate and varied observations and experiences of everyday life to the decision of questions of fact, are more likely to reach a correct conclusion than a single judge; and this must be so, if the jury system is worthy to be preserved. The courts have long since abrogated the doctrine that a mere scintilla of evidence from which there might be a surmise of negligence is sufficient to carry a case to a jury, and have adopted the more reasonable rule that in all cases there is a preliminary question, which the judge must decide,—whether, granting to the testimony all the probative force to which it is entitled, a jury can properly and justifiably infer negligence from the facts proved; for, while negligence is usually an inference from facts, it must be proved, and competent and sufficient evidence is as much required to prove it as to prove any other fact. The simplest definition of “negligence” is, absence of due care under the circumstances. This seems easy of comprehension, but when one attempts to apply it to a particular case the inherent vagueness of the terms “due care” and “reasonable prudence” becomes apparent; for there is no fixed and immutable standard by which to measure duty in the varying and diverse transactions and happenings of life, and what may be due care in one condition and relation is the want of it in another. A process of ratiocination, therefore, becomes necessary,—comparison and deduction. When this comes into play, new difficulties arise, from the distinctive individualities, peculiarities, and anfractuositities of the human mind. Of all the reported cases wherein judges have granted nonsuits or directed verdicts in actions of negligence, there are few where other judges, equally conscientious, might not have discovered some fact which would be considered rightly capable of producing a different impression on other minds, and therefore properly cognizable by a jury. One clear thread seems to run through them all, and that is that in all actions founded on negligence, whenever the facts are in dispute or conflicting, or the credibility of witnesses is involved, or the preponderance of testimony, and wherever the facts admitted or not denied are such that fair-minded men might draw different inferences from them, it is a case for a jury, and a case should not be withdrawn from the jury unless the inferences from the facts are so plain as to be a legal conclusion. In the case now under review the essential facts are few and undisputed. It is in attempting to draw inferences from those facts that we are plunged into a sea of uncertainty, where there is no chart directing to an infallible conclusion. A learned and conscientious judge, in dismissing the complaint, has, in effect, decided that no inference of negligence could rightly be deduced from these facts. It was his duty to so decide if the case was so plain that he would have been impelled to set aside the verdict as one rendered through prejudice, passion, or caprice. It is equally our duty to review the correctness of his conclusion.



The accident out of which the action grew occurred near Melrose, on the Asheville & Spartanburg Railroad, between 3 and 4 o'clock in the morning of October 10, 1894. The plaintiff was the conductor of a freight train, and left Asheville a little after midnight with a train of 16 loaded cars, arriving at Saluda about half past 2 o'clock. The rules of the company required the conductor to go over his train with the engineer at Saluda, and to inspect the brakes and appliances. A helper engine is kept at Saluda to help trains up and down the grade. It was usually employed in helping trains up the grade, but could be used in going down, if required. It was not manned or fired that morning, and the conductor, not deeming it necessary, did not ask for it. Between Saluda and Melrose, the first station 3 miles to the east, there is a very steep grade,—about 240 to 260 feet to the mile. For a half mile after leaving Saluda the train was kept under control. After that the brakes failed to hold, the train got beyond control and rushed down the mountain side at a terrific speed past Melrose, the foot of the steep grade, and was wrecked at a point one-half mile below where there is a sharp curve, and the plaintiff received injuries which necessitated the amputation of his leg. It is impossible for any fair-minded man to say with certainty what caused the train to get beyond control. There was evidence that some of the brakes were found defective on the arrival at Saluda, but they were repaired, and the conductor evidently concluded that his train was in a safe and suitable condition to make the descent; for, having the right to demand the assistance of the helper, he did not ask for it. In the opinion of the presiding judge, he "was a man of intelligence, of good habits, of experience in the management and movement of trains, perfectly familiar with this steep grade on which the wreck occurred, and its dangers." The cause which led to the train getting beyond control may therefore be said to be inscrutable. We do not find any proof of such negligence on the part of the company in not providing safe machinery and appliances as would sustain a verdict against it. Nor is there any proof of such contributory negligence on the part of the plaintiff as would prevent his recovery if negligence on the part of the company had been established. The best machinery that can be provided will sometimes fail to respond to the demands upon it, as the most careful of human beings will sometimes omit due precautions. Inattention and accident are incident to human affairs. This being the obvious conclusion of all human experience, it is a duty to provide against such contingencies, and the omission to make such provision may be justly regarded as negligence. Whether there was such omission of duty in this case is the only question to be considered, for there is no sufficient evidence of negligence as to the cars and brakes and other appliances. In view of the testimony that accidents of this nature had frequently occurred at this very place, and in the very manner detailed here; that it was an extremely steep grade,—a dangerous place, where accidents were likely to occur,—we hold that it was an obvious duty of the defendant company, not only to take every precaution to prevent such accidents, but also to provide against the consequences thereof, and to minimize the

dangers likely to flow therefrom, if they could not, in the nature of things, be altogether prevented. As to whether that could be effectually accomplished, we express no opinion. That seems to us peculiarly a question of fact, to which a jury should respond under such instructions as the court would properly give. The testimony in this case showed that about one-half mile from the foot of the steep grade there was a sharp curve, where the train was derailed, and that there was no guard rail at that curve. A witness who claimed to have had 20 or 25 years of experience as a railroad constructor, and one who had been a section boss for 16 years, testified that a guard rail upon such a curve would be a great safeguard; that guard rails are used upon a great many railroads; that they have a tendency to hold the flange of the wheels on, and to prevent their leaving the track, and as such they are a great protection. If this testimony is to be believed, it is impossible to resist the conclusion that the absence of the guard rail may have been the cause of the derailment. That it is the duty of a railroad company to provide a safe track and roadbed, and that its employes should not be exposed to any perils or hazards against which they may be guarded by proper diligence, is a proposition which cannot be disputed; and the degree of care is to be measured by the exigencies of the situation, and will often depend upon the situation of the road and the topography of the ground. Persons employed upon a road such as this undoubtedly assume greater risks than upon level lands, but on the other hand the degree of care and prudence in the construction of a track through mountain ranges varies with the circumstances, and what might not be a faulty construction upon the level would be so in a land of steep grades and sharp curves. Engineering questions should not be left entirely to the varying and uncertain opinion of juries, but the well-established rule as to the duty of a railroad company to use due care and skill in the construction and maintenance of track and roadbed cannot be abrogated. There is a common knowledge, which may be gathered from the experience and observations of everyday life, which, while it may not outweigh the opinion of competent engineers, is entitled to be considered in connection with it; and, where previous accidents at the same place from the same cause had directed attention to a source of danger, it seems to us to present a question of fact, for the determination of a jury, under proper instructions, whether, under the circumstances of this case, the plaintiff was subjected to any increased and unnecessary danger by reason of the failure of the defendant company to provide a guard rail, or some other appliance which would have prevented the derailment. It may be that the company might show that a guard rail would not answer that purpose, but that is a matter of defense. A railroad company, in relation to its servants, is not bound to adopt every new invention which may lessen danger. If it keeps reasonably abreast with improved methods, its servants must determine for themselves whether they will encounter the hazards incidental to the service. Nor can it always be said, after an accident has occurred, that it ought to have been anticipated by the use of some special device or precaution not in common use. The happening of an accident does not of itself prove negligence, but,

where it reveals defects of such character and of such long standing that ordinary diligence would have discovered and ordinary care have prevented them, a company cannot be free from the imputation of negligence in failing to adopt some safeguards or preventive remedies proportioned to the imminency of the danger. If the injury is the combined result of accident and negligence, the fact that the contributing cause was pure accident would not exonerate a defendant, if guilty of a want of ordinary care, by which the result of the unavoidable calamity might have been essentially mitigated. Our records show another case at this term where a train was derailed at this same spot, and the testimony showed that accidents had been frequent there. Mr. Justice Field, in *District of Columbia v. Armes*, 107 U. S. 525, 2 Sup. Ct. 845, says: "The frequency of accidents at a particular place would seem to be good evidence of its dangerous character. At least, it is some evidence to that effect." The testimony of Corpening, a railroad builder of over 20 years' experience, was that a guard rail at the curve would have been a great safeguard, and would have tended to keep the train on the track. The testimony of Owens, formerly a section boss, of 16 years' experience, was to the same effect. The case, therefore, does not seem to us to fall within the rule above stated, in that there was some testimony from which, if believed, a jury might have fairly inferred that the company was negligent in not providing guard rails at the curve. "It is well settled," says Mr. Justice Brewer in *Railroad Co. v. Powers*, 149 U. S. 45, 13 Sup. Ct. 749, "that, where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this whether the uncertainty arises from a conflict in the testimony, or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them." "If fair-minded men may draw different inferences," says the court in *Railroad Co. v. McDade*, 135 U. S. 572, 10 Sup. Ct. 1049, "no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be reasonable and prudent," says Mr. Justice Lamar in *Railway Co. v. Ives*, 144 U. S. 417, 12 Sup. Ct. 682. "Where the inference to be drawn from the facts is not so plain as to be a legal conclusion." *Railroad Co. v. Egeland*, 163 U. S. 93, 16 Sup. Ct. 975. "There can be no doubt, where evidence is conflicting, that it is the province of the jury to determine from such evidence the proof which constitutes negligence." Mr. Justice White in *Railroad Co. v. Pool*, 160 U. S. 440, 16 Sup. Ct. 339; *Railroad Co. v. Stout*, 17 Wall. 664; *Jones v. Railroad Co.*, 128 U. S. 446, 9 Sup. Ct. 118; *Kane v. Railroad Co.*, 128 U. S. 91, 9 Sup. Ct. 16. Courts cannot fix, themselves, nor allow juries to fix, an arbitrary standard of duty in any given case. Nor can it be left entirely to surmise, conjecture, guess, or random judgment, whether proper precautions were taken, or whether any precautions would have warded off the result. Nor can the varying and uncertain opinions of jurors be permitted to determine engineering or scientific questions. We express no opinion upon these points. All that we determine is that there was testimony sufficient to go to the jury in this case. If their minds are

properly directed to the precise questions which it is their province to determine, and they are not swayed by extraneous circumstances, there should be little danger of a miscarriage of justice. The right and duty of a court to set aside a verdict not supported by adequate testimony, always inflexibly maintained, will suffice to correct an occasional abuse. Judgment reversed and case remanded, with instructions to grant a new trial.

GOFF, Circuit Judge. I am unable to concur in the conclusion reached by the court in this case, as in my opinion the judgment rendered by the court below is without error. After the plaintiff had offered his testimony to the jury, counsel for the defendant, without offering any evidence, moved the court to direct a verdict in favor of the defendant company. In disposing of the motion the trial judge said:

"Can the plaintiff, under the evidence taken in this case, hold the defendant liable for the injury which he received? The plaintiff was the conductor of the wrecked train. He is a man of intelligence, of good habits, of experience in the management and movement of trains,—perfectly familiar with the steep grade on which the wreck occurred, and with its dangers. As conductor of the train, and in control of it, he had concluded to take it down the grade. He had carefully examined the brakes of the said train, had found the defects in them, and had remedied these defects to his own satisfaction. He knew everything about his train,—as to the number of the cars, their contents, and the weight. He was not obliged to take the risk of the descent,—at least, without protest. The brakes proved insufficient. The train ran away. The plaintiff took the risk at his own will, and must take the consequences. If the defendant is liable in a case like this, it is liable because its agent took a loaded train down this dangerous grade with insufficient protection. Now, who was the agent of the railroad company in charge of the train,—governing its movements? The plaintiff was. If the defendant company is liable, it is liable for his negligence."

Giving to the testimony offered by the plaintiff the full weight that it deserves, and drawing from it every just inference proper under the circumstances, I think the court properly directed the jury to find a verdict for the defendant. In cases where the testimony is like that found in the record we are now considering, it is, in my opinion, the duty of the trial judge to direct a verdict, for the reason that the conclusion follows, as matter of law, that the plaintiff cannot recover upon any view which can be taken of the facts that the evidence submitted to the jury tends to prove. *Herbert v. Butler*, 97 U. S. 319; *Bowditch v. Boston*, 101 U. S. 16; *Griggs v. Houston*, 104 U. S. 553; *Randall v. Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. 322; *Gardner v. Railroad Co.*, 150 U. S. 349, 14 Sup. Ct. 140; *Railroad Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619; *Railroad Co. v. Pool*, 160 U. S. 438, 16 Sup. Ct. 338. This court, after a careful examination of the authorities bearing upon this question, reaffirmed the position I have just referred to in the case of *Franklin Brass Co. v. Phoenix Assur. Co.* (decided Feb. term, 1895) 25 U. S. App. 119, 13 C. C. A. 124, and 65 Fed. 773. It seems plain to me, if the jury had, on the evidence before it, rendered a verdict for the plaintiff, that it would have been the duty of the judge to have set it aside; and, if that be so, certainly he did not err in pursuing the course that he did. In

the case of *Commissioners v. Clark*, 94 U. S. 278, 284, Mr. Justice Clifford, speaking for the supreme court of the United States, said:

"Judges are no longer required to submit a case to the jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence. *Ryder v. Wombwell*, L. R. 4 Exch. 39. Decided cases may be found where it is held that, if there is a scintilla of evidence in support of a case, the judge is bound to leave it to the jury; but the modern decisions have established a more reasonable rule, to wit, that before the evidence is left to the jury there is, or may be, in every case, a preliminary question for the judge,—not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed. L. R. 2 P. C. 335; *Improvement Co. v. Munson*, 14 Wall. 448; *Pleasants v. Fant*, 22 Wall. 120; *Parks v. Ross*, 11 How. 373; *Merchants' Bank v. State Bank*, 10 Wall. 637; *Hickman v. Jones*, 9 Wall. 201."

I find no evidence in the record that establishes negligence on the part of the defendant. Indeed, it is conceded in the opinion of the court that there is no proof of negligence, so far as machinery and appliances are concerned; and I have no right to presume that such evidence exists, and will be offered in case another trial of this cause is had. The plaintiff was injured in an accident that occurred on a heavy grade on a mountain section of the defendant's road, as to which, on account of the danger attending the same, special rules and regulations had been established by the company for the movement of trains over it. The plaintiff was familiar with the road, the dangers attending the same, and the regulations established to govern it. For reasons that were doubtless satisfactory to him at the time, he ignored the rules, assumed the risk, and took the consequences; and, if there was negligence, it was, in my opinion, on his part. I think the judgment of the court below should be affirmed.

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MANHATTAN LIFE INS. CO. OF NEW YORK v. CARDER.

(Circuit Court of Appeals, Fourth Circuit. November 10, 1897.)

No. 225.

1. LIFE INSURANCE—FALSE REPRESENTATIONS.

The term "in good health," in a life insurance policy, is comparative; and an assured is in good health unless affected with a substantial attack of illness, threatening his life, or with a malady which has some bearing on the general health.

2. SAME—AUTHORITY OF AGENTS—NOTICE.

A life insurance company cannot defeat recovery on a policy by proof of restrictions and limitations, of which the assured had no notice, upon the authority and powers of its officers and representatives whom it had clothed with all the indicia of authority.

In Error to the Circuit Court of the United States for the District of West Virginia.

F. B. Enslow, for plaintiff in error.

Malcolm Jackson and John H. Holt, for defendant in error.

Before GOFF and SIMONTON, Circuit Judges, and PURNELL, District Judge.

**SIMONTON, Circuit Judge.** This case comes up by writ of error to the circuit court of the United States for the district of West Virginia. The action below was brought by Agnes S. Carder, an infant, by her next friend, against the Manhattan Life Insurance Company of New York. The cause of action was a policy of life insurance on the life of her father, Albert S. Carder, of which she was the beneficiary. The proceedings began in the state court, and were removed into the circuit court of the United States for the district of West Virginia. The policy of insurance bears date the 17th of May, 1893, and is in the sum of \$5,000. It was issued upon the application of Albert S. Carder, which application contained his answers to a large number of questions, giving a very full account of his family and of himself. At the end of his answers is the following warranty and contract:

"(90) It is hereby warranted that the above statements and answers are full, complete, and true in every particular, and they are offered as a consideration for the insurance applied for, which, however, shall not be forfeited for any misstatement made herein after three years from the date hereof. And it is agreed that there shall be no contract of insurance until a policy shall be issued by the company, and accepted, subject to the conditions and stipulations therein contained, during the good health of the person to be insured, and the first premium paid thereon. And all right and claim to paid-up insurance or reserve value of any kind, under the laws of any state or otherwise, except as provided in the laws of the state of New York or the policy, is hereby waived and released."

There is no dispute respecting the truth of any of the statements and answers made in his application. The policy was issued and accepted, and the premium was paid thereon. The questions in this case are, was it issued and accepted during the good health of the person insured? If not, was this condition waived? The cause was tried before a jury. At the end of the testimony on behalf of the defendant as well as the plaintiff, the defendant entered a demurrer to the evidence. Plaintiff joined in the demurrer, and the jury, under the instruction of the court, and in accordance with the practice prevailing in West Virginia, returned a verdict for the full amount claimed by the plaintiff, subject to the opinion of the court on said demurrer. The court, having heard argument thereon, overruled the demurrer, and judgment was entered for plaintiff. Exceptions were duly taken and assignments of error filed. The questions in the case, as stated above, ordinarily would have been questions of fact to be answered by the jury under the instructions of the court. The defendant, by its demurrer to the evidence, took these questions entirely from the jury, and placed upon the court the responsibility and duty of answering them. The decision of the court necessarily was based on the testimony. Our conclusion in the case must be made after a review of the evidence in the record.

Carder, the insured, was a dentist in the town of Huntington, W. Va. He was approached in March, 1893, by J. L. Thompson, who was soliciting insurance in the defendant company. Thompson was

an appointee of R. P. Woods, who was a state agent or manager of the defendant company, resident of Cincinnati, Ohio. Woods had authority to appoint Thompson as agent to solicit insurance. Thompson induced Dr. Carder to make application for insurance, superintended the preparation of the papers, and had an examination of the applicant made by a physician chosen by Thompson himself. The application went forward, and in due course two policies of insurance on the life of Carder were issued by the home office of the defendant company, and were sent to Woods, from whose possession Thompson received them. When the policies came, Thompson, being engaged elsewhere, sent them to Carder by an agent of his, named Henry. Carder refused to accept the policies. Soon after, Thompson decided to see Carder himself. To this end he went to Huntington, called at Carder's office, and learned that he was at his home. Going to the home of Carder, he found him in a bed chamber, lying on the bed in his night clothes, playing with his little daughter. With him also was Dr. Grooms, the physician who had examined him on behalf of the company when he made application for insurance. Introducing the matter of insurance, Thompson urged Carder to accept the policies. Carder excused himself on the ground that he had no money to pay for insurance, but offered his note. Thompson agreed to accept the note, went out, got a blank note, filled it up, got Carder to sign it, and thereupon delivered to Carder the policy for \$5,000. Carder would not accept the other policy. This was on the 22d of June, 1893. Thompson noted Carder's condition, and came to the conclusion that he was not seriously sick; and, to his inquiry, Dr. Grooms said that Carder had a little trouble with his bowels, or something like that, and he thought he would be all right in a day or two. Several physicians have testified who attended Carder, and they all concur in the opinion that he had a slight gastric irritation of the intestinal canal, a disease not necessarily dangerous, and seldom or never fatal. His complaint gradually diminished, and he got up and about, went to his office, and attended to his business; never, however, apparently being wholly free of the gastric irritation. On the 12th of July, 1893, he took a family dinner with a friend. While there, he indulged in a bottle of beer, an unusual thing for him, and ate heartily of veal, sliced tomatoes, and watermelon. After eating dinner, he worked, and overheated himself. That night he was taken with cholera morbus, from which he died the next day. This cholera morbus was not the result of his previous indisposition, although it may have rendered him more susceptible to such an attack. Thompson had said nothing to Woods or to the company about finding Carder in bed when he delivered to him the policy. On the 22d of July he detailed to Woods the circumstances attending the delivery. A day or two after, Woods went to Huntington, and there learned for the first time that Carder was dead. On his return to Cincinnati, the 25th of July, he reported to the company all that he had heard from Thompson, and also the death of Carder. In the meanwhile he furnished to the administrator of Carder blank proofs of death, made a claim upon the administrator for the premium accruing during the quarter in which Mr. Carder died, stating at the same time that it must be either paid then or be deducted

from the sum due on the policy. The note given by Carder to Thompson was collected, and carried to the credit of the company; and a notification was sent out from the office of the company in New York, mailed to Dr. Carder, stating that the premium would fall due the 17th day of August, 1893, or else the policy would be forfeited, and after that the company concluded not to pay the policy. This was the 14th day of August, 1893. The authority of the agents of this company was strictly limited, and this fact was not communicated to the insured.

As has been seen, two questions arise under this state of facts: First. Was Dr. Carder in good health when the policy was accepted? Second. If not, was this waived by the company or any agent of it, so as to bind the company?

The term "in good health" is comparative. It does not mean in perfect health, nor would it depend upon ailments slight and not serious in their natural consequences. In construing this term in a life policy, we must regard the character of the risk assumed. Looking at it from this point of view, it would seem that a person was in good health unless he was affected with a substantial attack of illness, threatening his life, or with a malady which had some bearing on the general health; not a slight illness or a temporary derangement of the functions of some organ. See *Connecticut Mut. Life Ins. Co. v. Union Trust Co.*, 112 U. S. 257, 5 Sup. Ct. 119.

In *May, Ins.* (2d Ed.) 387:

"Good health does not import a perfect physical condition. The epithet 'good' is comparative, and does not ordinarily mean that the applicant is free from infirmity. Such an interpretation would exclude from the list of insurable lives a large proportion of mankind. The term must be interpreted with reference to the subject-matter and the business to which it related. Slight troubles not usually ending in serious consequences, and so unfrequently that the possibility of such result is usually disregarded by insurance companies, may be regarded as included in the term 'good health.'"

"The term 'sound health,' says the supreme court of Michigan in *Brown v. Insurance Co.*, 65 Mich. 306, 32 N. W. 610, "when used in questions in applications for life insurance, means a state of health free from any disease or ailment that affects the general soundness and healthfulness of the system seriously, not a mere temporary indisposition, which does not tend to weaken or undermine the constitution of the assured."

The testimony of the physicians all concur in treating the ailment of Carder as temporary indisposition, which did not weaken or undermine his constitution. We are of the opinion that, within the meaning of the policy, he was in good health. This would seem to have been the conclusion of the agents of the defendant company. Thompson, who was charged with the delivery of the policy and the completion of the contract of insurance, saw Carder, and talked with him in the presence of his own examining physician. With full knowledge of his condition, he delivered the policy. Woods, a superior agent, the general agent of the company, after full information from Thompson of all that had occurred, went on, collected the money due upon the note given for the policy, made demand for the accruing



premium on the policy, sent on and saw to the preparation and the perfection of the proofs of loss, and seemed to entertain no other idea than that the policy would be paid in full. These agents were clothed with all the indicia of authority. No notice of limitation on that authority was ever given to or known by the insured or his beneficiary, so far as the record discloses. Under these circumstances, the policy was properly accepted, and became a binding contract. The conclusion thus reached renders further discussion of the second point unnecessary. The judgment of the circuit court is affirmed, with costs.

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### CULP v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. October 25, 1897.)

#### No. 4.

#### USE OF MAILS TO DEFRAUD.

The act of March 2, 1889 (25 Stat. 873), entitled "An act to punish dealers and pretended dealers in counterfeit money and other fraudulent devices for using the United States mails," and which amended Rev. St. § 5480, by inserting therein an enumeration of various ways or devices for using the mails to defraud, did not repeal this section, or narrow its scope to the specific schemes and artifices so specified; and an indictment describing a scheme to defraud by sending letters requesting the persons addressed to sell and ship to defendant articles of merchandise, for which he did not intend to pay, states a punishable offense, under the statute.

In Error to the District Court of the United States for the Western District of Pennsylvania.

This was an indictment against J. A. Culp for using the mails to defraud. Defendant, having been convicted in the district court, sued out this writ of error.

James Scarlet and J. H. McDevitt, for plaintiffs in error.

Samuel B. Griffiths, for defendant in error.

Before ACHESON and DALLAS, Circuit Judges, and KIRKPATRICK, District Judge.

ACHESON, Circuit Judge. The indictment charged the defendant with having devised a scheme to defraud, to be effected by opening communication with certain named persons by means of the post-office establishment of the United States, and that in executing such scheme the defendant deposited in a post office of the United States certain letters, addressed to said persons, to be sent and delivered to them by the post-office establishment; and the fraudulent scheme particularly set out was this: That, intending to defraud the persons to whom said letters were addressed, the defendant therein and thereby requested the persons addressed to sell and ship to him certain articles of merchandise, for which he agreed to pay the shippers, whereas, in truth and in fact, he did not intend to pay for said articles, but intended fraudulently to appropriate them and convert them to his own use without paying therefor. There is no doubt that the indictment plainly sets out a scheme to defraud (*Evans v. U. S.*, 153 U. S.

584, 592, 14 Sup. Ct. 934, 939; *Weeber v. U. S.*, 62 Fed. 740), that it was to be effected by means of correspondence through the post-office establishment, and that, in the execution of the scheme, letters were placed in the post office. It is not seriously questioned, and, indeed, cannot be denied, that the indictment charges an offense within the terms and meaning of section 5480 of the Revised Statutes. It is, however, contended on behalf of the plaintiff in error that that section was completely repealed and superseded by the act of March 2, 1889, c. 393, entitled "An act to punish dealers and pretended dealers in counterfeit money and other fraudulent devices for using the United States mails" (25 Stat. 873), and that this later act does not reach such a case as this record discloses. But in this conclusion we are unable to concur. It may be that the act of March 2, 1889, the initial clause of which reads, "Be it enacted," etc., "that section fifty-four hundred and eighty of the Revised Statutes be, and the same is hereby, so amended as to read as follows," superseded said numbered section (5480), and is a complete substitute therefor. But, granting this, it does not follow that the plaintiff in error was wrongfully convicted and sentenced. The first section of the said act of 1889 embodies the whole of the original section 5480, verbatim, and in addition thereto it contains new matter, which is introduced immediately after the words, "If any person having devised or intending to devise any scheme or artifice to defraud," and immediately before the words, "to be effected by either opening or intending to open correspondence or communication with any person, whether resident within or outside the United States, by means of the post-office establishment of the United States," etc. The addition thus inserted reads:

"Or to sell, dispose of, loan, exchange, alter, give away, or distribute, supply, or furnish, or procure for unlawful use any counterfeit or spurious coin, bank notes, paper money, or any obligation or security of the United States or of any state, territory, municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious articles, or any scheme or artifice to obtain money by or through correspondence, by what is commonly called the 'sawdust swindle,' or 'counterfeit money fraud,' or by dealing or pretending to deal in what is commonly called 'green articles,' 'green coin,' 'bills,' 'paper goods,' 'spurious treasury notes,' 'United States goods,' 'green cigars,' or any other names or terms intended to be understood as relating to such counterfeit or spurious articles.  
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Now, we cannot assent to the proposition pressed upon us by counsel for the plaintiff in error, that the act of 1889 was intended to curtail the operation of the original enactment, and to limit the scope of action and application of the law to the particular schemes and artifices specified in the new part of the act of 1889 above quoted. No such limitation, we think, was contemplated or effected by the amendatory act of 1889. In our view, the purpose of the amendment was not to restrict, but to extend, the operation of the statute. The additional clause is introduced disjunctively, and evidently was intended to bring within the prohibition and penalty of the statute schemes, dealings, and transactions relating to counterfeit or spurious money and other articles, to be effected by the use of the United States mails, which were not embraced in the original act. We think it clear

that the provisions of section 5480 of the Revised Statutes were continued in undiminished force and effect by the act of March 2, 1889. This was the practical construction which the courts gave to this act in the cases of *Weeber v. U. S.*, 62 Fed. 740, and *U. S. v. Durland*, 65 Fed. 408. It is true that it does not appear that the precise question now before us was distinctly raised or discussed by counsel or court in either of those cases, but the very omission is significant. Moreover, the latter case was reviewed by the supreme court (*Durland v. U. S.*, 161 U. S. 306, 16 Sup. Ct. 508), and the conviction was sustained. That case involved the construction of the act of March 2, 1889, and the judgment of affirmance there rendered is equivalent to a direct ruling against the point which the plaintiff in error here makes. The judgment of the district court is affirmed.

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UNITED STATES v. BINNEY.

(Circuit Court of Appeals, Second Circuit. May 22, 1896.)

No. 2,222.

CUSTOMS DUTIES—CLASSIFICATION—DIAMOND STEEL.

"Diamond Steel," which is made by crushing small steel ingots, after they have been submitted to a special treatment, to various degrees of fineness, from the size of a buckwheat kernel to an impalpable grain, and which is used in sawing stone and for like purposes, was dutiable under the provision for "steel in all forms and shapes, not specially provided for," in paragraph 122 of the act of 1894, and not as a manufactured article not specially provided for, under paragraph 177.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was an application to the circuit court, by an importer, for a review of a decision of the board of general appraisers reversing the decision of the collector of the port of New York in the classification for duty of certain merchandise invoiced as "Diamond Steel." The collector assessed a duty of 35 per cent., under paragraph 177 of the tariff act of August 28, 1894, and the importer protested, claiming that the duty should have been levied at the appropriate rate, under paragraph 122. The merchandise was described by the appraiser in the following language, which the evidence shows is substantially correct:

"It is manufactured from small steel ingots, the process consisting of submitting the ingots to an intense heat; then, after cooling, putting them into a crusher, which crushes them into various degrees of fineness, from the size of a buckwheat kernel to an impalpable grain. The different degrees of fineness are separated by passing the different material through sieves or screens. When the process of manufacture is completed, it is put up in packages, and numbered according to its degree of fineness. It is used by stone sawyers and for various special purposes."

Paragraph 177, under which the collector classified this merchandise, is as follows:

"177. Manufactured articles or wares, not specially provided for in this act, composed wholly or in part of any metal, and whether partly or wholly manufactured, thirty-five per centum ad valorem."

Paragraph 122 is in the following language:

"122. Steel ingots, coggled ingots, blooms, and slabs, by whatever process made; die blocks or blanks; billets and bars and tapered or beveled bars; steamer, crank, and other shafts; shafting; wrist or crank pins; connecting rods and piston rods; pressed, sheared, or stamped shapes; saw plates, wholly or partially manufactured; hammer molds or swaged steel; gun-barrel molds not in bars; alloys used as substitutes for steel in the manufacture of tools; all descriptions and shapes of dry sand, loam, or iron-molded steel castings; sheets and plates not specially provided for in this act; and steel in all forms and shapes, not specially provided for in this act, all of the above valued at one cent per pound or less, three-tenths of one cent per pound. \* \* \*

The board of general appraisers sustained the importer's protest, holding that the goods should be classified as "steel in all forms and shapes not specially provided for," under paragraph 122.

On appeal to the circuit court, the decision of the board was sustained by Townsend, J., in the following opinion:

"The merchandise in question is known as 'Diamond Steel,' and was assessed for duty under paragraph 177 of the act of 1894, as a manufacture of steel not otherwise provided for. The importer protested, claiming that it was dutiable under the provisions of paragraph 122 of said act, as 'steel in all forms and shapes not specially provided for.' The question is as to which of these provisions is more specific. Upon this doubtful question I am inclined to follow the finding of the board of appraisers that the merchandise is a form of steel. As is argued by counsel for the importer, this article is made by crushing steel ingots, which are specifically provided for under paragraph 122. The only change in the ingot is a change of form. Inasmuch as paragraph 122 covers both steel ingots and steel in all forms and shapes, and the article remains steel, but simply changed in form without any change in the character of the metal, I think the finding of the board of general appraisers sustaining the protest is right. Let an order be entered accordingly."

From this decision of the circuit court, the United States took the present appeal.

Wallace MacFarlane, U. S. Atty.

Comstock & Brown, for appellee.

Before LACOMBE and SHIPMAN, Circuit Judges.

PER CURIAM. Decision affirmed, on opinion below.

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CONSOLIDATED CAR HEATING CO. v. AMERICAN ELECTRIC HEATING CORP. et al.

(Circuit Court, D. Massachusetts. August 25, 1897.)

No. 684.

1. PATENTS—INVENTION—EVIDENCE—COMMERCIAL SUCCESS.

The fact that a patented device went into immediate use, and practically supplanted all others, is not to be attributed entirely to artful advertising in the case of an article which is not sold to the public at large, but is used only by mechanics of skill in their art, as is the case with electrical heaters for railway cars.

2. SAME—ELECTRICAL HEATERS.

The McElroy patent, No. 500,288, for an electrical heater consisting of a combination of an insulating substance, a wire coiled in the form of a

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spiral spring about the insulating substance, and a nonconducting material placed between the adjacent layers of the spring, covers a novel, useful, and patentable invention, under all the circumstances. The second claim is infringed by a construction in which the core and the nonconducting material between the adjacent layers of the coil are built solidly as one piece.

This was a suit in equity by the Consolidated Car Heating Company against the American Electric Heating Corporation, the West End Street-Railway Company, and certain individuals, for alleged infringement of letters patent No. 500,288, issued June 27, 1893, to the complainant, as assignee of James F. McElroy.

Fish, Richardson & Storrow and R. A. Parker, for complainant.

Lange & Roberts, for defendant Morss.

Wm. B. Sprout, for defendants Sargent, Little, and West End St. Ry. Co.

Lange & Roberts, for defendants Smith, Sargent, Little, and West End St. Ry. Co.

Lange & Roberts, specially, for defendant American Electric Heating Corp.

**PUTNAM, Circuit Judge.** The main question in this case is that of patentability. It is entirely plain that, in the state of the art, whatever the inventor accomplished was by careful attention to mechanical details of a character which do not ordinarily involve invention. We think, however, the circumstances bring the patent within the practical rules stated in *Watson v. Stevens*, 2 C. C. A. 500, 51 Fed. 757.

There are two claims in this case, as follows:

"(1) In an electrical heater, a wire wound in the form of a spiral spring extending in a spiral path about a cylindrically formed nonconductor, in such a manner that each spiral shall come into contact with the nonconductor at one point only, and the layers of spirals shall be separated from each other, substantially as described and for the purpose set forth.

"(2) In an electrical heater, the combination of an insulating substance, a wire coiled in the form of a spiral spring extending in a spiral path about said insulating substance, a nonconducting material placed between the adjacent layers of the said spring, substantially as described and for the purpose set forth."

The second claim contains the real invention covered by the patent. The first differs from the second merely in the element of contact "at one point only." This is said to be for the purpose of maintaining circulation, but it is clearly such a matter of detail that it cannot form an element sufficiently distinguishable from the second claim to establish patentability. Of course, the expression "at one point only" cannot be construed in a strictly mathematical sense. It necessarily means that the point of contact is to be narrow, without designating to what extent. It is therefore plain that the extent of contact must be settled according to the judgment of the builder in each particular case, balancing on one hand the matter of convenience, and on the other the question of circulation. It is the same practical question which arises in every case where more or less circulation is desired, and which is being constantly solved, in the ordinary mechanical way. The first claim is, in effect, the second with an additional element, too indefinite to be made a distinct element in a patentable combination; so that, as one of the two claims must be rejected, it seems

more suitable to reject the first as void. We therefore limit our consideration to claim 2.

There has been very much urged on us with a view to persuading us that this invention contains an advance on the state of the art in some elementary and substantial function; but the case clearly shows otherwise. It must be conceded, as maintained by the respondents, and as clearly shown by the patent, and by what is commonly known as to the state of the art, that, prior to the complainant's device, the use of electrical resistance for converting electrical energy into heat, the use of such resistance in the form of coiled wire, and such use of coiled wire wound in coils upon cylindrical or equivalent supports, were old. It also cannot be doubted that all the electrical laws availed of in the complainant's patent were known prior to the invention in issue here. That we are right in this proposition appears plainly from the language of the specification, as follows:

"In this way, the spirally formed coil of wire is drawn out and wound about the insulating substance on the spindle in such a manner that no two successive spirals are in contact with each other. In consequence of this winding, I am enabled to place upon the nonconductor a very large amount of wire, so that the wire at all points is entirely insulated, and so that a current traversing this wire cannot be short circuited between any two parts of the winding. By this method of arranging my wire in the form of a spiral spring, I provide for the expansion of the wire when heated. The wire, instead of becoming loose and bunching, and thus short circuiting, remains tightly wound, the expansion being taken up by the spring of the wire. If two adjoining spirals should by the expansion be drawn into contact, there would be no appreciable loss of force; simply one of the spirals would be interfered with. There is no danger of two successive layers of spirals coming in contact with each other, separated, as they are, by the insulating material; but, if this should occur, it would result simply in one of the layers being short circuited, and no appreciable injury would take place. By my method of winding the wire, having but one point of the edge of each spiral in contact with the insulating substance, and the spirals separated from each other, and the layers of spirals separated in their path along the nonconducting substance, the air or liquid in which this winding may be placed can circulate freely on all sides thereof. Thus, the insulating material is protected from excessive heat, and the atmosphere and liquid are in contact with the greater portion of the wire. In this way, I am enabled to place a very large amount of wire on a small cylindrical insulator, and thus obtain a very great amount of heat energy from the electrical current."

This shows that the inventor claimed only a device in which the spirals would not be in contact with each other, in which the wires at all points would be entirely insulated, in which expansion would be provided for, in which the wires would always remain tightly in place, in which short circuiting would be prevented, or, if it occurred, no appreciable injury would take place, in which provision was made for ventilation, in which the insulating material would be protected from excessive heat, and in which a very large amount of wire would be wound on a small cylindrical insulator. Nothing beyond this was described in the patent as a function of the invention, and nothing more can now be successfully maintained. Therefore, as we have already said, the case comes down to one of success through skillful use of mechanical details, and nothing more.

The specification states that the invention relates to mechanism adapted to warming apartments, and also that its object is to provide

a device for heating street cars and railway trains by electricity. This last suggestion is important, because some of the most desirable features found in the device would not be of value with reference to heating houses, and yet become of great value in connection with heating street cars and railway trains, where there are oscillation and jar. It is mainly, if not entirely, due to the fact that the device is adapted to all these purposes that the court is led to the conclusion that it involves patentable invention.

On the questions of mere novelty and utility there can be no doubt. The precise device of the complainant is not shown by any anticipatory matter proven in the record, as will perhaps appear more distinctly when we come to the question of patentable invention. The proposition of utility will also be developed in the same connection, although the fact that the respondents, with all their experience, have adopted the complainant's device, and maintain a claim of a right to use it with great persistency, is a practical proof in behalf of the complainant on this point, rendering almost unnecessary any additional evidence in that direction.

It cannot be disputed that the complainant's device went into immediate use, has been very extensively availed of by surface railways operated by electricity, and has practically supplanted all others. The respondents suggest that this is largely, if not entirely, due to artful advertising on the part of the complainant, indeed so artful as to be to some extent fraudulent. A suggestion of this character would have great force with reference to an article sold to the public at large, but is of little value in the present case, where the device is used only by mechanics of skill in their art. It cannot be denied that the patented device is the first practical successful heater for surface cars operated by electricity; nor that persistent and very numerous efforts by persons skilled in the art were made prior to the work done by the complainant's patent to accomplish the same result, all ending in failure. There have been introduced in the records 29 patents, beginning as early as 1859, for improved electric heating apparatus, of which 24 were introduced by the respondents. The respondents maintain that the field of experiment with reference to electric heating for surface cars is very modern, and, by cross-examination of the patentee, they succeed in putting it back not earlier than 1889; but the record contains, within the period commencing in 1889, and ending with the date of the application for the patent in issue, 13 patents relating to this particular subject-matter, all of which seem to have proved failures in practice. All these, with one exception, issued from the patent office of the United States. How many other like patents, with like unsuccessful results, were taken out in foreign countries, the record does not show; but, in view of the activity of the electrical art during that period, the court cannot hesitate to assume, as a matter of common presumption, that the number not proven is much larger than that proven. In addition, the respondents, by their cross-examination of the patentee, who filed his application October 1, 1892, proved that he took up the matter covered by the patent in suit as early as 1890; so that it must have been a study by him for a period of about two years. When, under the circumstances proven, a result

has been obtained so successful and important as that of the device covered by the patent in suit, after so many efforts attempted by a class so skillful and vigilant as the electrical engineers of modern times, it would be folly for the court to deny that the result involved something more than ordinary mechanical work, or to deny the reward which would be commonly given by disinterested intelligent minds.

The respondents urge on us, in the way of anticipation, many devices contrived for rheostatic resistance. It is undoubtedly true that the arts of rheostatic resistance and electric heating are closely akin to each other, indeed so closely that they might be called one art. But, even if they can be so called, they must, at least, be regarded as subdivisions of the same art, because, while rheostats seek to produce resistance with the least possible giving off of heat, the purpose of electric heating devices is to avail themselves of resistance in order that heat may be given off. Of course, if a rheostat can be found in the prior art, constructed in all respects like the heating device in suit, it might be impossible to conceive that there was invention in using the same device for either of the two different purposes. But, by the very nature of the results intended to be accomplished by rheostats, as contrasted with those intended to be accomplished by electric heating devices, this hypothesis seems an impracticable one. Whatever may have been devised for rheostatic resistance must be assumed to be, in its construction and incidents, substantially different from a heating device. In accordance with this presumption, the record fails to show any rheostat which can be adapted to heating purposes without change in its construction or incidents; and it is this change and adaptation which, under the circumstances to which we have referred, we are compelled to admit involves invention, or else stand in the face of the common judgment of disinterested intelligent minds. It is something of this nature which the supreme court refers to in *National Cash Register Co. v. Boston Cash Indicator & Recorder Co.*, 156 U. S. 502, 515, 15 Sup. Ct. 439, where it said as follows:

"Indeed, this use of the connecting mechanism can hardly be termed analogous to such as similar mechanisms had been previously used for; but, even if it were, the results are so important, and the ingenuity displayed to bring them about is such, that we are not disposed to deny the patentees the merit of invention."

The same considerations dispose of all alleged anticipatory heating devices shown in the case. Those which come at first sight the nearest to the device in suit are Kirkegaard's coil and Rose's device. Rose's device is found in an English patent, and certainly it is not covered by a description so clearly expressed as, in accordance with the well-settled rule, is necessary in order to make a foreign publication a sufficient anticipation. Kirkegaard's coil was a comparatively small affair, used in connection with an electric arc lamp, and neither required nor suggested devices adapted to prevent difficulties coming from oscillation and jar. In other words, it lacked the method for preventing contacts between the coils found in the complainant's device. Rose's device, so far as we understand it, was lacking in the same respect.



On the question of infringement, the case seems so clearly favorable to the complainant, so far as claim 2 is concerned, that we do not deem it necessary to enlarge upon it. The only pretense of variance lies in the proposition of the respondents that in the complainant's patent the nonconducting material placed between the adjacent layers of the coil is no part of the insulating substance,—that is, no part of the cylindrical core; while in the respondents' construction the core and the nonconducting material between the adjacent layers of the coil are built solidly as one piece. Nothing either in the letter or the substance of the complainant's claim sustains this proposition.

The case was originally brought against two corporations and several individuals, alleged to be officers of one or more of the corporations. Discontinuance has been entered as against the individuals concerned, and no respondent now remains except the two corporations. In order to maintain the bill, it must be alleged and proven that the two corporations are guilty of joint infringement. It may be that both are guilty severally, one for manufacturing and selling, and the other for using. But the only proof in the record is that one manufactured and sold, and the other used, without showing any co-operation between them. This, of course, does not prove joint infringement. Therefore, as the case now stands, the bill must be dismissed. If, however, the complainant desires to dismiss the bill against one of the remaining respondents, it may do so on payment of costs. As a matter of course, the question of costs arising out of our finding that the first claim is invalid must abide the final decree. Ordered, the complainant has leave to dismiss without prejudice as against one of the respondent corporations, with costs, on or before the 4th day of September next; and, unless it so dismisses, the bill will be dismissed, with costs; if it so dismisses, there will be a decree as provided in rule 21, adjudging claim 1 void, and for an accounting and injunction as to claim 2.

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### MEMORANDUM DECISIONS.

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ANDERSON et al. v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit.) No. 989. Certified to supreme court for instructions upon certain questions, under the provisions of section 6 of the act of March 3, 1891.

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BARBER et al. v. DAYTON et al. (Circuit Court of Appeals, Eighth Circuit. September 6, 1897.) No. 795. In Error to the Circuit Court of the United States for the District of Kansas. Dismissed, without costs to either party, on motion of plaintiffs in error; attorney's fee being waived.

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BOARD OF COM'RS OF PRATT COUNTY, KAN., v. BOSTON SAFE-DEPOSIT & TRUST CO. et al. (Circuit Court of Appeals, Eighth Circuit.) No. 904. Appeal from the Circuit Court of the United States for the District

of Kansas. Edwin A. Austin and J. C. Ellis, for appellant. Fred W. Bentley, John S. Miller, Merritt Starr, A. A. Hurd, and Robert Dunlap, for appellees. No opinion. Affirmed, per stipulation of parties, with costs against the receiver, McEntire.

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**BOYLE v. CLARE.** (Circuit Court of Appeals, Sixth Circuit. February 2, 1897.) No. 491. In Error to the Circuit Court of the United States for the Western District of Tennessee. Dismissed, with costs, on motion of Percy & Watkins, counsel for plaintiff in error.

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**BURT v. McGRATH.** (Circuit Court of Appeals, Sixth Circuit. October 25, 1897.) No. 530. In Error to the Circuit Court of the United States for the Northern District of Ohio. Alexander L. Smith, for plaintiff in error. Scribner Waite, for defendant in error. No opinion. Judgment affirmed.

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**BUTLER v. ASHLAND COAL & IRON CO.** (Circuit Court of Appeals, Sixth Circuit. February 24, 1897.) No. 465. Appeal from the Circuit Court of the United States for the District of Kentucky. W. A. Byrne, for appellant. John Hager, for appellee. No opinion. Affirmed.

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**CAMPBELL v. ROWLAND et al.** (Circuit Court of Appeals, Fifth Circuit. June 7, 1897.) No. 569. Appeal from the Circuit Court of the United States for the Eastern District of Texas. Before PARDEE and McCORMICK, Circuit Judges, and NEWMAN, District Judge.

**PER CURIAM.** In the decree of the circuit court we find no reversible error prejudicial to the appellant. The same is therefore affirmed.

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**CHAPIN v. UNION CONSOL. RY. CO. et al.** (Circuit Court of Appeals, Seventh Circuit. October 4, 1897.) No. 339. Appeal from the Circuit Court of the United States for the Northern District of Illinois. Levy Mayer, for Charles A. Chapin. Clarence A. Knight and John P. Wilson, for Union Consol. Ry. Co. and others. Dismissed, on motion of appellant.

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**CHICAGO & N. W. RY. CO. v. ANDREWS.** (Circuit Court of Appeals, Eighth Circuit. September 15, 1897.) No. 885. In Error to the Circuit Court of the United States for the District of Minnesota. L. L. Brown and W. D. Abbott, for plaintiff in error. William N. Plymat and W. E. Young, for defendant in error. Dismissed, without costs to either party, pursuant to stipulation of parties.

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**THE CITY OF MACKINAC.** (Circuit Court of Appeals, Sixth Circuit. November 10, 1896.) No. 315. Appeal from the District Court of the United States for the Eastern District of Michigan. John C. Shaw, for appellants Timothy Hurley and another. Wells, Angell, Boynton & McMillan, for appellee claimant of the City of Mackinac. Discontinued, by consent, after the reversal of the decree dismissing the libel, and before any rehearing was had under the order of October 5, 1896, granting a rehearing. See 73 Fed. 883.

**COCKRILL v. UNITED STATES NAT. BANK.** (Circuit Court of Appeals, Eighth Circuit. September 15, 1897.) No. 984. In Error to the Circuit Court of the United States for the Eastern District of Arkansas. S. R. Cockrill, for plaintiff in error. John Fletcher and W. C. Ratcliffe, for defendant in error. No opinion. Affirmed, with costs.

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**COOKE v. UNITED STATES.**

(Circuit Court of Appeals, Fifth Circuit. June 7, 1897.)

No. 583.

**CRIMINAL LAW—APPEAL—CONFESSION OF ERROR.**

Error from the District Court of the United States for the Northern District of Texas.

Before PARDEE and McCORMICK, Circuit Judges, and NEWMAN, District Judge.

**PER CURIAM.** In this case, in which J. H. Cooke, the plaintiff in error, was indicted, tried, convicted, and sentenced for embezzlement of money order funds of the United States, the United States, through their counsel, confess error in the peremptory instruction given by the trial judge to find the plaintiff in error guilty; and being satisfied that, under the facts and circumstances of the case, such peremptory instruction was erroneous, the judgment of the district court must be reversed, and the cause remanded, with instructions to set aside the verdict heretofore rendered, and award a new trial. Other important questions arise upon the record, and are assigned as error, but upon them we make no ruling whatever, because they have not been fully argued, and need not necessarily arise on another trial of the case. Reversed and remanded.

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**ELROD v. ADAMS EXP. CO.** (Circuit Court of Appeals, Sixth Circuit.) No. 525. In Error from the United States Circuit Court for the District of Kentucky. O'Neal & Pryor and George Weissinger Smith, for plaintiff in error. Lawrence Maxwell, Jr., and Stone & Sudduth, for defendant in error. Dismissed, on motion of defendant in error, pursuant to the twenty-third rule, for failure to print the record.

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**FARMERS' MIN. CO. et al. v. GOOSAW MIN. CO.** (Circuit Court of Appeals, Fourth Circuit. May 11, 1897.) No. 220. Appeal from the Circuit Court of the United States for the District of South Carolina. Mitchell & Smith, for appellants. Smythe, Lee & Frost and Edward McCrady, for appellee. Dismissed, pursuant to the twenty-third rule, for failure to print record. See 75 Fed. 860.

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**FLORENCE MIN. & MANUF'G CO. v. MORRIS.** (Circuit Court of Appeals, Sixth Circuit. February 2, 1897.) No. 490. Appeal from the Circuit Court of the United States for the Middle District of Tennessee. Dismissed, with costs, on motion of Champion, Head & Brown, counsel for appellant.

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**FLORIDA CENT. & P. R. CO. v. BELL et al.** (Circuit Court of Appeals, Fifth Circuit. June 16, 1897.) No. 599. In Error to the Circuit Court of the United States for the Southern District of Florida. Before PARDEE and McCORMICK, Circuit Judges, and MAXEY, District Judge.

**PER CURIAM.** This case is substantially the same as to facts with *Oil Co. v. Bell*, 82 Fed. 113. The rulings of the trial judge, the assignments of error, and the motion to dismiss and affirm are identical. For the same reasons, the motion to dismiss and affirm is denied.

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**FOSTER et al. v. MYERS et al.** (Circuit Court of Appeals, Eighth Circuit. September 6, 1897.) No. 877. Appeal from the Circuit Court of the United States for the District of Kansas. J. G. Hutchison, for appellants. John D. S. Cook and A. N. Gassett, for appellees. Dismissed, with costs, pursuant to the twenty-third rule, for failure to print record, on motion of appellees.

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**FREIBERG v. MATTINGLY CO.** (Circuit Court of Appeals, Sixth Circuit. February 2, 1897.) No. 454. Appeal from the Circuit Court of the United States for the District of Kentucky. D. W. Fairleigh, for appellant. George W. Dane, for appellee. No opinion. Affirmed.

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**HARISTON et al. v. JARVIS-CONKLIN MORTG. CO.**

(Circuit Court of Appeals, Fifth Circuit. June 1, 1897.)

No. 585.

**TRUSTEE'S SALE—VALIDITY.**

Appeal from the Circuit Court of the United States for the Northern District of Mississippi.

The defendants, Marshall Hariston and wife, executed their note for the sum of \$5,275, due five years after date, attaching thereto semiannual interest coupon notes. To secure the payment of these notes, they executed a trust deed to the complainant, the Jarvis-Conklin Mortgage Company, upon their plantation. Default having been made, and the trustees named in the trust deed having declined to act, the defendants, under a power contained in the deed, substituted as their trustee one W. A. Smith, who was in their employ. Smith advertised the property for sale, and, on the day of sale, he and defendant Hariston were the only bidders. Smith bid \$8,500 for the property, in the name of the Western Investment Company. The Western Investment Company was a corporation distinct from the Jarvis-Conklin Mortgage Company. The evidence showed that Smith had received no instructions from the officers of the Western Investment Company to bid for the land, and that his only instructions came from the officers of the Jarvis-Conklin Company, by whom he was directed merely to see that the property brought the amount of the debt and the costs of sale. The Western Investment Company declined to approve Smith's unauthorized bid, and the Jarvis-Conklin Company thereafter filed this bill to foreclose the trust deed. The defendants filed an answer and cross bill, claiming that the loan was usurious; that the purchase by Smith at the sale was in fact for the complainant, the Jarvis-Conklin Company, and that the Western Investment Company was a mere dummy, controlled by the Jarvis-Conklin Company; that, therefore, complainant had become the owner of the plantation, and owed the defendants the difference between the amount of Smith's bid and the true amount of the debt secured. Accordingly, they prayed for a money decree against the complainant. The material allegations of the cross bill were denied, and proofs were taken in the circuit court. That court entered a decree dismissing the cross bill, because it was not sustained by the evidence, but found that there was usury in the loan, fixed the amount due at \$4,502.75, allowed a solicitor's fee, and ordered a sale of the property. From this decree the defendants have appealed.

Wm. C. McLean and W. S. Sullivan, for appellants.  
E. D. Saunders and T. M. Miller, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and NEWMAN, District Judge.

PER CURIAM. Considering that the alleged trustee's sale and adjudication were invalid, because of the total want of authority on the part of the trustee to make any bid for, or adjudicate the property to, the Western Investment Company, there is no reversible error in the decree appealed from, and the same is affirmed.

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HUNTINGTON v. CITY OF NEVADA et al. (Circuit Court of Appeals, Ninth Circuit. October 7, 1897.) No. 356. Appeal from the Circuit Court of the United States for the Northern District of California. Wilson & Wilson, for appellant. A. D. Mason and J. M. Walling, for appellees. Dismissed, upon stipulation of parties. See 75 Fed. 60.

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INDEPENDENT ELECTRIC CO. v. DONALD et al. (Circuit Court of Appeals, Eighth Circuit. October 5, 1897.) No. 932. In Error to the Circuit Court of the United States for the District of Kansas. B. F. Waggener, Albert H. Horton, and J. W. Orr, for plaintiff in error. Henry Elliston, for defendants in error. Dismissed, with costs, pursuant to the twenty-third rule, for failure to print the record on motion of defendants in error.

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INTERSTATE COMMERCE COMMISSION v. LEHIGH VAL. R. CO. (Circuit Court of Appeals, Third Circuit. October 1, 1897.) No. 28. Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania. No opinion. This cause having been called for argument in its regular order, and upon motion of counsel for appellant, it is now here ordered, adjudged, and decreed by this court that the appeal be, and the same is hereby, withdrawn, at the costs of appellant. See 74 Fed. 784.

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THE IRON CHIEF. (Circuit Court of Appeals, Sixth Circuit. March 2, 1897.) No. 459. Appeal from the District Court of the United States for the Eastern District of Michigan. Fred Harvey and H. C. Wisner, for appellant. John C. Shaw and Harvey D. Goulder, for appellee. No opinion. Affirmed, after argument. See 53 Fed. 507.

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KELLY et al. v. JOHNSON. (Circuit Court of Appeals, Eighth Circuit. October 5, 1897.) No. 933. In Error to the United States Court of Appeals for Indian Territory. W. N. Redivine, for plaintiffs in error. J. P. Grove, for defendant in error. No opinion. Motion of defendant in error to strike bill of exceptions sustained, and judgment affirmed, with costs.

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KING v. SPERRY'S ADM'R. (Circuit Court of Appeals, Sixth Circuit.) No. 444. In Error to the Circuit Court of the United States for the Northern District of Ohio. J. W. Jenner, for plaintiff in error. Darius Dirlam, for defendant in error. No opinion. Affirmed.

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LESLIE E. KEELEY CO. et al. v. BURSON. (Circuit Court of Appeals, Seventh Circuit. October 6, 1897.) No. 409. Appeal from the Circuit Court

of the United States for the Northern District of Illinois. Wm. Rothman, for Leslie E. Keeley Co. and others. R. L. Tatham, for James N. Burson. Dismissed, on motion of appellant.

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LEVY v. BROWN et al. (Circuit Court of Appeals, Ninth Circuit. July 11, 1893.) No. 116. In Error to the Circuit Court of the United States for the Northern Division of the District of Washington. J. B. Metcalf, for plaintiff in error. W. Lair Hill, for defendants in error. Dismissed, for want of jurisdiction. See 53 Fed. 568.

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MOORE v. BATES et al. (Circuit Court of Appeals, Eighth Circuit. September 7, 1897.) No. 837. In Error to the Circuit Court of the United States for the District of Nebraska. J. H. Quick and A. S. Wilson, for plaintiff in error. R. E. Evans, Mell C. Jay, and H. J. Welty, for defendants in error. Dismissed, with costs, on motion of plaintiff in error.

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#### MOREHEAD v. STRIKER.

(Circuit Court, S. D. New York. August 3, 1897.)

#### RECEIVER—RESIGNATION—DISCHARGE.

This is an interlocutory order accepting the resignation of the receiver, providing for the appointment of his successor, and the denial of motions to make certain new parties and to declare the bond forfeited.

Harland Cleveland, for the motion.

Edward Huffman and William H. Stayton, opposed.

LACOMBE, Circuit Judge. The various motions recently argued are disposed of as follows:

1. The present receiver, Mills W. Barse, having presented his resignation, will, upon filing the same, be relieved from further administration of the trust; but he will not be discharged until his accounts shall have been duly passed, and any sums therein with which he may be surcharged shall have been paid. Immediately upon the appointment of his successor, said Barse shall turn over to him all the assets, books, and papers of the receivership.

2. Upon signing the order accepting such resignation, the court will appoint a new receiver.

3. The motion to make Charles N. Haskell, C. H. Roser, and the Manhattan Trust Company parties to this action is denied. If, as is alleged, these individuals are indebted to the receivership, or hold assets to which it is entitled or in which it has an interest, the receiver may protect the interests of the trust sufficiently by bringing some appropriate suit.

4. The motion to make the American Surety Company, the bondsman of the present receiver, a party to this action, is also denied. The master, however, will notify that company that Mr. Barse's accounts are now being investigated, and, should the company appear, will allow it to take part in the investigation. Motion to declare the bond forfeit is premature, and is denied.

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MUHLENBERG COUNTY, KY., v. JABINE et al. (Circuit Court of Appeals, Sixth Circuit. October 21, 1897.) No. 510. In Error from the Circuit Court of the United States for the District of Kentucky. D. W. Sanders and W. H. Yost, for plaintiff in error. D. M. Rodman, for defendant in error. No opinion. Judgment affirmed, with costs.

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MYERS v. PENNSYLVANIA SALT MANUF'G CO. (Circuit Court of Appeals, Eighth Circuit. October 11, 1897.) No. 953. Appeal from the Circuit

Court of the United States for the Eastern District of Missouri. **J. M. Holmes**, for appellant. **George W. Lubke**, for appellee. Dismissed per stipulation, a mandate and attorney's fee for appellee being waived. See 79 Fed. 87.

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**NORTHERN PAC. RY. CO. v. DUDLEY et al.** (Circuit Court of Appeals, Ninth Circuit. October 19, 1897.) No. 394. Appeal from the Circuit Court of the United States for the Northern Division of the District of Idaho. **Dudley, Bunn & Dudley** and **F. M. Dudley**, for appellant. Dismissed, upon motion of appellant.

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**OHLMAN et al. v. WATTERS et al.** (Circuit Court of Appeals, Eighth Circuit. September 13, 1897.) No. 866. In Error to the Circuit Court of the United States for the District of South Dakota. **A. B. Kittredge, L. B. French**, and **A. H. Orvis**, for plaintiffs in error. **Joe Kirby** and **D. H. Sullivan**, for defendants in error. Dismissed, with costs, pursuant to stipulation of parties.

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**PACIFIC CABLE RY. CO. v. BUTTE CITY ST. RY. CO.** (Circuit Court of Appeals, Ninth Circuit. January 15, 1894.) No. 112. Appeal from the Circuit Court of the United States for the District of Montana. **Wm. F. Booth**, for appellant. **Geo. H. Knight**, for appellee. Dismissed. See 58 Fed. 420.

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**PACIFIC CABLE RY. CO. v. PIEDMONT CABLE CO.** (Circuit Court of Appeals, Ninth Circuit. January 10, 1893.) No. 94. Appeal from the Circuit Court of the United States for the Northern District of California. **Wm. F. Booth**, for appellant. **Wheaton, Kalloch & Kierce**, for appellee. Dismissed, on motion of counsel for appellant, and on consent of counsel for appellee.

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**P. DOUGHERTY CO. v. ALBEMARLE & C. CANAL CO.** (Circuit Court of Appeals, Fourth Circuit. May 6, 1897.) No. 218. Appeal from the Circuit Court of the United States for the Eastern District of Virginia. **Robt. H. Smith** and **William W. Old**, for appellant. **William H. White** and **Robt. N. Hughes**, for appellee. Dismissed, on motion of appellant.

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**PHENIX STONE CO. v. DUNHAM TOWING & WRECKING CO.** (Circuit Court of Appeals, Seventh Circuit. October 4, 1897.) No. 459. Appeal from the Circuit Court of the United States for the Northern District of Illinois. **O. E. Kremer**, for Phoenix Stone Co. Dismissed, for failure to docket.

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**PRESTON v. HUNTER et al.** (Circuit Court of Appeals, Ninth Circuit. April 29, 1895.) No. 190. In Error to the Circuit Court of the United States for the District of Montana. **Albert Allen**, for plaintiff in error. **McConnell, Clayberg & Gunn**, for defendant in error. No opinion. Reversed, pursuant to decision in **Preston v. Hunter**, 29 U. S. App. 621, 15 C. C. A. 148, and 67 Fed. 996.

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**THE P. S. CHAPPELL. THE P. S. CHAPPELL v. THURSBY.**<sup>1</sup> (Circuit Court of Appeals, Fourth Circuit. November 11, 1897.) No. 230. Appeal from the District Court of the United States for the District of Maryland. **Thomas C. Chappell**, for appellant. **B. W. Mister**, for appellee. Before **GOFF** and **SIMONTON**, Circuit Judges, and **PURNELL**, District Judge.

<sup>1</sup> Rehearing denied November 24, 1897.

**PER CURIAM.** This case in admiralty comes up on appeal from the district court of the United States for the district of Maryland. We see no error in the decree of the district court. The same is affirmed, with costs.

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**RELIANCE NOVELTY CO. v. DWORTZEK et al.** (Circuit Court of Appeals, Ninth Circuit. October 26, 1897.) No. 387. Appeal from the Circuit Court of the United States for the Northern District of California. John L. Boone, for appellant. Isaac Frohman, for appellees. Dismissed, pursuant to the twenty-third rule, for failure to print record. See 80 Fed. 902.

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**RISTINE v. AMICONE.** (Circuit Court of Appeals, Eighth Circuit. September 27, 1897.) No. 909. In Error to the Circuit Court of the United States for the District of Colorado. Lucius M. Cuthbert, for plaintiff in error. F. B. Tiffany, for defendant in error. Dismissed, with costs, on motion of plaintiff in error.

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**ROBINSON'S ADM'R v. DETROIT & C. STEAM NAV. CO.** (Circuit Court of Appeals, Sixth Circuit. November 10, 1896.) No. 314. Appeal from the District Court of the United States for the Eastern District of Michigan. John C. Shaw, for appellant. Wells, Angell, Boynton & McMillan, for appellee. Discontinued, by consent, after the reversal of the decree dismissing the libel, and before any rehearing was had under the order of October 5, 1896, granting a rehearing. See 20 C. C. A. 86, 73 Fed. 883.

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**SABIN v. BARNETT et al.** (Circuit Court of Appeals, Ninth Circuit. October 14, 1897.) No. 366. In Error to the Circuit Court of the United States for the Western Division of the District of Washington. Cox, Cotton, Teal & Minor, for plaintiff in error. Edward F. Hunter, C. H. Forney, and Charles Richardson, for defendants in error. Dismissed, upon stipulation of parties. See 79 Fed. 947.

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**SECURITY TRUST CO. v. DODD et al.** (Circuit Court of Appeals, Eighth Circuit.) No. 916. Certified to supreme court for instructions upon certain questions, under the provisions of section 6 of the act of March 3, 1891.

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**SHIVEROCK v. R. J. GUNNING CO.** (Circuit Court of Appeals, Eighth Circuit. September 8, 1897.) No. 853. In Error to the Circuit Court of the United States for the District of Nebraska. R. S. Hall, for plaintiff in error. Charles Offutt, for defendant in error. Dismissed, with costs, pursuant to the twenty-third rule, for failure to print the record, on motion of defendant in error.

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**SWIFT et al. v. McKENDRY.** (Circuit Court of Appeals, Eighth Circuit. October 4, 1897.) No. 930. In Error to the Circuit Court of the United States for the District of Nebraska. I. R. Andrews, for plaintiffs in error. T. J. Mahoney, for defendant in error. No opinion. Motion of defendant in error to strike bill of exceptions sustained, and judgment affirmed, with costs.

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**TRUMBULL v. LOWE.** (Circuit Court of Appeals, Eighth Circuit. September 14, 1897.) No. 876. In Error to the Circuit Court of the United States for



the District of Colorado. Henry W. Hobson and Elmer E. Whitted, for plaintiff in error. Charles J. Hughes, Jr., and Tyson S. Dines, for defendant in error. Dismissed, with costs, pursuant to stipulation of parties.

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**WAGNER v. MORRIS**, United States District Judge, D. Md. (Circuit Court of Appeals, Fourth Circuit. May 14, 1897.) No. 228. Petition for mandamus to direct clerk of United States circuit court of the district of Maryland to file certain suits. John W. Clark, for petitioner. Mandamus refused, and petition dismissed.

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**WALTER BAKER & CO., Limited, v. SANDERS et al.** (Circuit Court of Appeals, Second Circuit. May 26, 1897.) No. 126. Appeal by Complainant from a Decree of the Circuit Court of the United States for the Southern District of New York.

**PER CURIAM.** The facts in this case, which deals with unfair competition in the sale of cocoa, are so nearly identical with those in the chocolate case between the same parties (No. 125; 26 C. C. A. 220, 80 Fed. 889) that it is unnecessary to discuss them. A mandate will issue in this case similar to that in No. 125.

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**WEST MICHIGAN FURNITURE CO. v. AMSTERDAMSCHÉ BANK.** (Circuit Court of Appeals, Sixth Circuit. February 2, 1897.) No. 494. In Error to the Circuit Court of the United States for the Western District of Michigan. Dismissed, with costs, on motion of McGarry & Nichols, counsel for plaintiff in error.

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**YELLOW POPLAR LUMBER CO. v. PAUL**, United States District Judge, W. D. Va. (Circuit Court of Appeals, Fourth Circuit. May 6, 1897.) No. 214. John N. Baldwin, for petitioner. No opinion. Petition for mandamus dismissed, on motion of attorney for petitioner.

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**AMERICAN FREEHOLD LAND-MORTGAGE CO. OF LONDON, Limited, v. POTTER.** (Circuit Court N. D. New York. August 18, 1897.) Bill by the American Freehold Land-Mortgage Company of London, Limited, against Huldah A. Potter. Decree for complainant. P. Tecumseh Sherman and W. Pierrepont White, for plaintiff. William F. Cogswell and William N. Cogswell, for defendant.

**PER CURIAM.** This cause presents the same questions as those decided in the action against Woodworth (82 Fed. 269). A similar order should be entered.

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#### **LEVIS v. CITY OF NEWTON et al.**

(Circuit Court, S. D. Iowa. C. D. August 16, 1897.)

#### **MUNICIPAL CORPORATIONS—USE OF STREETS—FRANCHISES—WITHDRAWAL—ORDINANCES—CONSTRUCTION.**

This is a suit for injunction. The complainant, Howard C. Levis, trustee, seeks to have the authorities of the city of Newton, Iowa, enjoined from enforcing an ordinance for the removal, from the streets, of the poles and wires of the Newton Electric Company. At the hearing for preliminary injunction, a demurrer to the bill was overruled. 75 Fed. 884. Defendant appealed, and the action

of the court in granting a preliminary injunction was sustained, and the case remanded for final determination. 25 C. C. A. 161, 79 Fed. 715. Defendants again file demurrer, which is overruled, and reference made to the former decision. 75 Fed. 884.

Gatch, Connor & Weaver and James S. Cummins, for plaintiff.  
N. T. Guernsey and O. C. Meredith, for defendants.

WOOLSON, District Judge. This suit is brought by the trustee of a certain deed of trust, to enjoin the authorities of the city of Newton, Iowa, from enforcing an ordinance passed by the city council of said city. The Newton Electric Company, a corporation organized under the laws of the state of Iowa, executed its deed of trust, in favor of Howard C. Levis, as trustee, upon its electric light plant, situated in said city of Newton. The bill avers that the outstanding indebtedness secured by such deed of trust is \$10,000, and is evidenced by bonds. It is further averred that the said plant was erected under and in accordance with an ordinance duly passed by said city council, prior to the execution of said trust deed; that said city council has lately passed, under appropriate forms of law, an ordinance purporting to repeal the said ordinance, under which said plant was erected, and to authorize and direct the authorities of said city to remove the poles, wires, etc., of said plant from the streets of said city; and that, if said removal (which said city proposes to make) is thus made, the said security, in said trust deed given for the payment of said bonds, will be destroyed, etc. The prayer asks for a writ of injunction restraining said city and its authorities from attempting to make said removal, etc. A detailed statement of the contents of the bill is here not necessary. This case was before this court upon application for a writ of preliminary injunction, and, in the opinion then rendered, the contents of the bill are set out in full. 75 Fed. 884. The preliminary writ was ordered and issued. At the hearing on the application for said writ, the merits of the bill were exhaustively discussed by counsel on either side, and were considered by the court, and its decision rendered thereon. The case was then appealed to the circuit court of appeals for this circuit, where the discussion of the merits of the case as presented in the bill were again presented and discussed at length. Counsel for plaintiffs and defendants have favored me with copies of their briefs as filed on such appeal. In the opinion affirming the action of this court (25 C. C. A. 161, 79 Fed. 715), the circuit court of appeals say: "The arguments and brief of counsel invite us to a consideration of the questions of law, which must be finally determined upon a demurrer to the bill, or upon a final hearing of this case after answer. We have, however, found it unnecessary to decide these questions on this appeal, and we express no opinion upon them. They are of sufficient importance and difficulty to demand careful examination and deliberate consideration; and, whatever the ultimate answers to them may be, the preliminary injunction was rightfully issued, because it simply maintained the existing conditions, prevented irreparable loss to the appellee, and inflicted very slight, if any, loss or inconvenience upon the appellants." Defendants have now filed a demurrer, presenting the same points which were urged against the sufficiency of the bill on the hearing for preliminary writ of injunction. Upon some of the points, counsel have presented additional argument, with further citation of authorities. These have been carefully considered, but have not in any wise modified the views held by this court, and expressed in the opinion rendered upon application for the preliminary writ. It is felt that further attempt at presenting these views is useless, the same having been stated at much length in the former opinion. 75 Fed. 884. I content myself with referring thereto, and with announcing that defendants' demurrer is overruled, to which defendants except.